

Exhibit C

1 **LAS VEGAS, NEVADA, WEDNESDAY, JULY 27, 2011**

2 **10:00 A.M.**

3 * * *

4 **P R O C E E D I N G S**

5
6 THE CLERK: This is the time set for
7 the show cause hearing and plaintiff's motion to
8 amend or correct complaint, Civil Case Number
9 2:10-CV-1575-JCM-PAL; Righthaven, LLC versus
10 Pahrump Life, and all others.

11 Counsel, please note your
12 appearance for the record.

13 THE COURT: Mr. Mangano.

14 MR. MANGANO: Good morning, your Honor,
15 Shawn Mangano on behalf of Righthaven.

16 THE COURT: Thank you.

17 MR. MANGANO: With me is Dale Cendali
18 who has been admitted pro hac vice.

19 MS. CENDALI: Thank you, your Honor.

20 THE COURT: Cendali, is that right?

21 MS. CENDALI: That's right, your Honor.

22 THE COURT: Thank you. All right.

23 MR. PULGRAM: Good morning, your Honor,
24 for Amicus Democratic Underground, Laurence
25 Pulgram of the law firm of Fenwick and West.

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1 With me is Curt Apsal (phonetic) of the
2 Electronic Frontier Foundation.

3 THE COURT: Yes, sir.

4 MR. SCHULTZ: Good morning, your Honor,
5 Jason Schultz. I'm one of the amici as well.

6 MR. DeWITT: Good morning, your Honor,
7 Clyde DeWitt for Citizens Against Litigation
8 Abuse, Amicus Curiae. We were allowed to appear
9 based on your order of June 29th.

10 MR. DEVOY: Good morning, your Honor,
11 J. Malcolm DeVoy of Randazza Legal Group here on
12 behalf of Amicus Media Bloggers Association
13 pursuant to this Court's order. Thank you.

14 THE COURT: Yes, sir. And those of you
15 who have appeared in front of me before know that
16 I welcome the amicus people. And I want to hear
17 other voices I guess and not to say, well, let's
18 not have a hearing, we'll just decide it on the
19 papers, or whatever. I always like to give
20 everybody a chance to be heard. I was going to
21 say something, but if you want to say something
22 first, go ahead.

23 MR. MANGANO: No. Go ahead, your
24 Honor.

25 THE COURT: I've reviewed this with my

1 brain trust. Let me tell you what I'm inclined
2 to do and I'll give everybody a chance to argue.

3 Righthaven has been involved in
4 litigation with, you know, in this building, you
5 know, where other judges have decided cases, you
6 know, which are interesting but not necessarily
7 controlling on my thinking. So as I look at
8 this, though, to cut right to the heart of the
9 matter, and it's kind of a procedural thing, but
10 I don't think Righthaven has standing based on
11 Lujan versus Defenders of Wildlife, 504 U.S. 555
12 at 571. In footnote 4 it says, the existence of
13 federal jurisdiction ordinarily depends on the
14 facts as they exist when the complaint is filed.

15 And then there is a follow-up
16 case, which I have somewhere here in my
17 paperwork, Newman-Green versus Alfonzo-Larrain,
18 490 U.S. 826, 109 S.Ct. 2218. The existence of
19 federal jurisdiction ordinarily -- this is Roman
20 numeral number II in the opinion -- let's see,
21 it's page 2222 of the Supreme Court Reporter and
22 488 of -- no, I'm sorry, it's at page 2222 of the
23 Supreme Court Reporter.

24 The existence of federal
25 jurisdiction ordinarily depends on the facts as

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1 they exist when the complaint is filed. And then
2 it notes there are two exceptions, the defective
3 under Title 28 USC, Section 1653, defective
4 allegations of jurisdiction may be amended upon
5 terms in the trial of appellate court, and that
6 is to say it again, defective allegations of
7 jurisdiction which suggests that it addresses
8 only incorrect statements about jurisdiction that
9 actually exist and not the affects of the
10 jurisdictional facts themselves.

11 And then the second exception is
12 Rule 21 which has since been amended, but anyway
13 this case where it has been interpreted by the
14 Second Circuit in Herrick, H-E-R-R-I-C-K,
15 Company, Inc. versus SCS Communications, Inc.,
16 251 F.3d, 315 at 329, Second Circuit, a 2001
17 case. And it says, quote, as a result where the
18 facts necessary to the establishment of diversity
19 jurisdiction are subsequently determined to have
20 obtained all along, a federal court may simply
21 allow a complaint to be amended to assert those
22 necessary facts. And again the allegations that
23 need to be corrected, then we can correct the
24 allegations, and then treat diversity
25 jurisdictions having existed from the beginning,

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1 but no such amendment is possible when the
2 underlying facts (and not merely the pleadings)
3 are inadequate to support federal jurisdiction.
4 For curing jurisdiction in such a circumstance
5 requires more than just changing the pleadings.

6 And the facts here are that, and
7 now I'm going to rely on other decisions as well,
8 but as other courts have found, you know, there
9 was no federal jurisdiction under the agreement
10 with Stephens Media. So what I'm inclined to do
11 is to dismiss the case based on lack of
12 jurisdiction. Now I'll be glad to hear whatever
13 people have to say.

14 MS. CENDALI: Your Honor, may I take
15 the podium?

16 THE COURT: Yes, ma'am, sure.

17 MS. CENDALI: Thank you.

18 First off, thank you, your
19 Honor, for granting my pro hac petition and for
20 letting me be here today.

21 THE COURT: Ms. Cendali, put your right
22 hand on the slant and find the button on the
23 slant. That's how you adjust the microphone. So
24 that's your tax dollars at work. So hit the
25 button again and it will go down.

1 MS. CENDALI: Does that seem the best
2 angle there?

3 THE COURT: I think so.

4 MS. CENDALI: All right, thank you very
5 much. I had a similar problem once at the United
6 States Supreme Court, and Judge Scalia suggested
7 I lower the podium to the maximum extent possible
8 so I think I'll do the same here today.

9 THE COURT: Oh, all right, that's fine.

10 MS. CENDALI: In any case, your Honor,
11 Righthaven does have standing today with regard
12 to the restated and amended Strategic Alliance
13 Agreement. No court has construed that
14 agreement. That agreement is on all fours with
15 the Silvers case in the Ninth Circuit. It is not
16 a bare right to sue but fully grants the right to
17 Righthaven in all rights to the copyrights at
18 issue in this case including the right to sue.

19 THE COURT: You speaking now of the
20 amendment, is that right?

21 MS. CENDALI: That's right.

22 THE COURT: Okay, but we go by the
23 facts as they existed at the time the lawsuit was
24 filed.

25 MS. CENDALI: So let's focus on that.

1 Your point is that in the Lujan case you need to
2 look at the facts as they existed at the time the
3 complaint was filed. Well, we have cited cases
4 which our opponents have not tried to distinguish
5 such as --

6 THE COURT: Oh, just wait, just wait.

7 MS. CENDALI: Well, such as Valmont,
8 Travelers, Gallans, Novende (all phonetic), all
9 of which accepted post filing facts as giving
10 rise to standing. And those courts, and I think
11 the Northstar decision in the Northern District
12 of California, a 2011 decision, is particularly
13 helpful and say that --

14 THE COURT: So you're saying I should
15 follow the Northern District of California rather
16 than the Supreme Court?

17 MS. CENDALI: No. The difference is
18 you have to read the rule that, of course, we're
19 not arguing that standing is not to be considered
20 at the time the complaint is filed, but almost
21 all of those cases, and as far as I know all of
22 the cases that have discussed this, have not also
23 dealt with the issue of a motion for leave to
24 amend to supplement the pleadings to plead the
25 new jurisdictional facts.

1 In fact, the Haddad (phonetic)
2 case in the Second Circuit specifically noted
3 that while a lot of cases cite the old saw that
4 you need to look at the facts at the time the
5 complaint was filed, they don't deal with the
6 more sophisticated issue of when you have a
7 motion for leave to amend in light of subsequent
8 events.

9 THE COURT: But I mean the facts have
10 changed?

11 MS. CENDALI: Yes, the facts have
12 changed, fundamentally have changed. The
13 business agreement that was originally entered
14 into is no longer the same business agreement
15 that it is today and what the Northstar case in
16 the -- in the --

17 THE COURT: But I mean what Supreme
18 Court cases say is that allegations, you can
19 change allegations, but you can't -- you can
20 amend, well, where you want additional
21 allegations, but not where you want to change the
22 facts.

23 MS. CENDALI: But the issue is how you
24 reconcile that with the issue of a motion for
25 leave to amend which we've liberally granted.

1 Again in the Northstar case, it discusses the
2 fact that there the argument, similar to what's
3 being made here by the amici, is that, well, it's
4 too late because we looked at what happened on
5 the day of the original filing, that's all you
6 looked at.

7 And the court said that this
8 argument elevates form over substance and goes on
9 to say that although there's no published Ninth
10 Circuit authority on this point, courts in other
11 circuits have found that parties may cure
12 standing deficiencies through supplemental
13 pleadings. And thus, because in that case there
14 was a subsequent assignment that cured in that
15 case the admitted lack of existing standing
16 originally, because there was that subsequent
17 assignment, the court said, I'm going to deny the
18 motion for -- the motion to dismiss and permit
19 the supplemental pleading.

20 And the court did this for a
21 very practical reason because the alternative, as
22 we know, standing is a jurisdictional issue with
23 dismissal without prejudice. The complaint can
24 be re-filed tomorrow based on the new restated
25 and amended Strategic Alliance Agreement which

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1 has never been viewed by any court, and we would
2 end up delayed but in the same position we are in
3 now, and the courts recognize why go through that
4 as a matter of judicial economy. Isn't it
5 practical under Rule 15 to permit an amendment?
6 There's relation back under Rule 15, let it amend
7 back, relate back, to the original filing and
8 let's get on with it.

9 There's already been an answer
10 filed. Let's get to the merits and we'd very
11 much like to get to the merits, your Honor. So
12 our point is that there is a line of cases.
13 Northstar I thought was helpful because it's
14 2011, and it summarized a lot of the law.
15 There's a line of cases that say, yes, absolutely
16 you need to look at standing at the time of
17 filing, but you also need to read that in
18 conjunction with subsequent facts and a motion
19 for supplemental pleading.

20 And in light of those cases and
21 in light of the practicality, it makes more sense
22 we respectfully submit to accept the
23 supplemental -- or grant our motion for leave to
24 amend and let the case proceed to the merits
25 phase because alternatively your Honor will

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1 dismiss without prejudice which is the rule and
2 we'll be re-filing, and it will just take that
3 much longer to get to the actual merits of the
4 copyright infringement here.

5 Thank you.

6 THE COURT: All right. Opposition?

7 MR. PULGRAM: Thank you, your Honor.

8 THE COURT: Yes, sir. Mr. Pulgram?

9 MR. PULGRAM: Yes, sir.

10 THE COURT: Yes.

11 MR. PULGRAM: Thank you for allowing
12 the amici to appear because this is an important
13 issue and the particular issue that you have is a
14 slightly progressed version of what has come
15 before the other courts here. Your Honor is
16 exactly correct that the case should be dismissed
17 for lack of standing under the Lujan line of
18 cases and five cases in this jurisdiction have so
19 held. Those aren't binding on your Honor as
20 precedent, but we do believe and we'll talk about
21 in a moment about whether they are collateral
22 estoppel.

23 Second, all of those cases have
24 held, as your Honor is stating, that when they
25 not manufacture facts to create jurisdiction,

1 that was the language used by Judge Dawson in the
2 Mostofi case, which is a final judgment in which
3 he said, plaintiffs and Stephens Media attempt to
4 impermissibly amend the facts to manufacture
5 standing. That just doesn't work as a matter of
6 federal practice. And I think the argument being
7 made here is twofold on the part of plaintiffs.

8 First, we would like to amend
9 even though we can't, and if you don't let us,
10 we'll have to sue again. And our position, your
11 Honor, is that this is not after a finding that
12 there was no standing because there was no
13 ownership of the copyright. That is not going to
14 be a dismissal without prejudice and, in fact,
15 those cases that have already dismissed on the
16 basis of lack of ownership of Righthaven, all of
17 which are the five cases before yours, all of
18 those cases also have preclusive effect here, and
19 let me explain if I may.

20 In the typical situation of a
21 copyright case there are two elements that need
22 to be shown, ownership of a copyright and a
23 copyright. The element of ownership is an
24 element of the claim. Now, in addition, the
25 element of ownership is an element of standing.

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1 And so when Judge Hunt, Judge Dawson, Judge Pro
2 concluded there was no ownership under the SAA in
3 Righthaven, they concluded that an element of the
4 claim of copyright is missing.

5 THE COURT: And just for the record,
6 SAA is the Strategic Alliance Agreement for the
7 record, but go ahead.

8 MR. PULGRAM: I'm sorry to use the
9 jargon but exactly right, and that was the
10 agreement that existed at the beginning of this
11 case and, Judge, in the Hoehn case Judge Pro even
12 went on to say that the clarification so-called
13 did not create an ownership interest. Now it
14 has, therefore, been settled that under the SAA
15 there is no ownership interest in Righthaven and
16 that isn't --

17 THE COURT: But they respond what about
18 this second -- I'm going to use the wrong
19 terminology -- but the second amendment, if you
20 will, to the Strategic Alliance Agreement?

21 MR. PULGRAM: So we have --

22 THE COURT: And understand what I'm
23 saying, I'm saying, okay, I understand these
24 other judges ruled against Righthaven, but now
25 with the second amendment to the Strategic

1 Alliance Agreement, that cures all of that.

2 MR. PULGRAM: And the answer to that
3 is, it does not because it has already been
4 concluded that under the Strategic Alliance
5 Agreement whether you amend it later or not,
6 under the Strategic Alliance Agreement there is
7 no ownership. You cannot after a judgment of a
8 court, of which there have been four saying that
9 this is no ownership, come back, change the facts
10 and avoid preclusive effect.

11 And I think there are two cases
12 that I would like to provide to your Honor and
13 your brain trust on this point because we
14 received yesterday a brief at 6:58 in the morning
15 that for the first time addressed this question
16 of collateral estoppel. We briefed the issue in
17 our June 27th brief. We got their first brief on
18 this yesterday and, if I may, I'll hand you
19 copies of the cases.

20 THE COURT: Sure, yes, sir. Have you
21 provided --

22 MS. CENDALI: They provided it moments
23 ago, your Honor.

24 THE COURT: Well, this case I think we
25 originally set for hearing back in May I think,

1 and somebody wants to file something and, like I
2 say, it's my preference is I want to hear more
3 rather than less so --

4 MR. PULGRAM: These are two multiple
5 copies of two cases.

6 THE COURT: Okay.

7 MR. PULGRAM: And I did provide them as
8 soon we got copies from Kinko's this morning
9 before the hearing, but the first case is a case
10 out of the Northern District of Illinois, Judge
11 Shadur, and it was affirmed in the Seventh
12 Circuit. And the place to start is the very last
13 page which is his first decision.

14 And the last paragraph says
15 because Hyperquest is not an exclusive licensee
16 of any of the rights that it now claims, it is
17 without standing to bring the current action.
18 Accordingly both the complaint and this action
19 are dismissed for lack of subject matter
20 jurisdiction. So just like all the courts and
21 your Honor can find no ownership, no exclusive
22 rights, no standing, to dismiss this, and he
23 calls it lack of subject matter jurisdiction.

24 If you turn to the second page
25 of this, he explains because one of the parties

1 said, Judge, that was a dismissal without
2 prejudice, that was just subject matter
3 jurisdiction. And in the bottom right-hand
4 corner, he explains, no, that was with prejudice,
5 and I'll read that paragraph.

6 THE COURT: Yes, sir.

7 MR. PULGRAM: By sharp contrast, what
8 was at issue in this case was not subject matter
9 jurisdiction in the real sense, but rather the
10 standing, or more accurately the lack of
11 standing, of Hyperquest to file suit in a case in
12 which, one, a copyright indisputably existed and;
13 two, this court had ample power to decide all
14 issues of that copyright's validity and its
15 claimed infringement. And then he says, in the
16 order, this court rejected HQ's litigative effort
17 definitively and with prejudice because of its
18 lack of standing, not because of the absence of
19 power of subject matter jurisdiction.

20 And so what Judge Shadur said
21 and what the Seventh Circuit said is, I dismissed
22 it because there was no ownership of an exclusive
23 right. I called it lack of jurisdiction, but
24 it's the part of jurisdiction standing that is
25 about justiciability not about power and,

1 therefore, it's a dismissal with prejudice. And
2 that's why, your Honor, those decisions by the
3 other courts have collateral estoppel effect
4 here, and it's why your Honor when you dismiss
5 because the SAA has no -- has no ownership
6 interest in Righthaven, it should be a dismissal
7 with prejudice.

8 Now, the plaintiffs argue we
9 just want to re-file with this new restated
10 agreement and that's where the second case that I
11 handed you, the Penonia (phonetic) case, comes
12 in. The plaintiffs have in their brief yesterday
13 cited a lot of cases that say a dismissal for
14 lack of jurisdiction, a dismissal just for lack
15 of jurisdiction, is not collateral estoppel. So
16 all that Judge Hunt and Judge Mahan decided was
17 there was no jurisdiction because we didn't own
18 the copyright, that's not collateral estoppel.

19 They cited a lot of cases for
20 that proposition, none of which dealt with
21 ownerships of copyrights, not any, and none of
22 which dealt with this case, the situation where
23 the merits are intertwined with standing,
24 intertwined with jurisdiction, and what the
25 Penonia Farms case shows is that where a court

1 has dismissed a claim based on lack of ownership,
2 that is collateral estoppel, and I would direct
3 the point to the -- the court to the third of the
4 pages of this decision, the paragraph ending
5 two-thirds down on the right-hand side.

6 THE COURT: I was looking at the head
7 notes. I'm sorry, the first page?

8 MR. PULGRAM: On the third page.

9 THE COURT: On the third page, I'm
10 sorry, let me catch up to you. Oh, on the
11 right-hand side, yes, sir.

12 MR. PULGRAM: Right. At the bottom of
13 that paragraph there is a sentence that begins
14 about seven lines up, the bottom of the last full
15 paragraph. This court finds that the Southern
16 District of New York Federal Court thoroughly
17 investigated the effect of the 1990 settlement
18 agreement in Penonia Farm's ownership interest in
19 Penonia One, reconsidered the issue in Penonia
20 Two. Therefore, a court of competent
21 jurisdiction did actually and necessarily
22 determine the standing issue, thus satisfying the
23 second prong of the Yamaha test, and the Yamaha
24 test is the test for issue preclusion. So what
25 we have is a decision because it decided

1 ownership that is preclusive.

2 THE COURT: But their response is,
3 well, we've amended the Strategic Alliance
4 Agreement, now we do have ownership.

5 MR. PULGRAM: That's right.

6 THE COURT: And no court has addressed
7 that.

8 MR. PULGRAM: That's exactly what they
9 say, your Honor, and they say pay no attention to
10 the fact that the agreement that was litigated on
11 which we sued has been conclusively determined to
12 not grant standing. We are changing nunc pro
13 tunc what happened in the last year-and-a-half,
14 and I know Judge Hunt said, I know Judge Hunt
15 ruled, and I know the DiBiasi decision entered
16 judgment that, quote, the plain language of the
17 SAA conveys the intent to deprive Righthaven of
18 any right save for the right to sue alleged
19 infringers and profits from such lawsuits.

20 I know that's what has been
21 decided to be what happened in this case, but
22 we're changing all of that now. We're coming in
23 after a judgment was entered, after preclusive
24 effect has been obtained, and we're now creating
25 a new set of facts. And we want to sue on it,

1 and we want to sue on the same SAA, the exact
2 same contract. We're just restating it because
3 we get, when we don't like the decision that has
4 come down in a prior case, to paper over it by
5 changing the language of the contract.

6 THE COURT: But I mean parties can
7 amend their agreements any time they want to.

8 MR. PULGRAM: They sure can.

9 THE COURT: And so here we've got
10 this -- if I can call it the Strategic Alliance
11 Agreement One, Strategic Alliance Agreement Two,
12 and by my count, and you bicker with me and say,
13 no, it's three, or two, or whatever, but now it
14 looks like the third incarnation of the Strategic
15 Alliance Agreement.

16 MR. PULGRAM: That's right.

17 THE COURT: No judge has determined
18 this Strategic Alliance Agreement doesn't confer
19 ownership, or I mean there's just no judge has
20 addressed that, no court has addressed that.

21 MR. PULGRAM: No court has determined
22 whether or not if this had been the original
23 Strategic Alliance Agreement, it could have
24 created ownership, but the courts are not time
25 travelers, and I would respectfully suggest that

1 my esteemed New York counsel isn't either such
2 that they can go back to the time that the SAA
3 was entered and decide I know there's been a
4 final adjudication, but the intent was to give
5 Righthaven nothing.

6 We're changing that after the
7 fact. We are undoing -- we're undoing the rule
8 on what the SAA meet and we're -- because we can
9 because we want to nunc pro tunc say the
10 opposite. The Strategic Alliance Agreement issue
11 number three, version number three says, recites,
12 that it is the intention of the parties -- that
13 it was the intention of the parties that
14 Righthaven receive all rights of an ownership and
15 the copyright. It's been decided exactly the
16 opposite that that's not what the SAA did.

17 And so if you come in after the
18 fact and you try to rewrite an agreement to
19 create a claim that has already been denied,
20 that's undoing the courts' decisions. And I
21 think it goes back to the question of what is
22 collateral estoppel issue preclusion about? And
23 the Supreme Court has made that pretty clear in
24 explaining that the doctrine is invoked by the
25 courts to promote conclusive resolution of

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1 disputes.

2 I'm quoting here from Montana
3 versus United States, 440 U.S. 147 at 153. The
4 doctrine is invoked by the courts to promote
5 conclusive resolution of the disputes thereby
6 protecting parties from the expense of multiple
7 lawsuits, conserving judicial resources, and
8 increasing the reliability and consistency of
9 judicial decisions. That's exactly why we should
10 only have one adjudication about the SAA in this
11 case and that's exactly why the plaintiffs can't
12 come in after that.

13 We cited the FM Industries case
14 for the proposition that a party cannot simply
15 amend its agreement to get around a judgment.
16 It's not been responded to by the plaintiffs, and
17 that court specifically was a copyright case
18 where the parties came in after the judgment and
19 they asked for relief. I think it was under Rule
20 59 or 60, and the court said, no, I'm not going
21 to allow you to change my judgment by rewriting
22 the agreement. And that's what's happening here.

23 Now, that's why the procedure
24 says this case is over. There are other reasons
25 why the substance of the restated agreement

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1 couldn't amount to a claim anyway, and I believe
2 that is sufficiently before the Court. Our
3 procedural position is that your Honor shouldn't
4 allow them in because Lujan prohibits it and
5 because all of these other cases were decisions
6 on the merits.

7 If you get past that issue, then
8 we're talking about whether or not this restated
9 agreement is real and whether it's something that
10 could be amended, and our position is that it is
11 not. And our position is that, in fact, this is
12 further propagating or perpetuating the fraud on
13 the court that Judge Hunt explained in his
14 sanctions order. I don't know if you've had a
15 chance to read it, but it was two weeks ago and
16 he ordered it delivered to every other court in
17 this jurisdiction and in Colorado that had these
18 issues.

19 The new agreement contradicts in
20 its recitation of intent the express findings
21 that Judge Hunt has made. It contradicts the
22 prior agreements. The prior agreements said that
23 after Righthaven was to be given so-called
24 exclusive rights, it was going to license back
25 all-exclusive rights. That was the SAA. The

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1 first amendment, the so-called clarification
2 said, when we said that the license back to
3 Stephens Media was exclusive, we didn't really
4 mean that. We meant that it was nonexclusive,
5 and they inserted the word "non" and then they
6 said, but Stephens Media has a right to veto any
7 further license or use by Righthaven.

8 And once Judge Pro rejected that
9 in the Hoehn case, they said, oh, third
10 clarification, now the nonexclusive license back
11 to Stephens Media doesn't have Stephens Media
12 with the right to veto anymore. So the point is
13 that each of these agreements are just
14 contradictory. They are not statements of true
15 intent. They are not what the parties agreed to
16 or were doing. They are efforts above all else
17 to create some status, some possible patina for a
18 claim, and that's not a basis upon which a new
19 claim can be made here.

20 I would just add that the
21 restated amendment also contradicts history. For
22 the last eighteen months, Righthaven has acted
23 exclusively as an agent to sue people. The
24 restated agreement purports on its face to say
25 during those eighteen months, that was not its

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1 status, it was an actual licensee with a right to
2 license people. And, in fact, we have before
3 your Court, your Honor, a copy of the LLC
4 Operating Agreement for Righthaven, and even that
5 says that its job is to sue people, and at the
6 end of those lawsuits the copyrights will, must,
7 be given back to the party who gave them.

8 The restated agreement would
9 just perpetuate the very fraud for which they
10 were sanctioned, and for that reason even if you
11 assume that there was any basis under Lujan and
12 under collateral estoppel rules that it could be
13 added, even if you assume that, it's not a basis
14 upon which a claim could be made now in this case
15 or in the future.

16 You know, it was interesting to
17 me to read the brief that we received yesterday
18 morning which said that the defendants in this
19 case or my law firm is interested in creating a
20 copyright free zone on the Internet.

21 THE COURT: A copyright free zone?

22 MR. PULGRAM: A copyright free zone was
23 the rhetoric, and what's also interesting is that
24 every case that is brought by Righthaven that has
25 gotten to the question of infringement has been

1 lost by Righthaven. Every single case in which
2 there's been a determination of whether there's
3 infringement or not, at least three have come out
4 at summary judgment to the contrary.

5 What we are defending, your
6 Honor, what the amici are here about is to
7 establish a shakedown free zone where real
8 lawsuits are filed by real parties who have real
9 grievances and real ownership interest and not by
10 people who can easily file hundreds of actions
11 against the unrepresented, against people who
12 have to go out to get pro bono counsel all over
13 the country in an effort to shakedown nuisance
14 settlements.

15 That's why we're here and we
16 think that your Honor has before you all the
17 facts to do exactly what you started with today
18 to dismiss this case, to dismiss it with
19 prejudice, and to end this lawsuit by this party
20 under this agreement, the SAA restated or not,
21 against this defendant.

22 THE COURT: All right. Thank you, Mr.
23 Pulgram.

24 MS. CENDALI: Your Honor, may I respond
25 to this, please?

1 THE COURT: No, you'll get a chance to
2 respond at the end. I've got another hearing
3 that started twelve minutes ago.

4 MR. PULGRAM: I apologize, your Honor.

5 THE COURT: No, no, I mean it just so
6 happens this got continued so often that I wanted
7 to get it on calendar as quickly as possible.

8 Professor, good to see you
9 again.

10 PROFESSOR SCHULTZ: Good to see you,
11 thank you, your Honor. I'll try and keep this
12 brief as well. I want to just add two points in
13 trying to focus a little bit more on copyright
14 policy and the Copyright Act and the Silvers
15 decision because I think from the sort of big
16 picture point of view, I want to make sure that
17 what happens here is consistent for all the
18 cases, not just Righthaven cases, but all
19 copyright cases.

20 So I want to start with one
21 solid reason why it might make sense to dismiss
22 this case and not allow amendment, and that is
23 that one important policy that's in the Copyright
24 Act is that when you have a prevailing party,
25 attorney's fees are available and costs. And

1 that's something that is used quite often on both
2 sides, both the copyright plaintiffs to get fees
3 when they win and defendants when they win.

4 And, in fact, you know it's
5 certainly one of the things that is at issue here
6 in a lot of these cases, and so one of the things
7 that I think I saw going on with these amendments
8 was that there's sort of this language about
9 restatement clarification, but I think I agree
10 with you, your Honor, that in some ways it's not
11 a do-over. It's not like they are trying to do
12 the same thing over and over, but yet a series
13 like, you know, you make a movie, and then a
14 sequel, and then a third one, and you're sort of
15 trying to get it, you know, kind of down the
16 road.

17 And it actually makes a
18 substantive difference, all right, because if you
19 don't have a valid copyright claim when you file
20 your complaint, then you are subject to fees and
21 costs if you lose and the defendant wins. And so
22 I think in Section 505 of the Copyright Act,
23 which clearly states that a prevailing party is
24 eligible for fees and costs, that's an important
25 policy that actually would back up a reason for

1 dismissing the case is not just allowing
2 perpetual amendments.

3 The second point that I would
4 like to make is to actually take a look at the
5 Silvers case a little closer as to a few
6 different places where the Ninth Circuit talked
7 about why the rule they instituted was important
8 and actually talked about why Congress passed
9 Section 501(b) specifically in the statute
10 because I think it's easy on some level to say
11 that maybe this new agreement, if you read
12 specific words in it, meets the single line
13 holding in Silvers.

14 But I actually don't think
15 that's true when you look at what the agreement
16 is really trying to do and also what Silvers is
17 trying to do, what the Ninth Circuit en banc
18 decision was trying to do because actually what
19 was interesting to me is how little discussion of
20 Silvers there was in detail in the plaintiff's
21 briefing, and I just wanted to highlight a couple
22 of things that I find there.

23 First is that there's an
24 explicit statement that the Copyright Act does
25 not permit copyright parties to choose third

1 parties to sue on their behalf, and in that
2 specific instance it was that there was an
3 assignment of the bare right to sue. So the
4 screen writer in Silvers who, you know, the
5 writer had claimed that the movie was copied from
6 her writings. She got a bare right to sue, and
7 the court said, no, that you don't have standing,
8 but the reason was for this fundamental principle
9 that you can't outsource your enforcement, and
10 that the court talks about the kind of history of
11 who could sue.

12 And I don't want to go into a
13 lecture, but let me just focus on one area which
14 is that originally actually under the 1909
15 Copyright Act, not only did the copyright owner
16 have to be the one who sued, but you couldn't
17 even split up a copyright. There are lots of
18 different parts of a copyright you can have
19 exclusive rights to reproduce, to distribute, to
20 perform publically a song, or a movie, or
21 something like those little pieces of it, a
22 bundle of sticks as they say in law school,
23 right?

24 And in the 1976 Act, Congress
25 amended it to say actually, okay, we're going to

1 allow you to split that up, but the reason they
2 did it, and Silvers says this explicitly, was
3 because Congress is aware of constraints on
4 commercial dealings, that there were certain
5 kinds of exploitations of the copyright. Say you
6 wrote a book and someone wanted to make a movie
7 of it, and you wanted to license or give them the
8 rights to do that exclusively over here, but then
9 someone wants to do an audio book over here, and
10 you want to do it a different thing, you are able
11 to split it up in order to kind of exploit the
12 copyright to make more works available, to make
13 money off of it, and that the enforcement that's
14 written into Section 501(b) is to back that up,
15 right, it's to allow people who go out and do
16 business to back it up.

17 So I just wanted to kind of
18 highlight that because when I look at the
19 amendments here, again this is -- I don't mean to
20 sort of, you know, harp on the same point, but it
21 even though in theory they say that Righthaven
22 has this right to exploit the copyright, there's
23 no indication that they're doing anything of that
24 sort that this is really about litigation, and so
25 I wanted to just sort of focus on the Silvers

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1 case in those two respects because I think if the
2 Court were -- I agree actually that there might
3 be a number of procedural issues in Lujan and all
4 these other cases.

5 But if the Court even does get
6 to this new agreement, I think the Silvers case
7 actually talks more broadly about why this right
8 to sue needs to be really held by the same people
9 exploiting the copyright and not allowed to
10 wander and the copyright to become fragmented.
11 And that's really what Congress's purpose was, so
12 that aligned with the attorney's fees provision,
13 I think are two additional reasons why I agree
14 with your Honor, and I think the decision can
15 focus in the instructions. So thank you.

16 THE COURT: All right, thank you.

17 Mr. DeWitt?

18 MR. DeWITT: Good morning, your Honor.

19 THE COURT: Good morning.

20 MR. DeWITT: As I said, I represent an
21 organization called Citizens Against Lawsuit
22 Abuse, and at their request the single issue I
23 have written on is that Righthaven is a law firm
24 engaged in the unauthorized practice of law.
25 There's only two points I want to make because my

1 other counsel here are much more esteemed than I
2 am.

3 One is I think just for the
4 public, you need to write an opinion in this case
5 and publish it, and I think it's very, very
6 important to the Scaccias and the other ones of
7 the world against whom Righthaven is engineering
8 stickup after stickup after stickup. And the
9 second point is it's very important this case be
10 dismissed with prejudice both for the claim
11 preclusion, issue preclusion, reasons that my
12 co-counsel has addressed so well, and because if
13 you dismiss it without prejudice, the defendants
14 don't have the resources to appeal.

15 They don't know how to do this
16 and they don't even have a lawyer. And so what's
17 going to happen if assuming the Ninth Circuit as
18 I'm confident it would uphold your ruling, then
19 it will just be another stickup. And it is so
20 important to get to the prejudice issue because
21 just a matter of public policy and a matter of
22 fairness to the defendants in this case and,
23 goodness knows, how many other defendants.

24 I'm not going to go into what I
25 put in my brief about why it's a law firm engaged

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1 in the unauthorized practice of law, but I can
2 only make -- there's two points that are
3 important. One thing that is in my brief, the
4 attorneys represent Righthaven. Righthaven
5 represents Stephens Media. Okay, Stephens Media
6 goes to Righthaven and talks to them about the
7 cases. It's not a privileged communication.
8 Righthaven isn't a lawyer, it doesn't claim to be
9 even though it's a law firm in fact.

10 And as to all these Strategic
11 Alliance Agreements, the Court needs to look at
12 substance over form. If you put a duck in a
13 chicken suit, it's still a duck. And I mean they
14 can write clever language in a Strategic Alliance
15 Agreement, which I'm sure they'll have ten more
16 amendments to in response to the Court's response
17 to what they're doing, but it's not what the
18 agreement says, it's what's really going on.

19 And what's really going on is
20 Righthaven is a law firm. It's engaged in the
21 unauthorized practice of law, and it's very
22 important that the Court find that and give the
23 Ninth Circuit a chance to agree with you, which
24 I'm confident that it will for the reasons that
25 are in my brief. Every state that's addressed

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1 this has come to that conclusion, and the cases
2 are all in there. Otherwise, my esteemed
3 colleagues are doing better than I am, so I'll
4 let them talk.

5 THE COURT: All right. Thank you, sir.

6 Mr. Devoy?

7 MR. DEVOY: Thank you, your Honor.

8 THE COURT: Yes, sir.

9 MR. DEVOY: I will be brief. Recapping
10 what my colleagues have said, I'm specifically
11 addressing the Court's need to not allow
12 Righthaven to have leave to amend its brief.
13 Specifically doing so would be futile. First of
14 all, it is moot because Righthaven does not have
15 standing and there is no way that amending its
16 complaint will simply cure that. It cannot go
17 back in time and change this with another
18 amendment to an agreement that has already been
19 found to not confer its standing from a
20 standpoint of justiciability.

21 What Righthaven has done the
22 first time is to put -- to have in its agreement,
23 and now by restating it again, it's put a beard
24 on it as Mr. DeWitt pointed out, and as
25 Righthaven somewhat hypocritically points out by

1 arguing about form over substance, Righthaven's
2 relationship with Stephens Media and its lack of
3 ownership of these copyrights is not going to
4 change until its conduct changes, and its conduct
5 is not going to change. What Righthaven is doing
6 in this case and has been doing in other cases is
7 attempting to create an army of zombie lawsuits,
8 things that have been settled, things that have
9 been set aside, in an effort to undermine this
10 Court's principles of finality and of preclusive
11 effects, and of prejudice in order to keep these
12 lawsuits alive for whatever purpose it's
13 accomplished.

14 These don't deserve to be alive.
15 They shouldn't be. They should have all have
16 been dismissed, and in many cases they have been
17 resolved for a point of judgment, yet they are
18 being re-filed under the pretense, the mistaken
19 pretense, that changing an agreement after the
20 fact and after the rights have transferred
21 somehow changes the facts many years in the past.
22 The other problem is that even if Righthaven got
23 everything that it wanted, it wouldn't change the
24 fact that these lawsuits ignore important First
25 Amendment principles.

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1 Most importantly, every single
2 case where a motion for summary judgment has been
3 brought by counsel, I understand that in this
4 case it hasn't happened because the defendants
5 have been pro per, but when evidence is put on
6 the record, Righthaven has not won a single
7 dispute on fair use because it is not in the same
8 market as content producers, it is in the market
9 of lawsuits. It is a separate market and unless
10 somebody else is claiming ownership of a
11 copyright and suing on it, it is not competing
12 with Righthaven.

13 Allowing Righthaven to re-file
14 this lawsuit ignores that, and it also allows
15 them to continue on with this enterprise that
16 harms the First Amendment. It puts people into
17 their basement where they're afraid to talk,
18 they're afraid to entrap one another, and they're
19 afraid to come out and to produce content because
20 it might infringe upon what somebody else has
21 done. Moreover, and as we represent bloggers as
22 the Media Bloggers Association's counsel, we also
23 have to uphold the provisions of copyright
24 owners.

25 Allowing Righthaven to continue

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1 on with this lawsuit and to further amend its
2 complaint harms the interest of legitimate
3 producers of content who own their own content
4 and sue on their own content by retaining
5 attorneys rather than a complex transfer of
6 rights that doesn't transfer anything at all.
7 And Righthaven has done more damage to the
8 interests of intellectual property holders than
9 Perfect Ten, Incorporated, which has filed
10 numerous lawsuits and strengthened the provisions
11 of fair use and given more protections to website
12 operators and Internet hosts.

13 It is important to understand
14 the relationship within the copyright between
15 content producers and content consumers, however,
16 the way that this is being done ignores important
17 First Amendment principles, punishes the most
18 protected kind of speech that we have in public
19 forums, such as the Internet, about public
20 matters of policy, politics, and other issues of
21 debate and tries to commoditize (phonetic) them
22 in what Mr. Schultz characterized as a secondary
23 market for lawsuits.

24 The U.S. Government, it is to
25 nobody's surprise, heavily regulates these

1 secondary markets, and if it intended to create
2 one for copyrights, it would be reflected in the
3 Copyright Act. To allow amendment of this and
4 for this lawsuit to persist and this model to
5 proliferate undermines these goals, harms the
6 court, harms producers, and it harms people who
7 are trying to exercise their free speech rights
8 guaranteed by the First Amendment.

9 Thank you.

10 THE COURT: Thank you.

11 Ms. Cendali, now you can get a
12 chance to reply.

13 MS. CENDALI: Thank you.

14 I will attempt to respond
15 briefly to the gist of the comments. First, if
16 there is a dismissal, we still believe that the
17 Court should grant our motion for leave to amend.
18 It clearly should be without prejudice. All the
19 other dismissals in the other district courts in
20 this -- have ruled on this and have done it
21 without prejudice because that is what the law is
22 when it's simply an issue of standing and
23 jurisdiction that doesn't reach the merits.

24 Second, there's no preclusive
25 effect here. It's clearly the overriding

1 takeaway that I get from especially Mr. Pulgram's
2 argument is that the amici want to prevent this
3 court or any court from ruling on the third
4 version, the restated amendment, and that's
5 because conspicuously absent from their brief is
6 really any challenge to the third amendment of
7 the restated agreement as to why it doesn't
8 comply with Silvers.

9 No court has ruled on the
10 restated amendment. That's the bottom line.
11 Because of that to deny us, Righthaven, the right
12 to file a new lawsuit based on a new agreement is
13 violation of due process and it fails the issue
14 preclusion requirement that there has to be an
15 identity of issues. There's no identity of
16 issues between the restated amendment and the
17 original SSA (sic).

18 Moreover, the case that Mr.
19 Pulgram mentioned that he copied from Kinko's,
20 presumably heard about before and he sent it to
21 Kinko's for copying, was a summary judgment
22 decision where the court specifically said even
23 in the language read that there was a full
24 opportunity for the court to hear and understand
25 the issues before ruling. This is a motion to

1 dismiss. They want to summarily adjudicate on a
2 motion to dismiss fundamental property rights.
3 That's antithetical to both the law and to the
4 constitution.

5 That's a violation of due
6 process and is not supported by any authority
7 that I am aware of. Moreover, conspicuously
8 absent from their discussion of other cases is
9 Judge Navarro's decision in Virginia Citizens,
10 and in that case Judge Navarro denied a motion to
11 dismiss and that was not either with regard to
12 the current restated amendment saying that they
13 pled that they had ownership rights and we'll
14 test it out in discovery and see.

15 I suggest that Judge Navarro's
16 approach is also a very practical approach that
17 this Court should take. She wrote a very recent
18 opinion. We'd be happy to provide your Honor
19 with a copy of it if your Honor doesn't have it.
20 It said that, look, if there is an issue on this,
21 let's decide it, you know, after a full
22 development of the record.

23 Finally, on the issue of the
24 amendment, counsel completely ignores a comment
25 that your Honor made which is that parties always

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1 have the right to amend and enter into new
2 agreements, and this is something that the United
3 States Supreme Court in Sprint Communications, a
4 case cited in our recent brief, specifically said
5 there, too -- it wasn't a copyright case, but it
6 was a case similarly where somebody was -- there
7 were aggregators who were suing on various
8 collection cases.

9 And the Supreme Court said if
10 there was some issue with the assignment, the
11 parties could readily fix it by entering into a
12 new agreement. So the Supreme Court certainly
13 believes in the freedom of contract and agrees
14 that you are not forever bound to whatever
15 agreement you may have entered into two years ago
16 and have no ability to change that agreement
17 based on guidance from the various courts.

18 The other thing is that we've
19 heard from our opponents is a lot of talk about,
20 well, you know, you're bad, Righthaven, because
21 you want to file lawsuits and that's a bad thing.
22 And I think that counsel, with respect, totally
23 misconstrues the Silvers case and what it holds
24 because Silvers simply says if all you have is
25 the right to sue, you don't have the right to

1 sue.

2 What Silvers says is that as
3 long as you have any one of the exclusive rights
4 under the copyright law, you have the right to
5 sue that goes with that. They're turning it on
6 its head and trying to say, well, you can't, your
7 purpose can't ever be as the copyright order to
8 file lawsuits, but Silvers said, look to patent
9 law. Silvers in the key area of the case says
10 because patent law and copyright law are similar,
11 especially for issues of assignment, it's
12 instructive to look to patent law.

13 And when you look to patent law,
14 you look to what -- the case I believe is highly
15 on point here, which is the SGS Thomson case
16 versus International Rectifier cited in our
17 omnibus brief that we submitted in the course of
18 this briefing, and there Judge Michel, Chief
19 Judge Michel, writing for the federal circuit
20 rejected a very similar argument that you're
21 hearing the professor and others making here with
22 the idea that there's somehow something wrong
23 with exercising as part of your ownership rights
24 the right to bring a suit.

25 The federal circuit found that

1 the district court erred in granting summary
2 judgment on the grounds that the patent
3 assignment in issue was a sham because the sole
4 purpose was to facilitate litigation -- sole
5 purpose to facilitate litigation. The federal
6 circuit held in so ruling the trial court ignored
7 the express language of the assignment and in
8 effect created a new requirement not found in any
9 case law that a patent assignment must have an
10 independent business purpose.

11 The motive or purpose of a
12 patent assignment is irrelevant to the assignee's
13 standing to enforce the assigned patent. This is
14 the key language. Even a motive solely or
15 expressly to facilitate litigation is of no
16 concern to the defendant and does not bear on the
17 effectiveness of the assignment citing the United
18 States Supreme Court language in discovery
19 records case. So the idea that there's something
20 wrong with choosing as part of your ownership
21 rights to file lawsuits is fundamentally flawed.
22 And equally fundamentally flawed is the idea that
23 there's something noble about copying other
24 people's intellectual property on the Internet.

25 These cases will ultimately I

1 hope be decided on the merits where the court can
2 look at the facts and properly view under the
3 First Amendment analysis under the fair use test
4 and see whether, in fact, there's an
5 infringement. I was taught if you're taking
6 somebody else's property wholesale, copying it in
7 toto, and using it for your own self and selling
8 ads to make money as a result of it, that's theft
9 and there's a right to bring that claim.

10 THE COURT: How many times should you
11 be permitted to amend?

12 MS. CENDALI: Well --

13 THE COURT: I mean because, you know,
14 you want to amend your complaint, but we're on
15 the third amendment, frankly, aren't we?

16 MS. CENDALI: We are, your Honor.

17 THE COURT: I mean you understand what
18 I'm saying, you didn't amend the complaint, but
19 basically you did because you've amended the
20 agreement. This is a third incarnation of the
21 agreement.

22 MS. CENDALI: I don't see any reason to
23 have to amend after this point.

24 THE COURT: I understand, but should it
25 be with prejudice or without prejudice because

1 you've had one bite at the apple, two bites at
2 the apple, and now you want a third bite of the
3 apple.

4 MS. CENDALI: But there's been no --
5 there's been no judicial -- it would be -- it
6 would be --

7 THE COURT: It would be, it's the third
8 amendment, isn't it? I mean I know you haven't
9 amended the complaint three times, but you've
10 amended the contract three times -- two times.

11 MS. CENDALI: But there's been no --
12 but there's been no judicial ruling as to whether
13 the amended contract provides standing. They
14 can't have it two ways. Look at it this way --

15 THE COURT: No, but answer my question.

16 MS. CENDALI: Okay.

17 THE COURT: Right? This is the
18 third -- I mean you had one amendment, now you've
19 amended it again. I mean this is like amending
20 the complaint. I mean somebody comes in and says
21 I want to amend my complaint. All right, I'll
22 give you a chance to amend your complaint. Okay,
23 now they come back. It's still no good. Well,
24 give me another chance. Okay, here's another
25 chance. And that's where we are, is it not?

1 MS. CENDALI: There's only been a
2 single motion to amend before you, your Honor,
3 and --

4 THE COURT: I know that.

5 MS. CENDALI: But the point is they
6 can't have --

7 THE COURT: But the point is -- the
8 point is you've amended the complaint, you've
9 amended the underlying contract, the Strategic
10 Alliance Agreement.

11 MS. CENDALI: And we have the right to
12 do that under the Supreme Court's ruling.

13 THE COURT: That's correct, but you've
14 amended that which in effect amends the complaint
15 because it changes the basis upon which the case
16 is brought.

17 MS. CENDALI: Right, and if that's the
18 case --

19 THE COURT: So there's one amendment,
20 two amendments, how many times do you get to
21 amend?

22 MS. CENDALI: Your Honor, if we -- if
23 you -- they have just argued to you that you
24 should not consider the restated and amended
25 agreement because it wasn't in existence at the

1 time of the original --

2 THE COURT: Well, I can't care what
3 they say. I mean, right, you've amended it,
4 you've amended this case --

5 MS. CENDALI: So if the restated if you
6 want to deem --

7 THE COURT: You've amended this case
8 twice now.

9 MS. CENDALI: And if you want to deem
10 the restated and amendment before the court, then
11 we should have a discussion right now as to
12 whether the restated and amended agreement is
13 valid under the Silvers test or not. We believe
14 that it is valid.

15 THE COURT: Well, we're here because
16 they're saying you still don't have standing.

17 MS. CENDALI: Right, and what they have
18 not articulated any reason why version three does
19 not convey standing. Your point in your
20 tentative was --

21 THE COURT: Well, except they have.
22 What you're trying to do is reverse court
23 decisions. Other courts have said, well, you
24 don't have any standing, and you say, well, okay,
25 let me work on this agreement. Well, you still

1 don't have any standing. Okay, well, let me work
2 on it some more. So you're just trying to create
3 jurisdiction and you want to amend to keep
4 creating jurisdiction.

5 MS. CENDALI: Your Honor, all we're
6 saying is that there has been no decision on
7 version three of the agreement. As a result of
8 that, to prohibit us from ever re-filing this
9 case --

10 THE COURT: Well, you've got other
11 cases you've filed. There are other cases,
12 aren't there? Is that the end then, are there no
13 more Righthaven cases after this?

14 MS. CENDALI: Well, your Honor, you
15 would have to decide that the restated version
16 three which wasn't in existence as of the time
17 the case was --

18 THE COURT: And, in fact, contradicts
19 the terms of the original agreement.

20 MS. CENDALI: It doesn't contradict the
21 terms of the original agreement.

22 THE COURT: Well, sure it does because
23 it says we intend to assign all the rights.
24 That's not what -- that wasn't in the first
25 agreement.

1 MS. CENDALI: But that's consistent,
2 there's no contradiction.

3 THE COURT: Well, sure, so then I don't
4 need -- then we don't need to have the amendment
5 because if there's no contradiction, then that's
6 the same agreement. I've got the same agreement
7 in front of me I had before then.

8 MS. CENDALI: Your Honor, there has --
9 on jurisdiction and standing there is no basis
10 for a decision --

11 THE COURT: Well, no, no, you said
12 there's no contradiction. There is a
13 contradiction.

14 MS. CENDALI: There's not a
15 contradiction. The intent of the parties was
16 always to --

17 THE COURT: But the intent of the
18 parties is what they express. We don't say, now
19 what did you intend? Well, I intended really to
20 create a brand new hamburger to sell to
21 McDonald's. Well, that's not what your agreement
22 says. Well, that's what I intended. And so the
23 intent of the parties is what they express.

24 They can't say, well, no, I know
25 what we said. I know we said that we were going

1 to create a car, build a car, but I meant to --
2 what we intended was I was going to create a
3 hamburger. Well, I don't care what you say your
4 intent is, does it square with what the terms of
5 the agreement are?

6 MS. CENDALI: And it does, your Honor.

7 THE COURT: And it doesn't because you
8 didn't have the right to sue -- I'm sorry --
9 that's all you had was the right to sue. You
10 didn't have the underlying copyright.

11 MS. CENDALI: That's apparently your
12 view with regard to the original --

13 THE COURT: Well, let's see, let me
14 call Judge Hunt and see if he agrees, and Judge
15 Dawson and see if he agrees, and Judge Whoever
16 and see if they agree.

17 MS. CENDALI: But now we're talking
18 about the version three.

19 THE COURT: No, now we're talking about
20 how that contradicts the first two.

21 MS. CENDALI: It doesn't contradict it,
22 it amends it. It changes it, it's a new set of
23 facts.

24 THE COURT: It contradicts it. It
25 doesn't contradict it so that you always have the

1 right -- that you had all of the rights under the
2 copyright law, right, and you always had that.
3 Why did you amend it then? Why did you amend it
4 once? Why did you amend it twice if you already
5 had those rights? There's no need to amend it,
6 is there?

7 MS. CENDALI: We amended it because
8 other courts have found that there was a problem
9 with standing under the original and under the
10 second version and in order to moot any issue --

11 THE COURT: Well, what did they find?
12 They found based on the language of the contract.

13 MS. CENDALI: Under the first and the
14 second but not the third.

15 THE COURT: Exactly, contradicted.
16 This contradicts the terms of the first and the
17 second.

18 MS. CENDALI: But no court found
19 anything with regard to the third, your Honor,
20 and that's the key point.

21 THE COURT: But this contradicts the
22 terms of the first and the second, does it not?

23 MS. CENDALI: No, it doesn't, it
24 changes it.

25 THE COURT: Well, sure it does. It

1 does because you didn't have these rights,
2 otherwise, why would you amend it if it didn't
3 contradict them? You're contradicting it to try
4 to give us jurisdiction. That's the only reason
5 you're amending it. So let's amend it again,
6 let's amend it again. Does it contradict? Of
7 course, it does because under the first agreement
8 you didn't have any right to -- you didn't have
9 all the copyright rights that you are supposed to
10 have. So then we'll change it. So you changed
11 it. That contradicts the terms of the first,
12 doesn't it? Yes, it does, yes, it does.

13 MS. CENDALI: It changes the change of
14 the first.

15 THE COURT: Yes, it does, it does.

16 MS. CENDALI: It changes the terms of
17 the first absolutely.

18 THE COURT: It absolutely contradicts
19 it.

20 MS. CENDALI: It's absolutely different
21 from the change of the first.

22 THE COURT: Well, thank you, finally.

23 MS. CENDALI: So it totally changes the
24 terms of the first agreement.

25 THE COURT: And the second.

1 MS. CENDALI: And the second.

2 THE COURT: That's right.

3 MS. CENDALI: Absolutely, and so the
4 point is that third agreement has not been ruled
5 on.

6 THE COURT: The point is you've already
7 amended it twice. You're saying let me amend it
8 again, let me amend it again. What about the
9 formation of Righthaven where counsel tells me
10 that in the formation documents they agree that
11 at the end of the litigation the copyright gets
12 returned to Stephens Media. That contradicts the
13 terms of the third agreement.

14 MS. CENDALI: No, it doesn't contradict
15 the terms of the third agreement. Right now the
16 only party with standing to sue is Righthaven
17 because Stephens Media only has a nonexclusive
18 license to use the copyright. So if you were to
19 decide that Righthaven had no ability even under
20 a new agreement that was not originally before --

21 THE COURT: But answer my question. I
22 can tell you're a lawyer. You know, yeah, the
23 parameters of the paradigm are such that the
24 confluence of factors bearing on the -- what?
25 What in the world are you saying? Answer my

1 question.

2 MS. CENDALI: What's your question, your
3 Honor?

4 THE COURT: Should I have the court
5 reporter read it back? I mean obviously you
6 weren't listening I guess.

7 MS. CENDALI: Forgive me, I don't
8 understand it.

9 THE COURT: What about the formation
10 documents of Righthaven?

11 MS. CENDALI: Right. The formation
12 documents of Righthaven --

13 THE COURT: They say that at the end of
14 litigation then the copyright reverts back to
15 Stephens Media.

16 MS. CENDALI: Right, and that is not
17 antithetical with the -- in the SGS case, the
18 federal circuit case that I was discussing
19 earlier, the federal circuit said the fact that
20 an assignment provides for a right of reversion
21 does not mean that it's not a bona fide
22 assignment that gives the right to sue. They
23 have cited no case law that that provision in the
24 operating agreement means that Righthaven --

25 THE COURT: But I mean what we've got

1 here are a series of amendments just trying to
2 give us jurisdiction. That's the way it seems to
3 me. I mean there's no other reason for these
4 amendments other than to try to create
5 jurisdiction.

6 MS. CENDALI: But the fundamental
7 business deal has changed, it used to -- that the
8 original agreement Righthaven got much narrower
9 rights. Now, under the new agreement it has all
10 right, title, and interest. Stephens Media only
11 has a nonexclusive right to use, which doesn't
12 even give it standing to sue. The copyright law
13 is clear that there's no standing to sue under
14 those circumstances.

15 Stephens Media has no ability to
16 make decisions on who can file a lawsuit or when.
17 It has no ability to get the copyrights back
18 whenever it wants it. All the -- if you look at
19 the Silvers case and the Nafal case and the cases
20 that find it, under all the decisions in that
21 case under the third agreement, there's clearly a
22 grant of copyright to Stephens -- to Righthaven
23 and with it the right to sue.

24 THE COURT: All right, I'm going to
25 grant the motion to dismiss, but it's always my

1 preference to do it without prejudice. So I'm
2 giving you -- but I'm telling you I'm running out
3 of patience with all of these amendments. Now,
4 understand and don't be technical and say, oh, we
5 haven't amended the complaint before. In effect
6 you have by amending the Strategic Alliance
7 Agreement, the agreement on which the lawsuit is
8 based. So there we are. So I'll dismiss it
9 without prejudice.

10 MS. CENDALI: Thank you, your Honor.

11 MR. PULGRAM: Could I have twenty-two
12 seconds, your Honor?

13 THE COURT: Twenty-two, you got it.
14 And understand it's just -- I want people to have
15 their day in court.

16 MR. PULGRAM: And we appreciate that,
17 your Honor, you've been very generous.

18 THE COURT: And understand, too, none
19 of us has focused on this third incarnation, and
20 it may be Casper, the friendly ghost, or I don't
21 know what it is, but, you know, I'm just
22 reluctant to say, no, you are out of time, you're
23 out of luck.

24 MR. PULGRAM: Then I'll take one minute
25 and twenty-two seconds.

1 THE COURT: Okay.

2 MR. PULGRAM: All right, first with
3 respect to the third amendment, there are two
4 ways and two reasons why it doesn't matter. The
5 first is that there's already a judgment that the
6 SAA did not create standing. That is collateral
7 estoppel. Now, the point I stood up to make is
8 this, counsel stated that the dismissals by the
9 other courts on the standing issue were -- was,
10 quote, without prejudice and with leave to amend.

11 I suggest that those decisions
12 be reviewed because they do not say that the
13 dismissal was without prejudice. They do not say
14 that it was with leave to amend. They say I
15 dismissed because there was no standing because
16 there was no ownership and as we looked at the
17 case earlier, that is a dismissal with prejudice
18 on the merits. And so that's reason one why you
19 don't get to the third agreement at all. This is
20 over. It's been decided. And the second
21 reason --

22 THE COURT: Wait, wait, let me stop you
23 right there.

24 MR. PULGRAM: Yes, yes.

25 THE COURT: One thing you don't want to

1 do is mislead a judge.

2 MR. PULGRAM: Absolutely.

3 THE COURT: You told me these were
4 without prejudice these other dismissals. I mean
5 I've got this other case and these people have
6 been waiting patiently to --

7 MS. CENDALI: Your Honor, if this is
8 helpful, under Federal Rule of Civil Procedure
9 41, in voluntary dismissals for lack of
10 jurisdiction is deemed a dismissal without
11 prejudice unless the court expressly states
12 otherwise. That's what Federal Rule of Civil
13 Procedure 41 says. There's nothing as far as I
14 know in any of these opinions that says, that
15 states, that it's with prejudice.

16 THE COURT: Well, you didn't say that
17 before, did you?

18 MS. CENDALI: So that's --

19 THE COURT: You didn't say that before,
20 did you?

21 MS. CENDALI: I did --

22 THE COURT: You did not say that
23 before, did you? Rule 41 says that, you didn't
24 tell me that before. You're relying on Rule 41,
25 is that what you're telling me now?

1 MS. CENDALI: Yes, it's none of them
2 say they're with prejudice, that means they are
3 without prejudice.

4 THE COURT: You didn't say that before.
5 You said these are dismissals without prejudice.
6 So I'm looking here to see were they without
7 prejudice or with prejudice and you're saying,
8 well, no, I'm relying on Rule 41. Why didn't you
9 tell me that before? All right, go ahead.

10 MR. PULGRAM: So Rule 41 is not the
11 rule that applies when you have a determination
12 of standing and ownership which is a
13 determination on the merits.

14 THE COURT: I understand.

15 MR. PULGRAM: Second, regardless of the
16 fact that these agreements are completely -- that
17 these amendments are foreclosed by the prior
18 decisions, we've gone through the reasons why all
19 of those contradictions mean they can't state a
20 claim. And, therefore, it should be with
21 prejudice so we don't have to come in here and do
22 this again. Thank you, your Honor.

23 THE COURT: I appreciate it. And again
24 my preference is just I want to be sure that
25 everybody gets their day in court and that we

1 have and full and fair hearing. None of us has
2 really focused -- and by that I mean the parties
3 either. I mean you've discussed it more than any
4 of the courts have, but it's just I want
5 everybody to have a fair shake at it.

6 So I'm going to order this
7 dismissal without prejudice, all right?

8 MS. CENDALI: Thank you, your Honor.

9 THE COURT: Thank you. We'll in be
10 this recess. Oh, Mr. Pulgram, now let me put the
11 burden on you to prepare an appropriate order if
12 you would, please.

13 MR. PULGRAM: We will, your Honor.

14 THE COURT: And I realize it's not
15 your -- your preference was with prejudice, but
16 prepare an appropriate order and submit that, if
17 you would, please.

18 MR. MANGANO: Could I review that?

19 THE COURT: Pardon me?

20 MR. MANGANO: Could I review that
21 before it's submitted?

22 THE COURT: Yeah, but understand they
23 win, they prevailed. So I mean I'm not going to
24 say, oh -- I mean I won't let them misstate
25 anything, but I'm not inclined to give you a lot

1 of leeway.

2 MR. MANGANO: No, I understand.

3 THE COURT: But, yeah, run it by Mr.
4 Mangano, please.

5

6 (Whereupon, the proceedings concluded.)

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12 I hereby certify that pursuant
13 to Section 753, Title 28, United States Code, the
14 foregoing is a true and correct transcript of the
15 stenographically reported proceedings held in the
16 above-entitled matter.

17 Date: August 29, 2011

/s/ Joy Garner
JOY GARNER, CCR 275
U.S. Court Reporter

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