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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

RIGHTHAVEN LLC, a Nevada limited liability  
company,

Plaintiff,

v.

AZKAR CHOUDHRY, an individual; and  
PAK.ORG, a corporation of unknown origin  
and nature,

Defendants.

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AZKAR CHOUDHRY, an individual,

Counterclaimant,

v.

RIGHTHAVEN LLC, a Nevada limited  
liability company,

Counter-defendant.

Case No. 2:10-cv-02155-JCM-PAL

**DEFENDANTS' AND  
COUNTERCLAIMANT'S MOTION  
TO DISMISS THE COMPLAINT FOR  
FAILURE TO STATE A CLAIM UPON  
WHICH RELIEF CAN BE GRANTED  
OR, IN THE ALTERNATIVE, FOR  
JUDGMENT ON THE PLEADINGS  
OR, IN THE ALTERNATIVE, FOR  
SUMMARY JUDGMENT**

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**MOTION**

Pursuant to Fed. R. Civ. P. 12(b)(6) – and, in the alternative, Fed. R. Civ. P. 12(c) and Fed. R. Civ. P. 56 – Azkar Choudhry and Pak.Org (collectively, “Mr. Choudhry”) hereby and respectfully move to dismiss with prejudice, or in the alternative for judgment on the pleadings or summary judgment, Righthaven LLC’s (“Righthaven”) sole cause of action for copyright infringement, and its improper request for transfer of the paklinks.com domain (the “Domain”). This motion is supported by the Memorandum of Points and Authorities, the Declaration of Mr. Azkar Choudhry (the “Choudhry Decl.”), and the Declaration of Mr. Benjamin A. Costa (the “Costa Decl.”) submitted concurrently herewith, and any oral argument the Court may allow.

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

Righthaven alleges that Mr. Choudhry infringed its copyright in an informational graphic concerning a solar “death ray” created by the Sun’s reflection off the Vdara Hotel at CityCenter on the Strip (the “Infographic”). [Pl.’s Compl., Ex. 1]. This lawsuit represents yet another example of Righthaven’s questionable business model – to sue first and ask questions later. Had Righthaven discharged its obligation to conduct even a basic pre-suit investigation, it would have quickly perceived – at a minimum – that the Infographic at issue appeared on Mr. Choudhry’s web site by virtue of an “inline link,” – a line of computer code used in internet web pages to direct a user’s browser program to a third-party site to retrieve an image directly from that third-party site. Righthaven’s lawsuit is fatally flawed because (i) inline linking of images does not infringe copyright as a matter of law, (ii) Mr. Choudhry engaged in no volitional act related to the allegedly infringing forum post, and (iii) any “use” Mr. Choudhry is purported to have made of the Infographic was a protected fair use of that work.

Righthaven’s request for transfer of the Domain must similarly fail because: (1) plaintiffs in copyright litigation are entitled only to those remedies authorized by the Copyright Act, which does not authorize domain transfer as a remedy for copyright infringement; (2) the Court has no authority to order a third party not present in this case to effect the transfer; and (3) divesting Mr. Choudhry of his domain name in response to a single post, on a web site with nearly 8 million

1 posts, would violate Mr. Choudhry's right to free speech pursuant to the First Amendment to the  
2 U.S. Constitution.

3 In terms of procedure, this Court has three options for quick disposal of this case. First,  
4 the Court may dismiss the Complaint under Fed. R. Civ. P. 12(b)(6), as the allegations of the  
5 Complaint are insufficient to state a claim for relief. Alternatively, should the Court somehow  
6 find those allegations sufficient, Defendant notes that he has filed his Answer and  
7 Counterclaims, providing the Court with additional pleadings that provide support for dismissal  
8 under Fed. R. Civ. P. 12(c). Finally, should the Court need to move beyond the pleadings,  
9 Defendant has provided additional evidence and argument in this motion demonstrating that no  
10 issues of material fact can reasonably be disputed, and that no reasonable jury could find for the  
11 Plaintiff.

## 12 **II. FACTUAL BACKGROUND**

### 13 **A. The Parties**

#### 14 **1. Mr. Choudhry And Pak.Org**

15 Mr. Choudhry is the long-time owner and operator of the paklinks.com and pak.org  
16 domains, both of which direct users to Mr. Choudhry's web site, GupShup. [Choudhry Decl.  
17 ¶¶ 2, 3]. GupShup is an Urdu<sup>1</sup> word meaning "gossip" or "casual talk." [Id. ¶ 4]. Mr. Choudhry's  
18 web site is a forum for like-minded community members to engage in discussions about a wide  
19 variety of interest areas, including travel, world affairs, philosophy, parenting, health,  
20 relationships, computer technology, business and fashion. [Id. ¶ 6].<sup>2</sup>

21 Mr. Choudhry began operating GupShup from his home in Houston, Texas in 1994 [Id.  
22 ¶ 7], gradually added web-based forums as the World Wide Web became more popular, and  
23 transitioned the site to its current forum-centered format in 1998. [Id. ¶ 8] GupShup is a very  
24 popular site. [Id. ¶¶ 9-12]. Today, GupShup has over 7.8 million posts across its diverse range of  
25 topic areas. [Id. ¶ 10]. In an average month, it receives more than 2 million page views from

26 <sup>1</sup> Urdu is a language commonly spoken in both Pakistan and India. [Choudhry Decl. ¶ 5].

27 <sup>2</sup> Righthaven has named "Pak.org" as a defendant; however Pak.org is not distinct from Mr.  
28 Choudhry as an individual. [Choudhry Decl. ¶ 46]. Accordingly, to the extent the instant motion  
does not resolve the entire case, Pak.org should be dismissed as an improper defendant.

1 almost half a million unique visits from dozens of different countries. [Id. ¶ 11]. GupShup is a  
2 place where users from all over the world can come together and share their views: nearly forty  
3 percent of its users are from Pakistan and India, 18% of users originate from the U.S., and the  
4 remaining come to GupShup from many other countries around the globe. [Id. ¶ 12].

5 Mr. Choudhry does not operate GupShup as a profit-making enterprise. Rather, he  
6 operates the site as a labor of love, and as a service to the hundreds of thousands of users each  
7 month who come to the site to engage in “casual talk” with each other. [Id. ¶ 13]. After hosting  
8 fees and other operating expenses, GupShup approximately broke even in 2009 and 2010. In  
9 prior years, GupShup has generally cost Mr. Choudhry more money than it has earned. [Id.].

10 Users do not come to Mr. Choudhry’s site to view copyrighted content; they come to talk  
11 to each other. As a service to its users, GupShup subscribes to a small number of RSS feeds<sup>3</sup> that  
12 are relevant to particular forum categories, and posts the content from those feeds in discrete sub-  
13 forums. [Id. ¶¶ 14, 15]. Out of 82 separate forum categories, 8 include a sub-forum with RSS  
14 feeds. [Id. ¶ 16]. The RSS feed sub-forums get relatively little traffic – as little as 0.28% of site  
15 traffic on any given day is attributable to RSS feed sub-forums – and they have little or no  
16 posting activity. [Id. ¶ 17]. Mr. Choudhry estimates that monthly revenue from all of the RSS  
17 forums combined amounts to less than \$5.00. [Id. ¶ 18]. The post at issue in this case was viewed  
18 89 times by an estimated 30 unique users, amounting to no more than a few pennies in  
19 advertising revenue being attributable to the individual post. [Id. ¶ 19].

20 Until he learned about the instant suit, Mr. Choudhry had never been sued by any content  
21 owner regarding even a single purported instance of copyright infringement. [Id. ¶ 20]. Mr.  
22 Choudhry does not operate a newspaper, or distribute content via any printed medium. [Id. ¶ 21].  
23 Before learning of the instant suit, Mr. Choudhry had never heard of the Las Vegas Review-  
24 Journal or of Plaintiff Righthaven. [Id. ¶ 22].

25 Mr. Choudhry did not learn of this case via letter or phone call from Righthaven. [Id.  
26 ¶ 23]. Rather, he learned about the case when Steve Green, a reporter for the Las Vegas Sun,

27 <sup>3</sup> RSS, described in more detail below, is an automated service that enables third party web sites  
28 to provide automated content updates to subscribers.

1 reviewed the Court’s docket and called Mr. Choudhry on December 12 for comment on the  
2 lawsuit. [Id. ¶ 24]. Immediately after he learned from Mr. Green that a copyright owner was  
3 concerned about a post on GupShup – and before even being served with the Complaint – Mr.  
4 Choudhry removed the post from public view. [Id. ¶¶ 25, 28].

## 5 **2. Righthaven, LLC**

6 Plaintiff Righthaven is a “copyright troll” whose sole purpose is to bring copyright  
7 infringement lawsuits based on works that it allegedly acquires rights in, solely for the purpose  
8 of bringing such suits. [Costa Decl., Ex. A. (Righthaven’s “only job is to protect copyrighted  
9 content.”)]. Although it is staffed by lawyers, run as a law firm, and sues people for copyright  
10 infringement of its clients’ newspaper articles, it is incorporated as an LLC and bills itself as a  
11 “technology company.” [Id]. Righthaven does not produce copyrighted content, nor does it  
12 operate a newspaper, or distribute copyrighted content via print or via any other means. [Id.,  
13 Ex. B].

14 Righthaven’s business model apparently revolves around soliciting copyright  
15 assignments from third party newspapers – including Stephens Media LLC (“Stephens Media”),  
16 the publisher of the Las Vegas Review-Journal (the “LVRJ”) – solely and exclusively for the  
17 purpose of encouraging and bringing copyright infringement lawsuits regarding the contents of  
18 those solicited assignments. [Pl.’s Compl., Ex. 3 (showing a copyright registration based on such  
19 an assignment); Costa Decl., Exs. B, C, and D (describing Righthaven’s business model)]. But  
20 for the piece of paper Righthaven attaches to its complaints, it appears to make no use  
21 whatsoever of the copyrights it “purchases,” and the LVRJ makes no change in how it handles  
22 the articles it “assigns” to Righthaven. [Costa Decl., Ex. E (Infographic still freely available  
23 without advertising)]. For example, the article at issue in this case is still published on the  
24 LVRJ’s web site, alongside the LVRJ’s advertisements, and still purports to be “© Las Vegas  
25 Review-Journal.” [Pl.’s Compl., Ex. 1]. When Righthaven was asked by this Court whether it  
26 formally licenses its purported copyrights back to the LVRJ, Righthaven’s counsel, Mr.  
27 Mangano, refused to provide an answer. *See Righthaven v. Center for Intercultural Organizing*,  
28 Case No. 2:10-cv-01322-JCM-LRL, Dkt 27.

1 Righthaven has filed over 200 copyright infringement lawsuits since its formation in  
2 early 2010. [Costa Decl., Ex. F]. Many of the targets of these suits appear to be individuals and  
3 non-profit organizations that lack the economic resources to defend themselves against  
4 Righthaven's claims. [Id]. Righthaven misuses the threat of statutory damages, the potential loss  
5 of a defendant's domain name, and the prospect of mounting attorney's fees to extract quick  
6 settlements from terrified defendants based on claims related to works owing to which  
7 Righthaven suffers no economic harm. Given that Righthaven appears willing to settle matters  
8 for "less than five figures" [Id., Ex. H], it makes no economic sense for defendants to resist –  
9 even if they have valid defenses. Mr. Choudhry has chosen to resist as a matter of principle, and  
10 because as a matter of law he is simply not liable for copyright infringement.

### 11 **B. The Alleged Infringement**

12 On or about September 25, 2010, the LVRJ published a news article entitled, *Vdara*  
13 *visitor: 'Death ray' scorched hair*. [Pl.'s Compl., Ex. 1 ( available free of charge at  
14 <http://www.lvrj.com/news/vdara-visitor---death-ray--scorched-hair-103777559.html>)]. The  
15 article concerns the Vdara Hotel at CityCenter in Las Vegas, which has the peculiar quality of  
16 reflecting sunlight into a 10-foot by 15-foot area hot enough to melt plastic cups and bags, and  
17 even to burn human hair. [Id.]. The article was accompanied by three images – two photographs  
18 and the Infographic, the latter of which illustrates the angle and characteristic of the solar  
19 convergence. Righthaven's complaint is based solely on Mr. Choudhry's alleged use of the  
20 Infographic. [Pl.'s Compl. ¶ 11].

21 On or about October 7, 2010, the Make Magazine blog ("Make"),  
22 <http://blog.makezine.com>, published a post entitled *Can a Building Be a Sun-Death Ray? Yes!*  
23 [Costa Decl., Ex. I].<sup>4</sup> Make's post included the Infographic, a link to an article in Wired  
24 Magazine about the optical and mathematical properties of curved buildings, a link to the LVRJ  
25 article, and a photograph from a prior issue of Make Magazine depicting a home-made Solar

26 \_\_\_\_\_  
27 <sup>4</sup> Make is a magazine, web site, and community focused on DIY projects and how-tos that help  
28 its readers make the most of technology. See <http://makezine.com/about/> ("MAKE Magazine brings the do-it-yourself mindset to all the technology in your life.")

1 Death Ray. [Id.] The purpose of Make's post was to juxtapose the Vdara death ray with the  
2 homemade death ray, along with Wired's instructions on the optical properties of solar death  
3 rays, so users could learn about an exciting optical phenomenon, and perhaps build one (or, if  
4 necessary, avoid building one) of their own. As it typically does with its blog posts, Make made  
5 its October 7, 2010 post available via its RSS feed: a feed to which the GupShup web site  
6 subscribed.<sup>5</sup>

7 On October 8, 2010, due to the automated operation of GupShup's vBulletin  
8 (<http://www.vbulletin.com>) software, the Make post automatically appeared in one of GupShup's  
9 sub-forums ("RSS:Gadgets"). [Choudhry Decl. ¶¶ 29, 31]. At no time did the GupShup post  
10 include a copy of the Infographic; it merely linked to that image at its location on Make's  
11 servers. [Id. ¶¶ 29, 32, 33].

### 12 **III. LEGAL STANDARD**

#### 13 **A. Motion To Dismiss**

14 Pursuant to Rule 12(b)(6), the court will dismiss complaints that "fail to state a claim  
15 upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). While the court must accept as true  
16 all well-pleaded factual allegations contained in a complaint, a plaintiff is required to provide  
17 "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
18 will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While leave to amend is  
19 often granted where deficiencies in a complaint are easily remedied, such leave should not be  
20 granted where amendment would be futile. *Yakama Indian Nation v. Wash. Dept. of Revenue*,  
21 176 F. 3d 1241, 1248 (9th Cir. 1999).

#### 22 **B. Motion For Judgment On The Pleadings**

23 Pursuant to Rule 12(c), a party may move for judgment on the pleadings at any time after  
24 the pleadings are closed but within such time as not to delay the trial. *See* Fed. R. Civ. P. 12(c).  
25 Judgment on the pleadings is proper when the moving party establishes on the face of the  
26 pleadings that no material issue of fact remains unresolved and that it is entitled to judgment as a

27 \_\_\_\_\_  
28 <sup>5</sup> RSS technology is discussed in detail in Section V, below.

1 matter of law. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550  
2 (9th Cir. 1990). When brought by the defendant, Rule 12(c) is a “means to challenge the  
3 sufficiency of the complaint after an answer has been filed” and is treated similarly to a motion  
4 to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *New.Net, Inc. v. Lavasoft*, 356 F.Supp.2d 1090,  
5 1115 (C.D. Cal. 2004); *see also, R.J. Gorman Derailment Services, LLC v. International Union*  
6 *of Operating Engineers, Local Union 150, AFL-CIO*, 335 F.3d 643, 647 (7th Cir. 2003) (12(c)  
7 motion uses same standard that applies to dismissals under Fed. R. Civ. P. 12(b)(6) for failure to  
8 state a claim on which relief can be granted).

### 9 C. Summary Judgment

10 When a court must consider evidence beyond the pleadings a motion to dismiss is  
11 properly treated as one for summary judgment. *Portland Retail Druggists Ass’n v. Kaiser Found.*  
12 *Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981). Summary judgment should be granted if there is  
13 no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.  
14 Fed. R. Civ. P. 56(c)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving  
15 party has met its initial burden, a party wishing to defeat summary judgment must present  
16 specific facts that demonstrate a genuine issue of material fact. Fed. R. Civ. P. 56(e); *Celotex*,  
17 477 U.S. at 323-324. Material facts are those that may affect the outcome of the case; a genuine  
18 dispute exists only if there is sufficient evidence for a reasonable jury to return a verdict for the  
19 nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A mere  
20 disagreement about a material issue of fact is not in itself sufficient to preclude an award of  
21 summary judgment. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1389 (9th Cir. 1990).

22 If the non-moving party cannot “elicit material evidence through further discovery,  
23 summary judgment is appropriate.” *Id.* (citing *Klinge v. Eikenberry*, 849 F.2d 409, 412 (9th  
24 Cir. 1988)). “Neither a desire to cross-examine an affiant nor an unspecified hope of undermining  
25 his or her credibility suffices to avert summary judgment.” *National Union Fire Ins. Co. v.*  
26 *Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983) (citing *Soar v. National Football League*  
27 *Players’ Association*, 550 F.2d 1287, 1289 n.4 (1st Cir. 1977)).  
28

1 **IV. PLAINTIFF HAS NOT PROPERLY ALLEGED, AND CANNOT ALLEGE, A**  
2 **VIOLATION OF ANY RIGHT PROTECTED BY THE COPYRIGHT ACT**

3 **A. Ninth Circuit Precedent Explicitly Precludes Direct Copyright Liability For**  
4 **Inline Linking To Copyrighted Material.**

5 It is well settled that – as a matter of law – linking does not constitute direct copyright  
6 infringement.<sup>6</sup> *See, e.g., Ticketmaster Corp. v. Tickets.com, Inc.*, 54 U.S.P.Q.2D (BNA) 1344,  
7 2000 U.S. Dist. LEXIS 4553, at \*6 (C.D. Cal. Mar. 27, 2000) (allegation of infringement in a  
8 complaint that is based on a linking theory “does not allege copying” because “. . . hyperlinking  
9 does not itself involve a violation of the Copyright Act . . . no copying is involved.”). Inline  
10 linking is no different.

11 Direct copyright infringement only occurs when the defendant engages in an act listed in  
12 Section 106 of the Copyright Act. *See* 17 U.S.C. § 106. This can include the direct reproduction,  
13 distribution, or display of a copyrighted image; however, inline linking does not reproduce,  
14 distribute, or display copyrighted material. Rather than providing an image directly to an end  
15 user, inline linking directs the web browsers of its users to load content (in this case, the  
16 Infographic) from a third party source (in this case, Make Magazine). Thus, it is the third party  
17 that is reproducing, distributing, or displaying any allegedly infringing image, not the provider of  
18 the inline link.

19 This is exactly the conclusion drawn by the Ninth Circuit in a case directly on point,  
20 *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160-1161 (9th Cir. 2007). In that case,  
21 Perfect 10 argued that Google infringed the copyright in Perfect 10’s photographs by  
22 “displaying” full-size versions of those photographs to end users through its Image Search  
23 service. Specifically, it alleged that, after users entered a search in Google’s Image Search,  
24 Google presented the results as “thumbnail” versions of images that acted as hyperlinks to the  
25 full-size versions. When users clicked these thumbnails, rather than sending users directly to the  
26 page containing the full-size image, Google presented the full-size image in a “frame,” as an

27 \_\_\_\_\_  
28 <sup>6</sup> Linking could theoretically be subject to allegations of secondary liability, which Righthaven  
has not alleged. For the reasons explained below, and in Section VI, any allegation of secondary  
liability would be futile.



1 inline link.<sup>7</sup> The Ninth Circuit described the process of inline linking, in pertinent part, as  
2 follows:

3 When a user clicks on a thumbnail image, the user's browser program interprets  
4 HTML instructions on Google's webpage. . . . [which] give the user's browser the  
5 address of the website publisher's computer that stores the full-size version of the  
6 thumbnail. Google does not store the images . . . and does not communicate the  
7 images to the user; Google simply provides HTML instructions directing a user's  
8 browser to access a third-party website. . . . Thus, the user's window appears to be  
9 filled with a single integrated presentation of the full-size image, but it is actually  
10 an image from a third-party website.

11 *Id.* at 1155-1156. Based on this finding, the Ninth Circuit held as a matter of law that  
12 inline linking could not directly infringe any of Perfect 10's copyrights. *Id.* at 1160.

13 Just as in *Perfect 10 v. Amazon*, although the GupShup forum post at issue may appear at  
14 first glance as if the image is displayed by the GupShup server, it is not. As the source code for  
15 the post makes clear, GupShup does nothing more than provide a link that the end-user's browser  
16 loads and displays "inline" from the Make web site. [Choudhry Decl., ¶¶ 29, 32-36; Ex. A at line  
17 811]. Line 811 of the source code contains the image tag for the Infographic that Righthaven has  
18 accused Mr. Choudhry of infringing:

19 ``

21 [Id. ¶¶ 34-36; Ex. A at line 811]. This is technologically identical to the inline linking  
22 Google used in *Perfect 10 v. Amazon*. Accordingly, in light of the source code to Exhibit 2 of  
23 Righthaven's Complaint, and as a matter of law, Mr. Choudhry is not liable for copyright  
24 infringement with respect to any of the copyright rights that Righthaven alleges have been  
25 infringed.

26 <sup>7</sup> Framing allows a web site to display more than one HTML document in the same browser  
27 window. In the *Perfect 10 v. Amazon* case, Google used framing to present third-party web sites  
28 along with information from Google's web site in the same browser window, and in addition  
linked inline the full-size images from the third party sites. GupShup did not use framing in this  
case, but rather simply linked the image inline. The difference is, for purposes of this case,  
immaterial: the *Perfect 10 v. Amazon* court found both framing and inline linking to be non-  
infringing in this context. *See Perfect 10 v. Amazon*, 508 F.3d at 1159.

1           **B.       The HTML Source Code Is Incorporated By Reference Into Righthaven’s**  
2           **Complaint.**

3           When evaluating a motion to dismiss, the Court may take into consideration documents  
4           referenced or relied on in the complaint under the “incorporation by reference” doctrine. *See,*  
5           *e.g., Parrino v. FHP, Inc.*, 146 F.3d 699, 706 n.4 (9th Cir. 1998), *superseded on other grounds,*  
6           *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006) (where a defendant attaches  
7           a document to its 12(b)(6) motion that “is integral to the plaintiff’s claims and its authenticity is  
8           not disputed, the plaintiff ‘obviously is on notice of the contents of the document and the need  
9           for a chance to refute evidence is greatly diminished.’”). Such consideration does not convert a  
10          Rule 12 motion into a motion for summary judgment. *See Branch v. Tunnell*, 14 F.3d 449, 454  
11          (9th Cir. 1994), *overruled on other grounds, Galbraith v. County of Santa Clara*, 307 F.3d 1119  
12          (9th Cir. 2002); *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). The purpose of the  
13          incorporation by reference doctrine is to prevent “plaintiff from surviving a Rule 12(b)(6) motion  
14          by deliberately omitting references to documents upon which their claims are based.” *Parrino*,  
15          146 F.3d at 706. The Court may treat a document incorporated by reference as part of the  
16          complaint, “and thus may assume that its contents are true for purposes of a motion to dismiss  
17          under Rule 12(b)(6).” *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

18          Righthaven alleges that a forum post, attached as Exhibit 2 to its Complaint, constitutes  
19          the infringement upon which it bases its claim; accordingly, Exhibit 2 forms the basis of  
20          Righthaven’s claim. The HTML code [Choudhry Decl., Ex. A] in fact *is* Plaintiff’s Exhibit 2,  
21          albeit in a slightly different form. When a web browser displays a web page, it loads the HTML  
22          code into memory, and interprets that code to produce an easily-readable web page. Because the  
23          HTML code attached to Mr. Choudhry’s Declaration as Exhibit A is the precise code that  
24          generated Plaintiff’s Exhibit 2, it is incorporated by reference. [Choudhry Decl., ¶¶ 26-27].  
25          Righthaven should not be permitted to omit the HTML code from its Complaint, particularly  
26          where, as here, it conclusively demonstrates non-infringement.<sup>8</sup> Nor can Righthaven credibly

27          <sup>8</sup> The HTML code, [Choudhry Decl., Ex. A], is also a proper subject for judicial notice, pursuant  
28          to Fed. R. Evid. 201(b).

1 dispute the authenticity the HTML code: there is no reason to believe it is anything other than  
 2 authentic, and Righthaven itself must of necessity have already been in possession of the HTML  
 3 code at the time it created a copy of the forum post for the purposes of creating Exhibit 2 – the  
 4 code would have been loaded into Righthaven’s web browser.

5 Because the source code demonstrates not only non-liability, but also that amendment  
 6 would be futile, the Complaint should be dismissed with prejudice. In the event the Court  
 7 decides that the source code is not incorporated by reference, summary judgment would be  
 8 appropriate, because there can be no material dispute regarding the fact that the Infographic was  
 9 linked inline.

10 **V. PLAINTIFF HAS NOT ALLEGED, AND CANNOT ALLEGE, A VOLITIONAL**  
 11 **ACT, WHICH IS A PREREQUISITE TO A CLAIM FOR DIRECT COPYRIGHT**  
 12 **INFRINGEMENT**

13 In order to succeed in its allegations of direct copyright infringement, Righthaven must  
 14 allege that Defendant committed a volitional act that resulted in a violation of a right in Section  
 15 106 of Title 17. *See Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d  
 16 Cir. 2008); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004); *Field v.*  
 17 *Google Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006); *Religious Tech. Ctr. v. Netcom On-*  
 18 *Line Commun. Servs.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995). It has not, and it cannot,  
 19 because the Infographic appeared through an inline link generated by an automated RSS feed  
 20 published by third party Make. [Choudhry Decl. ¶¶ 29, 31-36].

21 Subscribing to an RSS feed is not a volitional act for purposes of the Copyright Act,  
 22 because such posts appear on Mr. Choudhry’s site automatically, with no human intervention  
 23 beyond the initial configuration of the system. *See Netcom*, 907 F. Supp. at 1367 (No  
 24 infringement where “According to a prearranged pattern established by Netcom’s software,  
 25 Erlich’s initial act of posting a message to the Usenet results in the automatic copying of Erlich’s  
 26 message from Klemesrud’s computer onto Netcom’s computer. . .”).<sup>9</sup> *See also, Cartoon*  
*Network*, 536 F.3d at 131; *CoStar Group*, 373 F.3d at 546.

27 <sup>9</sup> Usenet is an Internet-based messaging service, to which Netcom subscribed and which closely  
 28 parallels Mr. Choudhry’s conduct in subscribing to Make’s RSS feed.

1 That there was no volitional act is plain from the face of Righthaven's Complaint. [Pl.'s  
2 Compl., Ex. 2 (title of sub-forum in which allegedly infringing post appeared is "RSS:Gadgets");  
3 Choudhry Decl ¶¶ 29, 31-36]. RSS (commonly expanded as "Really Simple Syndication"), is a  
4 family of web feed formats used to publish frequently updated works – in this case, blog entries  
5 – in a standardized format. *See, e.g.*, Wikipedia, <http://en.wikipedia.org/wiki/RSS>;  
6 <http://www.mnot.net/rss/tutorial> (last visited Jan. 18, 2011). An RSS feed allows users, including  
7 web sites such as GupShup, to "subscribe" to the feed. Such a subscription enables the web site  
8 "to receive automatic updates (such as headlines) originating from a third party source. . . . The  
9 website receiving the RSS feed will 'call' the originating website automatically." *Diario El Pais*,  
10 *S.L. v. Nielsen Co.*, (US), No. 07-CV-11295(HB), 2008 U.S. Dist. LEXIS 92987, at \*3 n.1  
11 (S.D.N.Y. Nov. 6, 2008); *see also*, Urs Gasser, *Regulating Search Engines: Taking Stock and*  
12 *Looking Ahead*, 8 YALE J. L. & TECH. 201, 206 (2006) (noting that RSS feeds are "provided  
13 automatically by websites" to search engines). The RSS standard is widely used by blogs and  
14 major content providers alike. [Costa Decl., Exs. J, K, L (showing RSS feeds available from  
15 several major news providers, including the LVRJ)].

16 RSS feeds typically consist of a snippet of text, followed by a link back to the source for  
17 the full content; how much content is included in the feed is the choice of the feed provider. In  
18 the feed at issue in this case, Make provided the text of its post, along with hyperlinks to two  
19 pictures: the Infographic in which Righthaven claims a copyright, and the homemade "Solar  
20 Death Ray" that had been featured in the pages of an earlier issue of Make Magazine. [Choudhry  
21 Decl. ¶ 29].

22 Mr. Choudhry subscribed to Make's feed over a year ago. [Id. ¶ 30]. Since that time, the  
23 software that runs the GupShup forums, vBulletin, has checked in with Make Magazine, and the  
24 other feeds it subscribes to, on a regular and fully automated basis. [Id. ¶ 15]. Since Mr.  
25 Choudhry's initial subscription to the feed, through at least the date of the alleged infringement,  
26 every post that that Make published through its RSS feed was posted automatically by the  
27 vBulletin software in GupShup's RSS:Gadgets sub-forum shortly after Make made it available.  
28 Id]. No additional steps were undertaken by Mr. Choudhry, and Mr. Choudhry does not – and

1 cannot – screen the contents of each and every third-party RSS feed that automatically appears  
2 on GupShup. [Id. ¶ 37].

3 In *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.*, 907 F. Supp. 1361 (N.D.  
4 Cal. 1995), an internet service provider was accused of copyright infringement based on a  
5 customer’s posting of material to a content service to which Netcom chose to subscribe. Unlike  
6 Mr. Choudhry, Netcom stored the allegedly infringing content on its own servers for a period of  
7 time. *See id.* at 1367-68. Nevertheless, because the content was transmitted to Netcom’s servers  
8 automatically via its Usenet subscription, the court held that there could be no infringement as a  
9 matter of law because an “element of volition or causation . . . is lacking where a defendant’s  
10 system is merely used to create a copy by a third party.” *Id.* at 1370. The court recognized the  
11 important of the volitional act element of copyright infringement is critical in the digital age;  
12 without it, copyright law “would create many separate acts of infringement and carried to its  
13 natural extreme, would lead to unreasonable liability” which may extend to each and every  
14 computer that is necessary for the function of the internet itself. *Id.* at 1369.

15 This Court recognized the volitional act requirement in *Field v. Google, Inc.*, 412 F.  
16 Supp. 2d 1106 (D. Nev. 2006), where the plaintiff alleged that Google infringed when it showed  
17 users copies of material that were “cached” on its computers – i.e., stored automatically for ease  
18 of delivery to those searching for those materials. *See id.* at 1115. The Hon. Robert Jones  
19 disagreed, holding that a “plaintiff must also show volitional conduct on the part of the defendant  
20 in order to support a finding of direct copyright infringement.” *Id.*; accord *Parker v. Google,*  
21 *Inc.*, 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006).

22 While the volitional act doctrine is of paramount importance to the existence and function  
23 of the internet, it is not a new rule. The Copyright Act has always required volition – as  
24 embodied within its protection of the exclusive right “to do” the actions reserved for copyright  
25 owners in 17 U.S.C. § 106. Netcom simply applied the well-settled principles of § 106 to the  
26 digital age. As such, it has been widely followed.<sup>10</sup>

27 <sup>10</sup> *See CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (concluding “that  
28 Netcom made a particularly rational interpretation of § 106 when it concluded that a person had

1 In *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), CoStar was a real  
2 estate listing service that produced photographs of commercial real estate properties offered by  
3 its customers. LoopNet provided a web site that hosted such real estate listings. Some of  
4 CoStar’s customers also wanted listings on LoopNet, and uploaded CoStar’s copyrighted  
5 photographs for display on the LoopNet website. *See id.* at 546-47. CoStar sued LoopNet – not  
6 the users who instigated the infringement – for copyright infringement. Following *Netcom*, the  
7 Fourth Circuit held that “[b]ecause LoopNet, as an Internet service provider, is simply the owner  
8 and manager of a system used by others who are violating CoStar’s copyrights and is not an  
9 actual duplicator itself, it is not directly liable for copyright infringement.” *Id.* at 546. As the  
10 court went on to explain:

11 “To establish direct liability . . . something more must be shown than mere  
12 ownership of a machine used by others to make illegal copies. There must be  
13 actual infringing conduct with a nexus sufficiently close and causal to the illegal  
14 copying that one could conclude that the machine owner himself trespassed on the  
15 exclusive domain of the copyright owner.... [A service provider] who owns an  
electronic facility that responds automatically to users’ input is not a direct  
infringer.”

16 *Id.* at 550. Even if Righthaven could allege generalized knowledge that RSS feeds  
17 sometimes contain infringing material – which it has not – that would be insufficient to state a  
18 direct liability claim. *See id.* at 549; *see also Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923, 932  
19 (N.D. Cal. 1996) (no direct liability even where the defendant operating the web site knew  
20 infringing games were uploaded, and solicited others to upload games).

21 Mr. Choudhry operates a web site that automatically publishes content produced by third  
22 parties. Such conduct does not give rise to direct copyright liability, and no amendment by  
23 Righthaven can claim otherwise. *See Netcom*, 907 F. Supp. 1361 (no direct liability even when  
24 operator explicitly subscribes to service to which third parties publish infringing content); *see*

25 to engage in volitional conduct — specifically, the act constituting infringement — to become a  
26 direct infringer.”); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008)  
27 (agreeing with *CoStar* that *Netcom* was “particularly rational”); *Marobie-Fl., Inc. v. Nat’l. Ass’n*  
28 *of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1176-79 (N.D. Ill. 1997) (following *Netcom*); H.R.  
Rep. No. 105-551(I), at 11 (1998) (Congress describes *Netcom* as the “leading and most  
thoughtful judicial decision to date” in the subject of internet liability).

1 *also Sega*, 948 F. Supp. at 1372. Accordingly, Righthaven’s sole claim for direct copyright  
2 infringement should be dismissed with prejudice. To the extent the Court finds the Complaint  
3 alone insufficient to demonstrate this point conclusively, summary judgment is appropriate  
4 because the fact that the post was published automatically by RSS is not reasonably subject to  
5 dispute, and demonstrates as a matter of law that Mr. Choudhry did not engage in any volitional  
6 act related to the alleged infringement. [Choudhry Decl. ¶¶ 15, 29-38].

7 **VI. IT WOULD BE FUTILE FOR RIGHTHAVEN TO ATTEMPT TO AMEND ITS**  
8 **COMPLAINT**

9 As shown above, Righthaven cannot allege any successful theory of direct infringement.  
10 However, Defendant anticipates that in light of the *Perfect 10* case, Righthaven might attempt to  
11 amend its Complaint to allege indirect or “secondary” copyright liability. To do so would be  
12 futile. The Complaint on its face demonstrates conclusively that such theories are unavailable to  
13 Righthaven in this circumstance.

14 A defendant is liable for contributory infringement when it, “with knowledge of the  
15 infringing activity, induces, causes or materially contributes to the infringing conduct of  
16 another.” *Perfect 10 v. Amazon*, 508 F.3d at 1171 (citing *Gershwin Publ’g Corp. v. Columbia*  
17 *Artists Mgmt, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Aside from the fact that Mr. Choudhry  
18 cannot be held to have “materially contributed” to any infringement merely because he made a  
19 link to the Infographic available to a handful of people, *see, e.g., Perfect 10, Inv. V. Visa Int’l*  
20 *Serv. Ass’n*, 494 F.3d 788, 796 (9th Cir. 2007), Righthaven cannot as a matter of law allege the  
21 knowledge element. This is particularly true now that Righthaven is on notice, by virtue of the  
22 instant motion, that the post appeared automatically by virtue of his subscription to Make’s RSS  
23 feed. Because of the way RSS works, the content at issue must have appeared (and in fact did  
24 appear) on Mr. Choudhry’s web site automatically, without any intervention by Mr. Choudhry  
25 beyond subscribing to the feed over one year prior to the alleged infringement. [Choudhry Decl.  
26 ¶¶ 15, 29-38]. Accordingly, he could not have known that the allegedly infringing post would  
27  
28

1 appear on his web site until after the post arrived.<sup>11</sup> Because of the automated nature of RSS, it  
2 would be futile for Righthaven to attempt to allege the knowledge element of contributory  
3 liability.

4 A defendant is liable for vicarious infringement when it derives a direct financial benefit  
5 from the direct infringement, and “has both a legal right to stop or limit the directly infringing  
6 conduct, as well as the practical ability to do so.” *Perfect 10 v. Amazon*, 508 F.3d at 1173. Mr.  
7 Choudhry has derived no financial benefit from Make’s posting of the Infographic, much less a  
8 “direct” financial benefit. [Choudhry Decl. ¶¶ 39-40]. Even if he had, Righthaven cannot allege  
9 that he has any right or ability to control the contents of the RSS feed published by third party  
10 Make. [Id. ¶¶ 41-44]. Mr. Choudhry is not affiliated in any way with Make, other than as a  
11 passive recipient of its RSS feed, [Id.], and Righthaven cannot allege any such affiliation.  
12 Similarly, Mr. Choudhry has no right or ability to control what Make Magazine decides to  
13 publish or store on its servers. [Id. ¶¶ 42-44]; *Perfect 10 v. Amazon*, 508 F.3d at 1174 (Even  
14 though Google can affect the infringement of third parties to some degree by virtue of its control  
15 over its own search results, as a matter of law that does not constitute “the practical ability to  
16 police the infringing activities of third-party websites”); *Perfect 10 v. Visa*, 494 F.3d at 803 (even  
17 the power to exert an indirect effect that would reduce infringing activity does not constitute  
18 “right and ability to control”).

19 “Amendment under the Federal Rules of Civil Procedure should be granted ‘unless  
20 amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or  
21 creates undue delay.’” *Yakama Indian Nation v. Wash. Dept. of Revenue*, 176 F. 3d 1241, 1246  
22 (9th Cir. 1999). Futility “includes the inevitability of a claim’s defeat on summary judgment.”  
23 *Johnson v. American Airlines, Inc.*, 834 F.2d 721, 724 (9th Cir. 1987); *see also, Gabrielson v.*  
24 *Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir.1986) (“any amendment would have been  
25 futile in that it could be defeated on a motion for summary judgment”); *Roth v. Garcia Marquez*,

26 \_\_\_\_\_  
27 <sup>11</sup> In fact, Mr. Choudhry did not find out that there was any alleged infringement at all until he  
28 was contacted by a newspaper reporter seeking comment on the instant litigation, of which Mr.  
Choudhry was also unaware at the time. [Choudhry Decl. ¶¶ 23,24].



1 942 F.2d 617, 628 (9th Cir. 1991). For the reasons discussed above, it would be futile for  
2 Righthaven to amend its complaint to allege contributory or vicarious liability, because – at a  
3 minimum – Righthaven cannot seriously dispute Mr. Choudhry’s lack of knowledge or the fact  
4 that he lacks the right and ability to control Make. Both are a natural consequence of the  
5 automated RSS feed that caused the post to appear on the GupShup site.

6 **VII. THE COMPLAINT SHOULD BE DISMISSED BECAUSE, AS A MATTER OF**  
7 **LAW, THE USE ALLEGED IS A FAIR USE**

8 Even if Mr. Choudhry had copied the Infographic to his server (which he did not), and  
9 even if Mr. Choudhry had engaged in a volitional act related to the alleged infringement (which  
10 he did not), Righthaven’s sole cause of action for copyright infringement is barred as a matter of  
11 law by the fair use doctrine. 17 U.S.C. § 107 lists four factors to be considered in determining  
12 whether a given use is a fair use: (1) the purpose and character of the use, including whether such  
13 use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the  
14 copyrighted work; (3) the amount and substantiality of the portion used in relation to the  
15 copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value  
16 of the copyrighted work. These factors are to be explored and weighed together in light of the  
17 purposes of copyright when evaluating fair use. *See Campbell v. Acuff-Rose Music, Inc.*, 510  
18 U.S. 569 (1994). In this case, each of the factors weighs strongly in favor of fair use.<sup>12</sup>

19 **A. The Purpose And Character Of The Use**

20 Most important to the Court’s analysis of the first factor is whether the use was  
21 “transformative.” Transformative uses weigh strongly in favor of fair use. *See, e.g., Kelly v.*  
22 *Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (online search engine’s use of thumbnail-  
23 sized images was transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d  
24 605, 609 (2d Cir. 2006) (book publisher’s use of reduced-sized images of concert posters and  
25 tickets as historical artifacts in Grateful Dead biography was transformative); *Blanch v. Koons*,  
26 467 F.3d 244, 252-53 (2d Cir. 2006) (artist’s use of plaintiff’s photograph of legs and feet in Pop

27 <sup>12</sup> For the purposes of this section only, Mr. Choudhry assumes *arguendo* that use of a  
28 copyrighted work has occurred.

1 Art collage served a transformative artistic purpose). It is not necessary for the underlying work  
2 to be changed in order for a use to be transformative; rather the relevant inquiry is directed to the  
3 way in which the work was used. *See, e.g., Perfect 10 v. Amazon*, 508 F.3d at 1165 (“even  
4 making an exact copy of a work may be transformative so long as the copy serves a different  
5 function than the original work.”)

6 In evaluating whether a work is transformative, courts consider “whether the new work  
7 merely supersedes the objects of the original creation, or instead adds something new, with a  
8 further purpose or different character, altering the first with new expression, meaning, or  
9 message.” *Campbell*, 510 U.S. at 579. The post in question, which has been attached to the  
10 Complaint as Exhibit 2, uses the Infographic in a transformative way: as an educational example  
11 in conjunction with other materials designed to educate readers on the properties of solar “death  
12 rays.” Make’s blog post juxtaposes the Vdara death ray with a photograph of a homemade solar  
13 death ray, along with Wired’s description of the optical and mathematical properties of curved  
14 surfaces (like the Vdara), in the interest of educating users about an exciting optical  
15 phenomenon, and teaching them how to build (or, if necessary, avoid building) a death ray of  
16 their very own. [Pl.’s Compl., Ex 2. (transformative blog post)]. This juxtaposition, and the  
17 informative purpose to which it was put, “adds something new, with a further purpose or  
18 different character,” and alters the meaning of the Infographic with new expression, new  
19 meaning, and a new message. *Campbell*, 510 U.S. at 579.

20 The LVRJ published the Infographic alongside an article and various photographs to  
21 provide timely, generalized information to Las Vegas residents about events in their local  
22 community – and perhaps to warn readers to avoid the Vdara hotel on sunny days. The Make  
23 blog post was intended to address a much different audience – technology-oriented DIY  
24 enthusiasts throughout the United States and abroad, who would benefit from learning about the  
25 engineering and optical principles of curved surfaces that focus the Sun’s rays. The intended  
26 audience of GupShup’s RSS:Gadgets forum is also those interested in technology issues, nearly  
27 half of whom reside in the nations of Pakistan and India. [Choudhry Decl. ¶ 12]. The fact that  
28 very different audiences were involved also supports the transformative nature of the work. *See*

1 *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454 (1984) (societal benefits are  
2 found in expanding public access to freely available information); *Field*, 412 F. Supp. 2d at 1119  
3 (finding fair use where Google’s cache of works served “different and socially important  
4 purposes” than the original works); *Nuñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22-23  
5 (1st Cir. 2000) (where photos that originally appeared in model’s portfolio were distributed by a  
6 newspaper in the interest of informing the public about controversy, informative nature of the  
7 new use weighed in favor of newspaper); *Bill Graham*, 448 F.3d at 609 (where posters were  
8 originally used to generate interest in, and convey information about, Grateful Dead’s concerts,  
9 educational nature of their new use in a book about the band weighed in favor of fair use).

10 The first factor may also consider “whether the original was copied in good faith to  
11 benefit the public or primarily for the commercial interests of the infringer.” *Am. Geophysical*  
12 *Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994). Not only is this a clear case of “public  
13 benefit,” but because the use was highly transformative, any potential commercial character  
14 fades in significance. *See Campbell*, 510 U.S. at 579; *Perfect 10 v. Amazon*, 508 F.3d at 1166.  
15 Mr. Choudhry made no effort to commercially exploit the Infographic. Although a trivial amount  
16 of revenue could have been generated from the post (perhaps as much as a few pennies), it  
17 stemmed from the fact that all forums on the web site contain advertising. Finally, “The crux of  
18 the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but  
19 whether the user stands to profit . . . without paying the customary price.” *Harper & Row,*  
20 *Publrs. v. Nation Enters.*, 471 U.S. 539, 562 (1985). The customary price of the work is free.  
21 [Costa Decl, Ex. E]. Because the use was transformative and of limited or no commercial  
22 character, there can be no legitimate dispute that this factor weighs strongly in favor of fair use.

### 23 **B. The Nature Of The Work**

24 Creative and expressive works are generally entitled to stronger copyright protection than  
25 those works that are purely factual or scientific in nature. The nature of the Infographic (as well  
26 as the article it accompanies) is purely factual in nature: it presents a factual and scientific  
27 account of the interaction between the Vdara Hotel and the Sun’s rays. [See Pl.’s Compl., Ex. 1  
28 (describing the specific side of the building struck by the Sun, and the resulting 10-15 foot

1 diameter area created thereby)]. Courts have recognized a greater public need for the  
2 dissemination of factual works than works of fiction or fancy, as well as the greater degree of  
3 creativity that typically inheres in the latter. *See L.A. News Serv. v. CBS Broad. Inc.*, 305 F.3d  
4 924, 940 (9th Cir. 2002) (internal citations omitted).

5 In addition to being a factual work, the work is at best minimally creative. Most of the  
6 Infographic is comprised of an illustration of the Vdara Hotel – a design not created by the  
7 Infographic’s illustrator, but rather by the architect of the Vdara itself. [Costa Decl. Exs. M, N, O  
8 (examples of copyrighted architectural renderings of the Vdara and its pool area, that are  
9 substantially similar to the Infographic’s rendering of the Vdara)]. To the extent the Infographic  
10 constitutes an infringing derivative work of the Vdara, or photographs or renderings thereof, it is  
11 not copyrightable. *See Sobhani v. @radical.media, Inc.*, 257 F. Supp. 2d 1234, 1238 (C.D. Cal.  
12 2003) (“ . . . if a work is derived from a previous work, and the new work thereby infringes a  
13 copyright in the previous work, then the new work is an unauthorized (and infringing) derivative  
14 work.”); *Anderson v. Stallone*, 1989 U.S. Dist. LEXIS 11109, at \*25 (C.D. Cal. April 26, 1989)  
15 (no copyright protection available to infringing derivative works). In this case, the LVRJ’s use of  
16 the Vdara in its illustration was likely a fair use (and therefore non-infringing).<sup>13</sup> Yet even when  
17 a derivative work is non-infringing, copyright in such a work “extends only to the material  
18 contributed by the author,” 17 U.S.C. § 103(b), and only to the extent such contribution is more  
19 than trivial, *see Entm’t Research Group v. Genesis Creative Group*, 122 F.3d 1211, 1218-1219  
20 (9th Cir. 1997). Perhaps this is why, in Righthaven’s application for copyright registration in the  
21 Infographic, it claimed copyright in only the “text” of the work. [Pl.’s Compl., Ex. 3].

22 The doctrines of merger and *scenes a faire* reinforce the conclusion that Righthaven’s  
23 copyright in the Infographic is, if it exists at all, extremely thin. Copyright law protects only an  
24 author’s expression of an idea; not the idea itself. *See* 17 U.S.C. § 102(b); *Mazer v. Stein*, 347  
25 U.S. 201, 217-218 (1954). The merger doctrine holds that where the idea underlying a work can

26 \_\_\_\_\_  
27 <sup>13</sup> It is ironic that the very doctrine that may afford Righthaven the ability to obtain the benefit of  
28 some, albeit minimal, copyright protection in the Infographic, is one that Righthaven will no  
doubt argue is inapplicable to Mr. Choudhry’s use of the same Infographic.

1 only be expressed in a narrow range of ways – particularly in the case of factual works – the idea  
2 and expression “merge.” *See, e.g., Landsberg v. Scrabble Crossword Game Players, Inc.*, 736  
3 F.2d 485, 488 (1984); *Ets-Hokin v. Skyy Spirits*, 225 F.3d 1068, 1082 (2000). Under the related  
4 doctrine of *scenes a faire*, “courts will not protect a copyrighted work from infringement if the  
5 expression embodied in the work necessarily flows from a commonplace idea.” *Ets-Hokin*, 225  
6 F.3d 1068 at 1082.

7         There are very few ways to illustrate the Sun’s reflection off the Vdara and into its pool  
8 area. Every illustration of the Vdara death ray must, of necessity, include: (1) the Vdara; (2) its  
9 pool area; (3) a beam of sunlight; (4) traveling at the precise angle required to be reflected into  
10 the pool area; and (5) some factual text. The idea of placing all of these elements together to  
11 describe the Vdara death ray is not copyrightable, nor are the facts that the elements represent.  
12 Given that the death ray reflects off the south side of the Vdara at a particular angle and into its  
13 pool area, any minimal degree of creativity involved in representing those facts is merged with  
14 the underlying facts. Similarly, because any minimal degree of original expression embodied in  
15 the work flows necessarily from the commonplace idea of an infographic illustrating the Vdara  
16 death ray, the doctrine of *scenes a faire* also suggests that the work is so factual in nature as to  
17 have, at best, extremely thin copyright protection.

18         Just as the drawing itself is so factual and derivative as to be not (or at the very best,  
19 barely) copyrightable, neither is the text that appears therein. The Infographic’s text consists of:  
20 (a) “Sunlight” (identifying the arrow); (b) “South side of property;” (c) “The solar reflection  
21 covers an approximate 10 foot by 15 foot area, which moves as the Earth rotates;” and (d) “Pool  
22 area.” [Complaint, Ex. 1]. These labels are pure fact. *See Feist Publ’ns, Inc. v. Rural Tel. Serv.*  
23 *Co.*, 499 U.S. 340, 344 (1991) (facts are not copyrightable). To the extent the text is anything  
24 other than pure fact, any minimal degree of creativity must merge with the underlying ideas.

25         The Infographic is a published, factual work that is entitled to, at best, extremely narrow  
26 copyright protection. This factor strongly supports fair use.

1           **C.       Amount And Substantiality Of The Portion Used**

2           Righthaven’s Complaint makes clear the amount of the work that was used – very little.  
3           Based on the size of the image represented in Exhibit 1 to the Complaint as Righthaven’s  
4           copyrighted illustration, and the size of the image represented in Exhibit 2 as the allegedly  
5           infringing work, the Make post is a substantially reduced-size version. In particular, Plaintiff’s  
6           work is an image measuring approximately 5.25 inches wide by 9 inches high (area = 47.25  
7           square inches). [Pl.’s Compl., Ex. 1.]. Defendants’ image is approximately 3.5 inches wide by 4  
8           inches high (area = 14 square inches). [Pl.’s Compl., Ex. 2.]. Accordingly, taking everything in  
9           Righthaven’s Complaint as true, Defendants’ image is a approximately 30% the size of  
10          Plaintiff’s original work. In addition, Defendants’ image omits the image title “Death Ray’ heats  
11          up Vdara guests, residents.”

12          The use of reduced-size images (or, “thumbnails”) has routinely been endorsed by courts  
13          in fair use cases as an important factor weighing in favor of fair use. *See, e.g., Kelly*, 336 F.3d at  
14          818-20 (online search engine’s use of thumbnail-sized images was fair use); *Bill Graham*  
15          *Archives v. Dorling Kindersly*, 448 F.3d 605, 613 (2d Cir. 2006) (even though images were  
16          copied in their entirety, factors such as reduced size, and juxtaposition with other related material  
17          weighed in favor of fair use). Further, in evaluating the third fair use factor, it is appropriate to  
18          consider only the amount and substantiality of *protectable* expression that has been used. *See,*  
19          *e.g., Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992) (“The nine-pointed figure,  
20          the labels and their sequence, taken separately, are non-copyrightable. We need consider only  
21          Ichazo’s creative decision to link the labels with the figure.”).

22          Finally, the third factor counsels courts to look not only at the mere percentage of the  
23          work used, but also at why the defendant used as much of the work as it did. *See, e.g., Campbell*,  
24          510 U.S. at 588-89 (for parody to be effective, it must take enough material to evoke the  
25          original); *Kelly*, 336 F.3d at 821 (“[i]t was necessary for Arriba to copy the entire image to allow  
26          users to recognize the image and decide whether to pursue more information. . .”); *Nuñez*, 235  
27          F.3d at 24 (“to copy any less than [the entire picture] would have made the picture useless to the  
28          story.”); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1118

1 (9th Cir. 2000) (noting that, in *Sony*, copying the entire work was appropriate because viewers  
2 had been invited to watch the television programs “in [their] entirety free of charge.”). In the  
3 case of Mr. Choudhry and Make Magazine, even if 100% of the image were protectable, even if  
4 100% had been used, and even if were at full size (which, according to the Complaint, it was  
5 not), such a use would have been necessary to convey Make’s solar death ray message to readers.

6 Make used only as much of the image as was necessary to educate readers about solar  
7 death rays generally, and the Vdara death ray in particular. Make did not include the picture’s  
8 title, because the title was not necessary to convey the information. However, the pictorial  
9 elements, including the illustration of the building, the line showing the path of sunlight onto the  
10 building and the angle of its reflection into the pool area, and the text showing the size of the  
11 heated area created by the sun is similarly, were indispensable to describing the optical properties  
12 of the Vdara. Without each of those elements, the illustration would have been meaningless to  
13 Make Magazine’s audience.

14 Because the Infographic comprises only a small percentage of the work claimed to have  
15 been infringed by Plaintiff Righthaven, and because Make Magazine used a reasonable amount  
16 of the work to illustrate the properties of solar death rays, this factor weighs strongly in favor of  
17 a finding of fair use.

#### 18 **D. Effect On The Market For Or Value Of The Copyrighted Work**

19 The fourth factor is “the effect of the use upon the potential market for or value of the  
20 copyrighted work.” 17 U.S.C. § 107(4). In evaluating this factor, courts consider the extent of  
21 market harm caused by the particular actions of the alleged infringer, as well as “whether  
22 unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a  
23 substantially adverse impact on the potential market for the original.” *Kelly*, 336 F.3d at 821  
24 (quoting 3 *Nimmer on Copyright* § 13.05[A][4] (1993)). A transformative work is less likely still  
25 to have an adverse impact. *See id.*

26 In this case, there is no effect on the potential “market” for the copyrighted work, because  
27 – at least with respect to Righthaven – there is no market for the work whatsoever. Righthaven  
28 does not operate a newspaper or otherwise profit from the Infographic, outside of its dubious

1 business model, which actually benefits from more, not less, infringement.<sup>14</sup> Righthaven has not  
2 alleged, other than in the most conclusory fashion, that it was harmed, and it can never do so,  
3 because Righthaven exists solely for the purpose of filing copyright infringement actions. [See  
4 Costa Decl., Ex. A (Righthaven is a “technology company whose only job is to protect  
5 copyrighted content.”)]. Such litigation-focused conduct as a matter of law deprives Righthaven  
6 of the argument that the market value of its work has been harmed. See *Video-Cinema Films,*  
7 *Inc. v. CNN, Inc.*, 2001 U.S. Dist. Lexis 25687, at \*32 (S.D.N.Y. Nov. 28, 2001) (finding no  
8 market harm when only payments were settlements to avoid litigation); *Field*, 412 F. Supp. 2d at  
9 1121 (fourth factor supported fair use where there was no evidence of any market for plaintiff’s  
10 made-for-litigation writings).<sup>15</sup>

11 Even before the LVRJ purported to have assigned its copyright to Righthaven, the post  
12 would not have harmed the market for the work. The LVRJ elected to give the Infographic away  
13 for free on the Internet – without advertisements – and continues to do so to this day. [Costa  
14 Decl., Ex. E (<http://media.lvrj.com/images/4822896-4-4.jpg>).] Given this fact, it is difficult to  
15 imagine that the LVRJ could have been harmed by the limited and transformative nature of  
16 GupShup’s use. Even if the LVRJ had been deprived of a few pennies in revenue as a result of  
17 diverted traffic (actually, the contrary is most likely given that the article was not copied, and  
18 was linked to, in the post), the law does not concern itself with such trifles. See *Sony*, 464 U.S. at  
19 451 n.34 (noting the “partial marriage between the doctrine of fair use and the legal maxim *de*

20  
21 <sup>14</sup> Were Righthaven to eliminate the sorts of uses it here takes issue with, it would presumably  
cripple its ability to go forward and market its “service” to third parties.

22 <sup>15</sup> In *Righthaven v. Realty One Group*, Case No. 10-1036-LRH-PAL, Righthaven argued that the  
23 market harm factor is not plaintiff-specific. See *id.*, Dkt. 12 at 14 n.7. That is incorrect. In fair  
24 use cases, courts look to the effect the use will have on the copyright owner’s market for the  
25 work. See *Mattel v. Walking Mountain*, 353 F.3d 792, 805 (9th Cir. 2003) (examining “the  
26 personal gain the copyright owner will receive if the use is denied.”) (citation and internal  
27 quotation omitted); accord *Sony*, 464 U.S. at 450 (examining whether the use would “impair the  
28 copyright holder’s ability to obtain the rewards that Congress intended him to have.”); *Kelly*, 336  
F. 3d at 821 (“Arriba’s use of Kelly’s images also would not harm Kelly’s ability to sell or  
license his full-sized images.”). This Court subsequently granted the motion to dismiss in *Realty  
One* on fair use grounds. See *Righthaven LLC v. Realty One Group, Inc.*, Case No. 10-1036,  
2010 U.S. Dist. LEXIS 111576 (D. Nev. Oct. 19, 2010).



1 *minim[i]s non curat lex*” when the use does not harm the copyright owner) (internal quotations  
2 omitted).

3 Would “unrestricted and widespread conduct” of the sort engaged in by Mr. Choudhry  
4 result in adverse impact on the “market” for Righthaven’s Infographic? Certainly not. Mr.  
5 Choudhry did nothing more than subscribe to an RSS feed – over a year ago – from a blog that  
6 he believed his visitors would enjoy keeping up with. [Choudhry Decl. ¶¶ 14, 15, 30]. He wanted  
7 to share regular updates from Make Magazine with his forum community, and never in his  
8 wildest dreams imagined that he would later be sued for infringing an image he never copied,  
9 and which appeared on his site automatically. [*Id.* ¶¶ 14, 15]. This factor strongly supports fair  
10 use.

11 Even if Mr. Choudhry had copied the work, rather than merely linking to it, and even if  
12 such copying had been volitional, rather than automatic – each of the four factors, and the factors  
13 taken as a whole, overwhelmingly weigh in favor of fair use. Although fair use is generally a  
14 mixed question of law and fact, in this case the facts supporting a finding of fair use are apparent  
15 on the face of Righthaven’s Complaint. [Pl. Compl., Exs. 1, 2]. *See also, Righthaven LLC v.*  
16 *Realty One Group, Inc.*, Case No. 10-1036, 2010 U.S. Dist. LEXIS 111576 (D. Nev. Oct. 19,  
17 2010) (dismissing Righthaven’s claim for infringement of a newspaper article on fair use  
18 grounds). To the extent that it is necessary for the Court to go beyond the pleadings (for  
19 example, with respect to the fact that Righthaven does not publish a newspaper, or with respect  
20 to other facts the Court may find material), such facts are not subject to reasonable dispute, and  
21 summary judgment would be appropriate.

## 22 **VIII. RIGHTHAVEN’S DEMAND FOR DOMAIN NAME TRANSFER SHOULD BE** 23 **DISMISSED**

24 The Court should categorically reject Plaintiff Righthaven’s *in terrorem* request for an  
25 order requiring “GoDaddy, and any successor domain name registrar for the Domain, to lock the  
26 Domain and transfer control of the Domain to Righthaven.” [Prayer for Relief, ¶ 3].<sup>16</sup>

27 <sup>16</sup> The Complaint defines the Domain as paklinks.com. [Pl.’s Compl. ¶ 6]. To the extent  
28 Righthaven’s Complaint could be construed as requesting a similar order regarding the pak.org  
domain, that request should be dismissed as well.

1 Righthaven has included such a demand for transfer as a matter of course in its stream of  
2 copyright infringement lawsuits, apparently intending to scare operators of web sites who fear  
3 losing one of their most critical assets. Such relief is unavailable as a matter of law, because (1)  
4 the Copyright Act does not authorize domain transfer; (2) Rule 65 prohibits entry of an order  
5 purporting to bind the non-party registrar of Mr. Choudhry's domain; and (3) an order  
6 transferring the Domain to Righthaven would violate the First Amendment.

7 **A. The Copyright Act Does Not Authorize Domain Name Transfer.**

8 The remedies available to a plaintiff in a copyright infringement action “are only those  
9 prescribed by Congress.” *Sony*, 464 U.S. at 431 (quoting *Thompson v. Hubbard*, 131 U.S. 123,  
10 151 (1889)), and they do not include transfer of domain names. *See* 17 U.S.C. § 501 *et seq.*  
11 Indeed, courts routinely reject plaintiffs' attempts to seek remedies beyond the Copyright Act.  
12 *See Sony*, 464 U.S. at 431 (“The judiciary's reluctance to expand the protections afforded by the  
13 copyright without explicit legislative guidance is a recurring theme.”); *Nintendo of Am., Inc. v.*  
14 *Aeropower, Co.*, 34 F.3d 246, 251 (4th Cir. 1994) (improper to award trebled statutory damages  
15 for copyright infringement because the Copyright Act “provides the exclusive remedies for  
16 copyright infringement and it contains no provision for trebling statutory damages”); *Budget*  
17 *Cinema, Inc. v. Watertown Associates*, 81 F.3d 729, 733 (7th Cir. 1996) (same); *Mulberry Thai*  
18 *Silks, Inc. v. K&K Neckwear, Inc.*, 897 F. Supp. 789, 792 (S.D.N.Y. 1995) (same).

19 17 U.S.C. § 502 authorizes injunctive relief only “on such terms as [a court] may deem  
20 reasonable *to prevent or restrain infringement of a copyright.*” (emphasis added). But Section  
21 502 is limited to injunctions that target specific infringing activities; a domain name has no  
22 nexus whatsoever with an infringing post that may appear somewhere within that domain.  
23 Popular web sites such as the New York Times, Amazon and Yahoo! have each faced copyright  
24 infringement allegations in the past; it would be absurd to suggest that a plaintiff alleging  
25 copyright infringement against one of those companies would be entitled to its domain name –  
26 even if that plaintiff prevailed. As a site that hosts a sizable community and millions of posts,  
27 GupShup is no different. Indeed, Righthaven has now admitted, in a separate lawsuit before this  
28

1 Court, that “such relief is not authorized under the Copyright Act.” *Righthaven LLC v. DiBiase*,  
2 Case No. 2:10-cv-01434-RLH-PAL, Dkt 29 at 5:26-27.<sup>17</sup>

3 **B. Rule 65 Prohibits The Court From Ordering A Non-Party To Transfer The**  
4 **Domain.**

5 In an attempt to justify its improper Prayer, Righthaven has argued in the *DiBiase* matter  
6 that even though the Copyright Act does not authorize transfer of a domain name as a remedy,  
7 the Court may nevertheless order a third party, the registrar GoDaddy, to transfer the domain  
8 name as part of its “general equitable powers,” *Id.* at 6-7. Yet GoDaddy is not a party to this  
9 action.<sup>18</sup> Pursuant to Rule 65(d)(2), injunctions may only bind: (a) the parties; (b) the parties’  
10 officers, agents, servants, employees, and attorneys; and (c) other persons who are in active  
11 concert or participation with the parties or their agents. Fed. R. Civ. P. 65(d)(2). The Complaint  
12 does not, and cannot, allege that GoDaddy is in “concert or participation” with Mr. Choudhry; it  
13 is merely the registrar of his domain name. [Choudhry Decl. ¶ 45]. Courts may not issue binding  
14 injunctive relief against individuals or entities not identified by Rule 65(d)(2). *See, e.g., Med.*  
15 *Mut. Ins. Co. of Maine v. Indian Harbor Ins. Co.*, 583 F.3d 57, 64 (1st Cir. 2009) (because none  
16 of the defendant companies’ directors or officers were named as a defendant, plaintiff’s  
17 complaint could not be “an effective vehicle for making a demand for relief against  
18 them”); *Bobolas v. Does 1-100*, No. CV-10-2056-PHX-DGC, 010 U.S. Dist. LEXIS 110856, at  
19 \*6 (D. Ariz. Oct. 1, 2010) (the district court lacks power to enter an injunction against non-party  
20 webhost and domain name registrar).

21  
22  
23  
24 <sup>17</sup> In this case, such an injunction would be moot in any event, because the allegedly infringing  
25 post has already been removed. *See Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132,  
26 1154- 55 (N.D. Cal. 2008) (claim for injunctive relief in copyright action mooted by online web  
27 site’s prior removal of content from its service).

28 <sup>18</sup> It is contrary to ancient and “well-settled principles of equity procedure to include parties in an  
injunction in a suit in which they [are] not heard or represented . . .” *Scott v. Donald*, 165 U.S.  
107, 117 (1897); *see also Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945); *Chase Nat’l Bank*  
*v. Norwalk*, 291 U.S. 431, 437 (1934).

1           **C.     An Order Transferring The Domain To Righthaven Would Violate Mr.**  
2           **Choudhry’s First Amendment Right To Free Speech.**

3           Finally, a court may not enter an order that would violate the First Amendment. A  
4 domain name itself represents protected speech. *See Taubman Co. v. Webfeats*, 319 F.3d 770,  
5 778 (6th Cir. 2003) (“The rooftops of our past have evolved into the internet domain names of  
6 our present . . . the domain name is a type of public expression, no different in scope than a  
7 billboard or a pulpit . . .”). If Righthaven wants to restrain that speech, it must allege facts  
8 demonstrating that the domain name outside of the First Amendment’s protections. *See, e.g.,*  
9 *Jefferson Cty. Sch. Dist. v. Moody’s Investor’s Servs.*, 175 F.3d 848, 860-61 (10th Cir. 1999)  
10 (affirming dismissal of complaint failed to plead any facts that would overcome First  
11 Amendment protection). Righthaven has not done so, because it cannot do so.

12           Righthaven has alleged infringement of a single image in a single forum post, among  
13 nearly 8 million posts that are available on Mr. Choudhry’s web site. There is no legal support  
14 for the proposition that merely because one infringement occurred on paklinks.com, Righthaven  
15 should be entitled forever to control the domain. An order transferring the paklinks.com domain  
16 would impact the entirety of Mr. Choudhry’s web site, not just the vanishingly small amount of  
17 content about which Righthaven complains. If the paklinks.com domain were transferred,  
18 Righthaven would be in charge of whether the public could view the GupShup forums or  
19 participate in the community’s discussion. Indeed, Righthaven could put whatever it wanted on  
20 the domain, thereby limiting the public’s access to Mr. Choudhry’s speech.

21           The Constitution does not permit Righthaven to force GupShup to use a different domain  
22 name to convey the same information. The Supreme Court has repeatedly held that “one is not to  
23 have the exercise of his liberty of expression in appropriate places abridged on the plea that it  
24 may be exercised in some other place.” *Reno v. ACLU*, 521 U.S. 844, 879-80 (1997) (rejecting  
25 argument that content-based restriction was permissible because the law allowed a “reasonable  
26 opportunity for speech to occur elsewhere on the Internet); *see also, Va. State Bd. Of Pharmacy*  
27 *v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) (“We are aware of no  
28

1 general principle that the freedom of speech may be abridged when the speaker's listeners could  
2 come by his message by some other means. . .”).

3 An order transferring the domain would also impair the First Amendment rights of  
4 GupShup's visitors as well. The First Amendment includes the right to receive ideas. *See Bd. Of*  
5 *Educ. V. Pico*, 457 U.S. 853, 867 (1982) (“[T]he right to receive ideas is a necessary predicate to  
6 the recipient's meaningful exercise of his own rights of speech, press, and political freedom.”  
7 GupShup is home to a vibrant community of people from all around the world, who are aware of,  
8 and who come directly to, paklinks.com in large numbers to talk about their lives, their religion,  
9 political matters, and many other topics. [Choudhry Decl. ¶¶ 6-12]. These and other internet  
10 users access paklinks.com by (1) typing the domain name directly into a browser; (2) selecting a  
11 bookmark in a browser; (3) using an internet search engine; or (4) following a hyperlink from  
12 another web page. Each of these methods would be compromised if the domain were transferred  
13 to Righthaven; users would assume that GupShup was no longer being maintained or operated,  
14 and their ability to access the speech therein would be sharply curtailed.

15 Depriving Mr. Choudhry of a domain name that he has owned and operated as the home  
16 of GupShup since 1994 – in particular as a remedy for one allegedly infringing forum post –  
17 would clearly violate the First Amendment's requirement that remedies be narrowly tailored to  
18 the harm alleged. *See, e.g., Tory v. Cochran*, 544 U.S. 734, 738 (2005) (“An ‘order’ issued in  
19 ‘the area of First Amendment rights’ must be ‘precis[e]’ and narrowly ‘tailored’ to achieve the  
20 ‘pin-pointed objective’ of the ‘needs of the case’”) (quoting *Carroll v. President and Comm'rs of*  
21 *Princess Anne*, 393 U.S. 175, 183-84 (1968)). Transferring the domain to prevent unspecified  
22 future infringement would amount to an impermissible prior restraint. *See, e.g., Netcom*, 923 F.  
23 Supp. 1231, 1259 (N. D. Cal. 1995 (“While a specifically-tailored injunction in a copyright case  
24 does not offend the First Amendment, attempting to shut down a critic's speech activities,  
25 including those that do not implicate the copyright laws in the least, would constitute an  
26 unwarranted prior restraint on speech.”); *Ctr. For Democracy & Tech v. Pappert*, 337 F. Supp.  
27 2d 606, 651 (E.D. Pa 2004 (statute requiring blocking of access to particular domain named  
28 amounted to unconstitutional prior restraint); *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260,

1 263 (E.D. Va. 1995 (“If a threat to national security was insufficient to warrant a prior restraint  
2 in *New York Times Co. v. United States*, the threat to plaintiff’s copyrights and trade secrets is  
3 woefully inadequate.”).

4 Righthaven’s demand for domain name transfer amounts to nothing more than an attempt  
5 to intimidate ill-informed defendants who are not aware that Righthaven’s “leverage” over them  
6 is no more than smoke and mirrors. It should be dismissed as a matter of law.

7  
8 **IX. CONCLUSION**

9 Regardless of whether Righthaven’s litigation tactics amount to an abuse of the legal  
10 process [Costa Decl., Ex. P], or whether Righthaven is instead a savior of the newspaper  
11 business to be celebrated for its chutzpah [Id., Ex. A], the instant case is one never should have  
12 been brought. For the reasons set forth above, Defendants respectfully request that the Court  
13 dismiss Righthaven’s Complaint in its entirety without leave to amend, or in the alternative enter  
14 judgment on the pleadings or summary judgment in favor of Defendants.

15 Dated: January 18, 2011

Respectfully submitted,

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