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

15 RIGHTHAVEN LLC, a Nevada limited-  
liability company, )  
16 )  
17 Plaintiff, )  
18 v. )  
19 THOMAS A. DIBIASE, an individual, )  
20 Defendant. )  
21 \_\_\_\_\_ )  
22 THOMAS A. DIBIASE, an individual, )  
23 Counterclaimant, )  
24 v. )  
25 RIGHTHAVEN LLC, a Nevada limited-  
liability company, )  
26 Counter-defendant. )  
27 \_\_\_\_\_ )

CASE NO.: 2:10-cv-01343-RLH-PAL  
**DEFENDANT/COUNTERCLAIMANT  
THOMAS A. DIBIASE'S MOTION FOR  
ATTORNEY'S FEES AND NON-  
TAXABLE COSTS**

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1 **NOTICE OF MOTION & MOTION**

2 Please take notice that defendant and counterclaimant Thomas DiBiase (“Mr. DiBiase”)  
3 respectfully moves for an order awarding attorney’s fees and non-taxable costs pursuant to  
4 17 U.S.C. § 505, Federal Rule of Civil Procedure 54(d)(2), and Local Rule 54-16 against  
5 defendant Righthaven LLC (“Righthaven”). This motion is supported by the accompanying  
6 memorandum of points and authorities, the declaration of Bart E. Volkmer (“Volkmer Decl.”),  
7 the declaration of Kurt Opsahl (“Opsahl Decl.”), any arguments of counsel, and any other  
8 matters that the Court deems appropriate when considering the motion.

9 **MEMORANUDM OF POINTS & AUTHORITIES**

10 **I. INTRODUCTION**

11 Righthaven’s lawsuit against Mr. DiBiase was a shameless attempt to extract a nuisance-  
12 value settlement from someone who spends his free time trying to assist prosecutors and  
13 investigators by maintaining a one-stop Internet resource for information about “no body”  
14 murder cases. Mr. DiBiase prevailed in this action because he demonstrated that Righthaven  
15 could not—as a matter of law—establish the first element of a valid copyright infringement  
16 claim: ownership of a copyright. Righthaven’s case was objectively unreasonable from the  
17 outset and motivated by improper purposes throughout. Indeed, this Court has found that  
18 Righthaven’s interpretation of the agreement that allegedly gave it the right to sue over Stephens  
19 Media’s articles was “flagrantly false—to the point that the claim is disingenuous, if not outright  
20 deceitful.” If there were ever a case where an award of attorney’s fees was warranted under  
21 Section 505 of the Copyright Act, this is it. Mr. DiBiase is entitled to attorney’s fees in the  
22 amount of **\$116,687** and non-taxable costs in the amount of **\$2,770**.

23 **II. FACTUAL BACKGROUND**

24 **A. Righthaven’s Formation and Litigation Campaign**

25 Righthaven formed on January 18, 2010. *See* Docket No. 51, Ex. B (Righthaven  
26 Operating Agreement (“RHOA”)) at 1. Its operating agreement candidly describes its business  
27 goals. Righthaven seeks a “limited, revocable assignment (with a license-back) of copyright  
28 from third Persons.” RHOA § 3.2(c). It then obtains copyright registrations listing it as the

1 copyright owner and files lawsuits with the understanding that the real copyright owner “would  
2 ultimately enjoy the copyright registration.” *Id.* §§ 3.2(c), 3.2(d). Righthaven’s members—  
3 Steven Gibson (under the name Net Sortie LLC) and SI Content Monitor (a Stephens Media  
4 shell company)—were keenly aware that Righthaven’s ownership position would not withstand  
5 scrutiny. *See* RHOA § 19.4(d) (memorializing the risk that “the willingness of consumers to  
6 understand and agree to the assignment and license-back structure that is inherent in the  
7 company’s business structure may not be consistent or even prevalent.”). On the day that it  
8 executed its Operating Agreement, Righthaven also entered into a Strategic Alliance Agreement  
9 (“SAA”) with Stephens Media, LLC (“Stephens”). Volkmer Decl., Ex. A. Under the SAA,  
10 Righthaven would file copyright infringement lawsuits based on Stephens’ articles and the  
11 parties would split any proceeds from the cases 50/50, less costs. SAA § 5.

12         There was, however, an underlying problem. The Ninth Circuit does not allow a copyright  
13 holder to assign an accrued cause of action for infringement. *See Silvers v. Sony Pictures*  
14 *Entertainment, Inc.*, 402 F. 3d 881 (9th Cir. 2005). And Stephens did not want to assign the  
15 copyrights for its articles to Righthaven. *See* Declaration of Mark Hinueber (Docket No. 56) at ¶ 9  
16 (stating Stephens’ intent to be able to continue to use the purportedly assigned content in the same  
17 general manner as before signing the SAA). Nor was Stephens interested in litigating to enforce  
18 its copyrights, which would involve undertaking discovery burdens as a party.<sup>1</sup> To accommodate  
19 these concerns, Righthaven and Stephens concocted a champertous plan under which: (1) they  
20 would try to shield Stephens from litigation; (2) Stephens would enjoy all of the rights of  
21 copyright owners; and (3) no court would have the opportunity to rule on the parties’ failed  
22 attempt to contract around *Silvers*.

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23  
24         <sup>1</sup> This can be deduced from Stephens’s behavior. If Stephens were interested in proceeding  
25 as a party, it could have simply hired an attorney and filed suit, without any need for Righthaven.  
26 And in fact, it may have been impossible for Stephens to transfer ownership, because it had  
27 already pledged the articles to secure loans. *See* SAA § 9.3 (permitting Stephens to “maintain  
28 Encumbrances on Stephens Media Assigned Copyrights as part of an overall funding  
securitization.”) (emphasis added). Section 9.3 of the SAA was not modified by the  
“Clarification,” and neither Stephens nor Righthaven has ever explained how Stephens can  
mortgage assets that it claims not to own.

1 To accomplish this, Stephens “assigned” copyrights using a format that was drafted to  
2 obscure the truth about the rights that Righthaven had actually received. See SAA § 7.1, Ex. 1.  
3 The standard assignment language speaks vaguely of “monetary commitments and commitments  
4 to services to be provided.” SAA, Ex. 1. While the term “monetary commitments” could be  
5 construed as a promise to pay a specified sum, in truth it was a commitment to split litigation  
6 proceeds. Moreover, the “Copyright Assignment” purported to transfer “all copyrights *requisite*  
7 to have Righthaven recognized as the copyright owner,” obscuring the fact that Stephens was only  
8 transferring to Righthaven an unadorned cause of action for infringement, and not any rights of  
9 copyright. *Id.* (emphasis added).

10 After receiving a sham “assignment” from Stephens, Righthaven then obtained copyright  
11 registrations as an alleged owner. This was—of course—all for show. The SAA, which  
12 Righthaven secreted, made abundantly clear that Stephens retained all of the relevant rights in the  
13 allegedly “assigned” copyrights. See *Righthaven LLC v. Democratic Underground, LLC*, \_\_ F.  
14 Supp. 2d \_\_, Case No. 2:10-cv-01356-RLH-GWF, 2011 WL 2378186, \*3 (D. Nev. June 14,  
15 2011) (rejecting Righthaven’s contrary interpretation as “flagrantly false—to the point that the  
16 claim is disingenuous, if not outright deceitful.”). The purpose of this design is obvious. In  
17 litigation, Righthaven could trot out a copy of the one-page assignment, assert a presumption of  
18 ownership based on a fraudulently obtained copyright registration, and keep the true nature of the  
19 transaction hidden from defendants. And Righthaven was not shy about executing this plan,  
20 aggressively using the assignment to misdirect defendants away from Stephens Media and leading  
21 “the district judges of this district to believe that it was the true owner of the copyright in the  
22 relevant news articles.” *Democratic Underground*, 2011 WL 2378186 at \*6.<sup>2</sup>

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23  
24 <sup>2</sup> Another important component of this plan was to disguise Stephens’ true connection with  
25 Righthaven. Stephens’ principals created a holding company, SI Content Monitor LLC, to invest  
26 in Righthaven. While SI Content Monitor LLC was ostensibly a separate entity, the SAA required  
27 that Stephens ensure that SI Content Monitor and Stephens would both be controlled by “common  
28 owners with no material variation in said ownership.” SAA § 2. Righthaven’s Operating  
Agreement even provided that, should SI Content Monitor experience a change in control such  
that it was no longer controlled by “members of the family of Warren A. Stephens and trusts for  
the benefit of such individuals,” it would forfeit its interest in Righthaven to Mr. Gibson’s own  
shell company, Net Sortie LLC. RHOA, § 15.5.

1           Indeed, under the defective structure set forth in the RHOA and SAA, Righthaven filed  
2 more than 200 cases in this district. Volkmer Decl., ¶ 2. Many of those cases appear to have  
3 settled before substantive litigation took place. *Id.*

4           **B. Righthaven’s Lawsuit Against Mr. DiBiase**

5           On June 11, 2010, Doug McMurdo published an article in the *Las Vegas Review-Journal*  
6 concerning a “no body” murder case (the “McMurdo Article”). Compl. ¶ 19. On July 19,  
7 2010—six months after the parties signed the SAA and after Righthaven identified the McMurdo  
8 Article on Mr. DiBiase’s blog—Stephens purported to assign the copyright in the article to  
9 Righthaven using the format mandated by the SAA. *See* Docket No. 59 (Mangano Decl., Ex. 1)  
10 (purported assignment agreement for the McMurdo Article). On August 9, 2010, Righthaven  
11 filed this action. Righthaven’s complaint twice alleged that it owned the copyright in the  
12 newspaper article at issue—allegations it must have known were false. Compl. ¶¶ 6, 18.

13           Righthaven’s complaint also included rhetorical flourishes designed to mislead Mr.  
14 DiBiase about who owned the Stephens’ articles. Righthaven claimed to hold: (1) “the exclusive  
15 right to reproduce the Work, pursuant to 17 U.S.C. § 106(1)”; (2) “the exclusive right to prepare  
16 derivative works based upon the Work, pursuant to 17 U.S.C. § 106(2)”; (3) “the exclusive right  
17 to distribute copies of the Work, pursuant to 17 U.S.C. § 106(3)”; and (4) “the exclusive right to  
18 publicly display the Work, pursuant to 17 U.S.C. § 106(5).” Compl. ¶¶ 25-28. These  
19 statements, too, were patently false. *See* SAA, § 3.3. Righthaven also attached to the complaint  
20 a purported copyright registration listing Righthaven as the owner of the work based on a  
21 “written agreement.” Compl, Ex. 4. That registration was obtained by fraud. There was no  
22 “written agreement” that transferred the copyright at issue from Stephens to Righthaven.

23           Once in court on false pretenses, Righthaven tried to invent copyright remedies that did  
24 not exist and misuse actual copyright remedies to try to induce a quick settlement. *See, e.g.,*  
25 *Righthaven v. Rawlings*, Case No. 2:10-cv-01527-JCM–GWF (D. Nev. June 28, 2011), Docket  
26 No. 25 (Righthaven reporting to the Court a settlement in the amount of \$1,000). Its prayer for  
27 relief asked the Court to transfer the domain for Mr. DiBiase’s website to Righthaven even  
28 though the Copyright Act does not allow such a remedy. Compl., Prayer for Relief at ¶ 3;



1 *Righthaven, LLC v. DiBiase*, Case No. 2:10-cv-01343-RLH-PAL, 2011 WL 1458778, \*2 (D.  
2 Nev. Apr. 15, 2011) (“Righthaven’s request for such relief fails as a matter of law and is  
3 dismissed”); *accord Righthaven LLC v. Pak.org, et al.*, Case No 2:10-cv-02155-JCM-PAL, 2011  
4 WL 1743839, \*5 (D. Nev. May 03, 2011). Righthaven also asked for \$75,000 in statutory  
5 damages for “willful infringement,” along with attorney’s fees. Compl., Prayer for Relief at ¶¶  
6 4-5; Civil Cover Sheet, Docket No. 1-2.

7 Mr. DiBiase, however, stood up to Righthaven despite the unfavorable economics based  
8 on principle: his posting of a *Las Vegas Review-Journal* article to his criminal-justice blog was a  
9 fair use and did not cause Righthaven (or Stephens for that matter) a single penny in harm. Mr.  
10 DiBiase would have moved to dismiss Righthaven’s complaint under Rule 12(b)(1) for lack of  
11 subject-matter jurisdiction had he known about the SAA when he filed his original motion to  
12 dismiss in October 2010. Volkmer Decl. ¶ 4. But Righthaven did not include that dispositive  
13 document as an exhibit to its complaint or otherwise alert Mr. DiBiase to its existence at the  
14 pleadings stage. Accordingly, Mr. DiBiase answered the complaint and successfully moved to  
15 dismiss Righthaven’s request for a domain-name transfer. *See* Docket Nos. 17, 19.

16 During the litigation, Righthaven serially tried to conceal that Stephens was the true  
17 owner of the McMurdo Article. Its Certificate of Interested Parties did not list Stephens even  
18 though Stephens held a 50% interest in any proceeds from this case. Docket No. 6. On January  
19 7, 2011, Righthaven served its initial disclosures, but it did not disclose or turn over the SAA.  
20 Volkmer Decl., ¶ 5. One aspect of Stephens’ ongoing involvement with Righthaven was more  
21 difficult to hide. The articles over which Righthaven was suing (including the McMurdo Article)  
22 continued to appear, for no charge, on Stephens’ website. Righthaven’s explanation for this was  
23 less than forthcoming. In a court hearing in a different case, Righthaven’s counsel told Judge  
24 Mahan that, while he was “sure” that Stephens’ continued publication of the news article at issue  
25 was “covered in their license agreement with the RJ and the assignment,” he was “not privy to  
26 that information as to how.” *Righthaven v. Jama*, Case No. 2:10-cv-01322-JCM-LRL,  
27 Transcript of Dec. 28, 2010 Hearing, (Docket 27) at 34. Judge Mahan also asked if Righthaven  
28

1 had “licensed the rights to others.” Righthaven’s attorney responded, “I don’t know as I stand  
2 here right now.” *Id.* at 24. Another opportunity to disclose the SAA thus slipped away.

3 On February 25, 2011, Righthaven responded to Mr. DiBiase’s Rule 34 request seeking  
4 “[a]ll agreements between Righthaven and Stephens Media” with a dizzying torrent of  
5 objections, but no documents:

6 Righthaven objects to this request on the grounds that the definitions of  
7 ‘Righthaven’ and ‘Stephens Media’ are vague, ambiguous, overly broad and  
8 impose compliance requirements outside of those authorized under Rule 34.  
9 Righthaven further objects to this request as it is compound, overly broad, vague,  
10 and ambiguous in its use of the terms and phrases ‘all agreements.’ Righthaven  
11 additionally objects to this request as calling for the production of irrelevant  
12 materials. Moreover, this request may invade the privacy rights of third parties.  
13 Righthaven additionally objects to this request on the grounds that it calls for the  
14 production of materials protected from discovery under the attorney work product  
15 doctrine and/or attorney client privilege. Righthaven further objects to this request  
16 on the ground that it calls for the disclosure of confidential and/or proprietary  
17 information and the parties have yet to enter into an agreeable Stipulated  
18 Protective Order in this case. As such, no protective order has been entered by  
19 the Court under which an appropriate confidentiality designation, if any, could be  
20 applied to responsive materials **to the extent such materials exist.**

21 Volkmer Decl., Ex. C at 40-41 (Response to Document Request No. 64) (emphasis added). The  
22 purpose of these objections was to delay, perhaps indefinitely, the production of the SAA and  
23 other relevant evidence.

24 On April 8, 2011, Righthaven finally turned over the SAA as a “supplemental initial  
25 disclosure.” Volkmer Decl., ¶ 3. But the only reason it did so was because *Stephens* had  
26 produced the document in the *Democratic Underground* case and Righthaven had no choice but  
27 to provide it in this action as well. After receiving a copy of the SAA, Mr. DiBiase promptly  
28 filed a motion to dismiss this case for lack of standing. Righthaven still did not relent. It  
opposed Mr. DiBiase’s motion based on an untenable reading of the SAA. *See* Docket No. 55.  
And it frantically tried to “clarify” the SAA to try to grant itself *nunc pro tunc* ownership rights.  
*Id.* That gambit was also unsuccessful: the “clarification” did not come close to vesting  
Righthaven with rights in the McMurdo Article. *See Righthaven, LLC v. Hoehn*, \_\_\_ F. Supp. 2d  
\_\_\_, Case No. 2:11-cv-00050-PMP-RJJ, 2011 WL 2441020, \*6 (D. Nev. June 20, 2011) (even  
after the clarification, “Righthaven does not have any exclusive rights in the Work”). On June  
23, 2011, this Court dismissed Righthaven’s complaint. Docket Nos. 72-73.

1 **III. ARGUMENT**

2 Righthaven was hoping that it would never have to turn over the SAA in discovery  
3 because the defendants in its numerous cases would settle, rather than spend time and resources  
4 fighting Righthaven's claims and uncovering the truth about who owned the articles at issue.  
5 That was a serious miscalculation. Mr. DiBiase stood up to Righthaven's threats, and prevailed  
6 by defeating the first element of a copyright infringement claim: ownership of the work being  
7 asserted. Mr. DiBiase is now entitled to an award of attorney's fees and non-taxable costs. Such  
8 an award is appropriate based on the frivolousness of Righthaven's case, the need to encourage  
9 parties like Mr. DiBiase to fight fraudulent copyright infringement lawsuits, and the need to deter  
10 Righthaven—and other entities like it—from running litigation shake-down operations that stifle  
11 legitimate online speech.

12 **A. Mr. DiBiase Is a Prevailing Party Under Section 505 of the Copyright Act.**

13 The Copyright Act states that prevailing parties may recover “a reasonable attorney’s  
14 fee” along with “full costs.” 17 U.S.C. § 505. Mr. DiBiase is a prevailing party based on the  
15 Court’s June 22, 2011 Order granting his motion to dismiss for lack of subject-matter  
16 jurisdiction. *See* Docket No. 72. In *Maljack Productions v. GoodTimes Home Video Corp.*, 81  
17 F. 3d 881, 889 (9th Cir. 1996), the Ninth Circuit affirmed an order granting attorney’s fees to the  
18 defendant under Section 505 after the district court dismissed the action for lack of subject-  
19 matter jurisdiction because the plaintiff did not own the copyright being asserted. Under this  
20 authority, Mr. DiBiase is a prevailing party. *See also Love v. Mail on Sunday*, Case No. CV05-  
21 7798 ABC (PJWX), 2007 WL 2709975, \*5 (C.D. Cal. Sept. 7, 2007) (awarding attorney’s fees  
22 where “Defendants were completely successful against the copyright claims, securing their  
23 dismissal with prejudice in their first motion to dismiss. The claims bordered on frivolous and  
24 were not objectively reasonable because Plaintiff did not own the copyrights.”).

25 **B. The Relevant Factors Support a Fees Award in This Action.**

26 The Supreme Court has held that prevailing defendants in copyright cases are entitled to  
27 attorney’s fees on the same terms as prevailing plaintiffs. *See Fogerty v. Fantasy, Inc.*, 510 U.S.  
28 517, 527 (1994) (“a successful defense of a copyright infringement action may further the

1 policies of the Copyright Act every bit as much as a successful prosecution of an infringement  
2 claim by the holder of a copyright.”). The following non-exclusive factors guide courts when  
3 deciding whether to award fees and costs: “frivolousness, motivation, objective unreasonableness  
4 (both in the factual and in the legal components of the case) and the need in particular  
5 circumstances to advance considerations of compensation and deterrence.” *Id.* at 534 n.19.  
6 Courts also may take into account other factors, like the purposes of the Copyright Act and the  
7 degree of success obtained. *See Fantasy, Inc. v. Fogerty*, 94 F. 3d 553, 559 (9th Cir. 1996).  
8 These considerations support a full award of attorney’s fees and costs in this action.

9 **Frivolousness:** While Mr. DiBiase does not need to show frivolousness to be entitled to  
10 a fees award, *see Fogerty*, 510 U.S. at 532 n.18, that label accurately describes Righthaven’s  
11 case. It practically goes without saying that Righthaven’s ownership position was frivolous.  
12 Indeed, this Court found one of Righthaven’s contract interpretation positions to be “flagrantly  
13 false—to the point that the claim is disingenuous, if not outright deceitful.” *See Democratic*  
14 *Underground*, 2011 WL 2378186 at \*3.

15 **Motivation:** Righthaven also harbored an improper motive: extorting nuisance-value  
16 settlements from vulnerable defendants. It was not interested in vindicating any important  
17 principle of copyright law or obtaining fair recompense for alleged infringement. Instead,  
18 “Righthaven and Stephens Media have attempted to create a cottage industry of filing copyright  
19 claims, making large claims for damages and then settling claims for pennies on the dollar.”  
20 *Righthaven v. Democratic Underground*, Case No. 2:10-cv-1356, Docket No. 94. Righthaven’s  
21 extortionate business model has clogged up the Court’s docket and inconvenienced hundreds of  
22 innocent parties all to advance what amounts to a get-rich-quick scheme. *See Righthaven LLC v.*  
23 *Hill*, Case No. 1:11-cv-00211-JLK, Docket No. 16 at 2 (D. Colo. April 7, 2011) (Righthaven’s  
24 business plan is “encouraging and exacting settlements from Defendants cowed by the potential  
25 costs of litigation and liability.”). As Righthaven itself concedes, the “the presence of improper  
26 motivation in bringing a lawsuit, or the presence of other bad faith conduct in the course of  
27 litigation, bolsters the argument in favor of awarding attorneys’ fees.” *See Righthaven v.*  
28

1 *Democratic Underground*, Case No. 2:10-cv-1356, Docket No. 36 at 17 (citing *Matthew Bender*  
2 *& Co., Inc. v. West Publishing Co.*, 240 F.3d 116, 124-27 (2d Cir. 2001)).

3 **Objective Unreasonableness:** The objective unreasonableness of Righthaven’s case also  
4 favors a fee award. *See Perfect 10, Inc. v CCBill, LLC*, 488 F.3d 1102, 1120 (9th Cir. 2007)  
5 (requiring the court to consider the objective unreasonableness of a party’s claims, “both in the  
6 factual and in the legal components of the case”); *see also Entertainment Research Group, Inc. v.*  
7 *Genesis Creative Group, Inc.*, 122 F.3d 1211, 1229 (9th Cir. 1997) (“because the evidence in the  
8 record reveals that [the losing plaintiff] never had any evidence to support its ... claims, the  
9 district court properly found that it was objectively unreasonable for [the plaintiff] to have  
10 maintained these claims”).

11 Righthaven’s claim to own the copyright in the McMurdo Article was objectively  
12 unreasonable, as was its conduct in trying to cover up the fact that Stephens was the true owner.  
13 Righthaven’s complaint in this action—and in others—explicitly claimed to own the article and  
14 recited four distinct Section 106 rights that it purported to control. Compl. ¶¶ 6, 18, 25-28.<sup>3</sup>  
15 Righthaven also attached a copyright registration asserting that it owned the work-in-suit.  
16 Compl, Ex. 4. Righthaven made those false statements to prevent defendants like Mr. DiBiase  
17 from being able to evaluate properly the ownership issue, and that behavior strongly supports a  
18 fees award. *See Righthaven v. Democratic Underground*, Case No. 2:10-cv-1356-RLH, Docket  
19 No. 36 at 17 (Righthaven conceding that a party can show improper motive by demonstrating  
20 “the plaintiff’s assertion of knowingly false allegations in the pleadings.”). Righthaven even  
21 briefed pleadings motions directed to ownership in other cases and obtained favorable rulings by  
22 concealing the SAA from the Court. *See Righthaven LLC v. Vote For The Worst, LLC, et al.*,

23 \_\_\_\_\_  
24 <sup>3</sup> In its briefing on the Motion to Dismiss, Righthaven advanced a theory that it temporarily  
25 owned the rights before they were automatically licensed back to Stephens. Even if that  
26 argument were given credence, there is no dispute that Stephens owned an exclusive license to  
27 all of the rights *at the time the Complaint was filed*. An exclusive license is a transfer of  
28 ownership. 17 U.S.C. § 101 (“A ‘transfer of copyright ownership’ is an assignment, mortgage,  
exclusive license, or any other conveyance . . . of a copyright or of any of the exclusive rights  
comprised in a copyright, whether or not it is limited in time or place of effect, but not including  
a nonexclusive license.”).

1 Case No. 2:10-cv-01045-KJD-GWF (D. Nev. Mar. 30, 2011), Docket No. 28 at 3; *Righthaven*  
2 *LLC v. Majorwager.com, Inc.*, Case No. 2:10-cv-00484-GMN-LRL, 2010 WL 4386499, at \*2  
3 n.2 (D. Nev. Oct. 28, 2010); *Righthaven LLC v. Dr. Shezad Malik Law Firm P.C.*, Case No.  
4 2:10-cv-00636-RLH-RJJ, 2010 WL 3522372, at \*2 (D. Nev. Sept. 2, 2010). Righthaven then  
5 tried to bootstrap these improperly obtained rulings when opposing Mr. DiBiase's meritorious  
6 motion to dismiss this action for lack of standing. *See* Docket No. 55 at 4 (Righthaven arguing  
7 that "DiBiase's reliance on the SAA is merely an attempt to divert the Court's inquiry from the  
8 Assignment's unambiguous language in view of the requirements under *Silvers*, which multiple  
9 courts from this district have correctly found to vest Righthaven with standing to maintain  
10 accrued copyright infringement actions.").<sup>4</sup>

11 While it is bad enough that Righthaven filed a case over a copyright it did not own,  
12 Righthaven exacerbated that problem by actively concealing that Stephens was the true owner.  
13 **First**, Righthaven filed a Certificate of Interested Parties that neglected to list Stephens. Docket  
14 No. 6; *see also Democratic Underground*, 2011 WL 2378186 at \*9 (Righthaven's failure to  
15 disclose Stephens in its Certificate of Interest was "the most factually brazen" of Righthaven's  
16 "multiple inaccurate and likely dishonest statements to the Court."). **Second**, Righthaven's  
17 answer to Mr. DiBiase's counterclaim was designed to convey the false impression that  
18 Righthaven was a genuine copyright owner. *See* Docket No. 19 at ¶¶ 5-9, 25; Docket No. 28 at  
19 ¶¶ 5-9, 25. **Third**, Righthaven did not produce or identify the SAA when it served initial  
20 disclosures in January 2011 despite Rule 26's clear directive that a party must provide a copy or  
21 description of all documents that the party "may use to support its claims or defenses." Fed. R.  
22 Civ. P. 26(a)(1)(A)(ii); Volkmer Decl., Ex. B. **Fourth**, Mr. DiBiase served a document request  
23 specifically asking for all agreements between Righthaven and Stephens. Instead of agreeing to  
24

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25 <sup>4</sup> In *Righthaven v. Malik*, Righthaven vigorously argued that the Assignment provided all  
26 the information necessary to show that it, not Stephens Media, owned the copyright, and that no  
27 further analysis was necessary. *See Righthaven v. Dr. Shezad Malik Law Firm*, Case No. Case  
28 2:10-cv-00636-RLH-RJJ, Docket No. 11. Indeed, Righthaven went so far as to move for Rule 11  
sanctions, contending that Malik's arguments that Righthaven did not have standing under *Silvers*  
were baseless. *Id.* at Docket No. 13. While ultimately Malik was shown correct, it was long after  
he reached a settlement. *Id.* at Docket No. 26.

1 produce responsive materials (or at least the SAA), Righthaven responded with every boilerplate  
2 objection in the book. Volkmer Decl., Ex. C. The SAA finally came to light when *Stephens*  
3 produced the document in the *Democratic Underground* case, approximately one year after  
4 Righthaven began its litigation campaign. Only after the die was cast did Righthaven hand over  
5 the SAA in this action—as a supplemental initial disclosure, not as a discovery response.<sup>5</sup>

6 **Compensation and Deterrence:** Considerations of compensation and deterrence strongly  
7 support a fees award here. On compensation, Mr. DiBiase and his pro bono attorneys should be  
8 made whole for the time and effort they put in defending a frivolous case. It would have been  
9 tempting for Mr. DiBiase to settle this matter on nuisance-value terms and walk away from the  
10 whole affair. Indeed, Righthaven offered to settle the case if Mr. DiBiase would pay \$7,500—a  
11 fraction of the costs of litigating. Opsahl Decl. ¶ 19. Instead, Mr. DiBiase pressed forward to  
12 vindicate broader principles, and he should be compensated for taking that risk.

13 An award of fees would also help deter Righthaven from continuing with its litigation  
14 campaign, and discourage others who might have the same idea. Indeed, given the allure of  
15 statutory damages and attorney’s fees, district courts across the country have been beset with  
16 dubious lawsuits filed against individuals and small companies by the alleged “assignees” of  
17 copyrighted works. An award of fees here would send a strong message that filing baseless  
18 copyright lawsuits has consequences. *See Maljack*, 81 F.3d at 890 (“[W]e consider that an award  
19 of fees may deter baseless suits.”); *see also Mattel, Inc. v. Walking Mountain Productions*, 2004  
20 WL 1454100, \*2 (C.D. Cal. 2004) (Plaintiff “brought objectively unreasonable copyright claims  
21 against an individual artist. This is just the sort of situation in which this Court should award  
22 attorneys fees to deter this type of litigation which contravenes the intent of the Copyright Act.”).

23 **Purpose of the Copyright Act:** “Because copyright law ultimately serves the purpose of  
24 enriching the general public through access to creative works, it is peculiarly important that the  
25 boundaries of copyright law be demarcated as clearly as possible.” *Fogerty*, 510 U.S. at 527. As

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26  
27 <sup>5</sup> To the best of our knowledge, Righthaven has not produced documents in response to  
28 discovery in *any* of its cases, preferring instead to occasionally provide “supplemental initial  
disclosures” of cherry-picked documents.

1 Judge Mahan has found, Righthaven’s “litigation strategy . . . does nothing to advance the  
2 Copyright Act’s purpose of promoting artistic creation.” *Jama*, 2011 WL 1541613 at \*5. In  
3 contrast, by litigating this case despite strong economic incentives to settle, Mr. DiBiase helped  
4 demarcate the boundaries of copyright law. His defense generally served as a check against  
5 Righthaven’s unfair business model, which is antithetical to public access to creative works and  
6 chills the fair use of them. *Id.* Specifically, Mr. DiBiase achieved a precedent-setting ruling that  
7 the Copyright Act does not authorize Righthaven’s demand for a domain-name transfer. *See*  
8 *DiBiase*, 2011 WL 1458778 at \*2. That order also cast doubt on Righthaven’s ability to obtain  
9 attorney’s fees for work performed by its in-house counsel. *Id.* In addition, Mr. DiBiase  
10 contributed a full set of briefs on the key standing issue that resolved this matter. *See* Docket  
11 Nos. 47, 64. A fees award is appropriate because Mr. DiBiase’s defense advanced the purposes  
12 of the Copyright Act for the benefit of the public.

13 **Degree of Success:** As Righthaven concedes, the first element of copyright  
14 infringement is ownership of a copyright. *See Feist Publications, Inc. v. Rural Telephone*  
15 *Service Co., Inc.*, 499 U.S. 340, 361 (1991); *Democratic Underground*, Docket No. 36 at 16 (the  
16 “law is venerable that to prove copyright infringement, one must demonstrate . . . ownership of  
17 the allegedly infringed work.”). The Court’s order dismissing this action established that  
18 Righthaven’s infringement claim failed on the merits. Mr. DiBiase, therefore, achieved a  
19 complete victory. Fees are appropriate for that reason as well.

20 \* \* \*

21 Any one of these factors alone might justify a fees award. Taken together, they present  
22 the paradigmatic case for awarding fees under the Copyright Act.

23 **C. Mr. DiBiase Seeks Reasonable Fees and Non-taxable Costs.**

24 When awarding attorney’s fees, the district court first determines the lodestar by  
25 multiplying the number of hours reasonably expended by a reasonable hourly rate. *Hensley v.*  
26 *Eckerhart*, 461 U.S. 424, 433 (1983). That figure may be adjusted based on the factors set forth  
27 in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69–70 (9th Cir. 1975) “which have not been  
28 subsumed in the lodestar calculation.” *Van Asdale v. International Game, Technology*, Case No.



1 3:04-cv-00703-RAM, 2011 WL 2118637, \*2 (D. Nev. May 24, 2011).<sup>6</sup> However, “[o]nly in  
 2 rare instances should the lodestar figure be adjusted on the basis of these considerations.” *Id.*  
 3 Under the lodestar formula, Mr. DiBiase seeks **\$116,687** in attorney’s fees and **\$2,770** in non-  
 4 taxable costs.<sup>7</sup>

5 **1. Mr. DiBiase’s Attorneys Worked a Reasonable Number of Hours.**

6 Mr. DiBiase was represented in this action by the Electronic Frontier Foundation (“EFF”)  
 7 and Wilson Sonsini Goodrich & Rosati (“WSGR”). In calculating the reasonable hours  
 8 expended, attorneys from the EFF and WSGR examined their contemporaneous records and took  
 9 a conservative approach concerning the billed hours for which they would seek compensation.  
 10 Opsahl Decl. ¶12; Volkmer Decl. ¶ 7. In doing so, they struck or reduced time entries where the  
 11 work was duplicative or took longer than might have been expected. *Id.* They also struck time  
 12 entries where the work was administrative or of a general nature. *Id.* In essence, the attorneys  
 13 “wrote off” a substantial portion of the fees bill to ensure that they arrived at a reasonable figure.

14 Kurt Opsahl from the EFF billed 177.5 hours to this matter through June 30, 2011, an  
 15 average of 19.7 hours per month. Opsahl Decl. ¶ 10. He performed the following tasks:  
 16 (1) reviewing and analyzing Righthaven’s complaint and Mr. DiBiase’s defenses; (2) drafting  
 17 Mr. DiBiase’s counterclaim and revising his answer; (3) revising the briefing on Mr. DiBiase’s  
 18 motion to dismiss Righthaven’s request for attorney’s fees and domain-name transfer;  
 19 (4) attending to various discovery matters; (5) drafting, revising and setting strategy on the  
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21 <sup>6</sup> The *Kerr* factors are: “(1) the time and labor required, (2) the novelty and difficulty of the  
 22 questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion  
 23 of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6)  
 24 whether the fee is fixed or contingent, (7) time limitations imposed by the client or other  
 25 circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation,  
 26 and ability of the attorneys, (10) the ‘undesirability’ of the case, (11) the nature and length of the  
 professional relationship with the client, and (12) awards in similar cases.” *Kerr*, 526 F.2d at 70.  
 The first five factors are subsumed in the lodestar and the sixth factor may not be considered.  
*Van Asdale*, 2011 WL 2118637 at \*2. The *Kerr* factors are also set forth in Local Rule 54-16.  
 We address these factors in the text of this memorandum and in the attached Appendix A.

27 <sup>7</sup> The loadstar fee sought here is only for the work through June 30, 2011. Because work on  
 28 this motion is ongoing, Mr. DiBiase will file a supplemental declaration adding the July 2011  
 hours with the reply brief in support of this motion.

1 briefing concerning the SAA and its “clarification”; (6) reviewing and revising Mr. DiBiase’s  
2 motion to compel; and (7) drafting and revising the present motion. Opsahl Decl., Ex. A.  
3 Corynne McSherry, the Intellectual Property Director at EFF, billed 19.50 hours to this matter  
4 through June 30, 2011, reviewing and revising court submissions and participating strategy  
5 conferences regarding those filings. Opsahl Decl. ¶ 10. Other attorneys and staff at the EFF  
6 assisted on this case, but Mr. DiBiase does not seek fees for their time; nor does he seek fees  
7 incurred by his local counsel, Chad Bowers. *Id.*

8 Bart Volkmer from WSGR billed 142.3 hours to this matter through June 30, 2011, an  
9 average of 15.8 hours per month. He performed the following tasks: (1) research for and drafting  
10 of Mr. DiBiase’s motion to dismiss Righthaven’s request for domain-name transfer and  
11 attorney’s fees; (2) drafting Mr. DiBiase’s answer and revising his counterclaim; (3) attending to  
12 various discovery matters; (4) drafting Mr. DiBiase’s opposition to Righthaven’s motion to  
13 dismiss the counterclaim; (5) drafting briefing on Mr. DiBiase’s motion to compel; (6) drafting  
14 briefing on Mr. DiBiase’s motion to dismiss for lack of standing; and (7) drafting the present  
15 motion. Volkmer Decl., ¶ 8.

16 Colleen Bal from WSGR billed 10 hours to this matter through June 30, 2011. She  
17 reviewed and revised court submissions and conducted strategy conferences regarding those  
18 filings. Volkmer Decl., ¶ 9. Evan Stern from WSGR billed 29.1 hours to this matter through  
19 June 30, 2011, an average of 3.2 hours per month. *Id.* He conducted legal and factual research  
20 supporting Mr. DiBiase’s defenses and court submissions. *Id.* He also prepared collateral  
21 documents supporting court filings. *Id.* Other attorneys at WSGR billed time to this matter, but  
22 we do not seek reimbursement for their time. *Id.* Full time records containing narrative task  
23 descriptions and hours worked are attached to the Volkmer and Opsahl declarations as Exhibits  
24 D and A, respectively.

25 In total, Mr. DiBiase seeks compensation for 378.4 attorney hours. That averages out to  
26 approximately 42 hours per month, or 10.5 attorney-hours per week. Those hours are  
27 reasonable. *See, e.g., Autodesk, Inc. v. Flores*, Case No. 10–cv–01917–LHK, 2011 WL  
28 1884694, \*2 (N.D. Cal. May 18, 2011) (awarding reasonable attorney’s fees for 109.4 hours

1 worked in a copyright action resolved by a default judgment). Mr. DiBiase was forced to take on  
 2 numerous litigation tasks because Righthaven filed suit over a copyright that it did not own:  
 3 (1) moving to dismiss portions of Righthaven’s complaint; (2) preparing a counterclaim of non-  
 4 infringement and an answer; (3) opposing Righthaven’s motion to dismiss the counterclaim;  
 5 (4) preparing and serving written discovery and disclosures; (5) extensively meeting and  
 6 conferring with Righthaven when it elected to respond to Mr. DiBiase’s document requests with  
 7 objections only; (6) filing a motion to compel the production of documents; (7) taking the Rule  
 8 30(b)(6) deposition of Righthaven’s CEO Steven Gibson; (8) subpoenaing the author of the  
 9 article at issue, Doug McMurdo; (9) analyzing the Operating Agreement, the SAA and the  
 10 “clarification” of that agreement; (10) filing a motion to dismiss based on lack of subject-matter  
 11 jurisdiction; and (11) filing this motion. Volkmer Decl. ¶ 10.

## 12 2. The Rates Sought Are Reasonable.

13 Turning to the reasonable rate, Kurt Opsahl bills his time at \$525 per hour. Opsahl Decl.  
 14 ¶ 4. That figure is a reasonable rate for attorneys in the San Francisco Bay Area of similar skill  
 15 and experience. *Id.* at ¶ 5. Other EFF attorneys have been awarded fees at similar rates. *Id.* at  
 16 ¶ 6.<sup>8</sup> Mr. Opsahl has expertise in copyright law and has been practicing law for 14 years. *Id.*  
 17 at ¶¶ 8-9. In 2007, Mr. Opsahl was named one of the “Attorneys of the Year” by California  
 18 Lawyer magazine. *Id.* at ¶ 8. Prior to joining the EFF, Mr. Opsahl worked at the law firm of  
 19 Perkins Coie. *Id.* He received his law degree from the University of California at Berkeley’s  
 20 Boalt Hall. *Id.* at ¶ 7. Corynne McSherry is a 2002 graduate of Stanford Law School, with  
 21 extensive experience in intellectual property matters. *Id.* at ¶ 13. She billed her time at \$475 per  
 22 hour in 2010. *Id.*

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 24 <sup>8</sup> In *Elec. Frontier Foundation v. Office of the Director of National Intelligence*, No. 07-  
 25 05278 SI, 2008 WL 2331959 (N.D. Cal. June 4, 2008), Judge Illston found reasonable the 2007  
 26 hourly rates of EFF’s attorneys, and awarded a total of \$51,540.00 in attorneys’ fees at those  
 27 rates. In *Apple v. Does* (Santa Clara Superior Ct., Case No. 1-04-cv-032178), EFF was awarded  
 28 attorneys’ fees in accordance with their lawyers’ 2006 and 2007 rates. In *In re Sony BMG CD  
 Technologies Litigation* (S.D.N.Y. Case No 1:05-cv-09575-NRB), EFF attorneys were paid fees  
 at their hourly rates as part of the settlement of the action in June 2006. Further, in *OPG v.  
 Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004), EFF attorneys were paid fees after a summary  
 judgment victory at the organization’s 2004 hourly rates.

1 Bart Volkmer billed his time at \$570 per hour when this case started, and now bills at  
2 \$610 per hour. Volkmer Decl., ¶ 11. For purposes of this submission, Mr. Volkmer uses the  
3 \$570 rate. This rate is paid by private parties in the marketplace, and is therefore a  
4 presumptively reasonable starting point for purposes of the lodestar calculation. *See* Moore’s  
5 Federal Practice, §54.190[2][b] at 54-472 (Matthew Bender 3d ed.) (“If the fee movant’s counsel  
6 is in private practice, the most convincing evidence of the market rate is the rate the counsel  
7 charges a client in similar actions. As a practical matter, an attorney who has established a  
8 normal billing rate will ordinarily recover fees based on that rate.”); *Moore v. Jas H. Matthews*  
9 *& Co.*, 682 F.2d 830, 840 (9th Cir. 1982) (“Unless counsel is working outside his or her normal  
10 area of practice, the billing-rate multiplier is, for practical reasons, usually counsel’s normal  
11 billing rate.”). This rate also conforms to the rates charged by attorneys with comparable  
12 experience working at similar Bay Area firms. Volkmer Decl., ¶ 11. Mr. Volkmer has been  
13 practicing law for over eight years and has extensive experience handling cutting-edge copyright  
14 and Internet matters. *Id.* He graduated *summa cum laude* from the Santa Clara University  
15 School of Law, and then clerked for the Honorable Richard Seeborg before joining WSGR. *Id.*

16 Colleen Bal is partner at WSGR who billed her time at \$725 per hour when this case  
17 started, and now bills at \$750 per hour. Volkmer Decl., ¶ 12. For purposes of this submission,  
18 Ms. Bal uses the \$725 rate. Her rates are also paid by private clients and conform to the rates  
19 charged by attorneys working at comparable firms. *Id.* Ms. Bal has been practicing law for over  
20 17 years and specializes in intellectual property and complex commercial litigation for  
21 technology companies. *Id.* She graduated from Harvard Law School. *Id.* Evan Stern is a 2009  
22 graduate from the Georgetown University Law Center. Volkmer Decl., ¶ 13. He billed his time  
23 at \$290 per hour when this case started, and now bills at \$380 per hour. *Id.* For purposes of this  
24 submission, Mr. Stern uses the \$290 rate. His rates are also in line with similar firms in the Bay  
25 Area and are paid by private parties in the marketplace. *Id.*

26 To account for the difference in billing rates between the San Francisco Bay Area market  
27 and the Las Vegas market and in a good-faith effort ensure the overall reasonableness of this  
28 submission, we reduce the billing rates by 33% for EFF and 50% for WSGR. Pursuant to that

1 revision, we apply the following effective rates: Kurt Opsahl: \$350; Bart Volkmer: \$285;  
2 Colleen Bal: \$362.50; Evan Stern: \$145; Corynne McSherry: \$316. Those effective rates  
3 conform to, or are below, the prevailing rates in the Las Vegas market. *See Incorp Services, Inc.*  
4 *v. Nevada Corporate Services, Inc.*, Case No. 2:09-cv-01300-GMN-GWF, 2011 WL 686262, \*2  
5 (D. Nev. 2011) (approving rates of \$400 per hour for law-firm partners, \$350 for an eighth-year  
6 associate, \$295 for a fifth-year associate, \$275 for a sixth-year associate, \$250 for a fourth-year  
7 associate); *Righthaven v. Leon*, Case No. 2:10-cv-01672-GMN –LRL, July 5, 2011 Order  
8 (Docket No. 52) (finding \$275 per hour a reasonable rate for an associate who became a member  
9 of the bar in 2010); *Righthaven v. Hyatt*, Case 2:10-cv-01736-KJD-RJJ, Declaration of Shawn  
10 Mangano (Docket No. 13) (Righthaven seeking an attorney’s fees award of \$300 per hour for  
11 Mr. Mangano’s time). Using this reduced-rate structure, Mr. DiBiase seeks attorney’s fees  
12 totaling **\$116,687**.<sup>9</sup>

### 13 3. A Lodestar Award Is Appropriate.

14 A lodestar award is warranted given the facts here. Attacking Righthaven’s claims  
15 presented novel and difficult legal issues because Righthaven concealed that Stephens was the  
16 true owner of the copyright at issue. That was, in fact, the very purpose of the overly  
17 complicated agreements between Righthaven and Stephens and the various corporate shells they  
18 set up. Indeed, Righthaven had little trouble persuading courts that its complaints sufficiently  
19 pled facts to demonstrate ownership. Against this backdrop, Mr. DiBiase needed attorneys with  
20 expertise in both copyright law and discovery in complex cases. In addition, both the EFF and  
21 WSGR took on this matter pro bono without any prior relationship with Mr. DiBiase. That  
22 meant that the EFF passed up other opportunities to provide free legal services in order to take  
23 on this case. It also meant that the WSGR attorneys diverted resources from its other matters to  
24 assist Mr. DiBiase in vindicating his rights.

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26 <sup>9</sup> WSGR and EFF provided legal services to Mr. DiBiase pro bono. That fact, however,  
27 does not disqualify them from seeking compensation for reasonable fees incurred. *Righthaven v.*  
28 *Leon*, Case 2:10-cv-01672-GMN–LRL, July 5, 2011 Order (Docket No. 52) (citing *Cuellar v.*  
*Joyce*, 603 F.3d 1142 (9th Cir. 2010) (denying attorney’s fees would discourage pro bono  
representation)).

1           Indeed, the non-subsumed *Kerr* factors suggest that an *increase* in the lodestar is  
2 appropriate: (1) Mr. DiBiase achieved a complete victory in a case that sought \$75,000 in  
3 statutory damages and attorney’s fees; (2) Mr. DiBiase was represented by attorneys with  
4 specialized experience in copyright law of strong reputation and ability; and (3) the case was  
5 “undesirable” in the sense that fees were guaranteed to exceed what a settlement would have  
6 cost, leaving Mr. DiBiase with few options if he had not obtained pro bono representation. *See*  
7 *Kerr*, 526 F.2d at 69. Given the considerable reductions that have already been applied, Mr.  
8 DiBiase should receive a fees award of no less than the full lodestar amount of **\$116,687**.  
9 Pursuant to the *Kerr* factors, the Court may increase the award to the full fee amount without the  
10 discount noted above. Without a discount, the total would be **\$199,250**.

11                           **4. Non-taxable Costs Should Also Be Awarded.**

12           Under the Copyright Act, Mr. DiBiase is entitled to “full costs” in addition to fees. 17  
13 U.S.C. § 505. Mr. DiBiase’s attorneys incurred **\$2,770** in non-taxable costs in this action for  
14 travel expenses, delivery costs, Westlaw research fees, copying costs, document preparation  
15 costs, and pro hac vice fees. Volkmer Decl., Ex. H. Righthaven should be ordered to pay those  
16 costs as well. *See Twentieth Century Fox Film Corp. v. Entertainment Distrib.*, 429 F.3d 869,  
17 885 (9th Cir. 2005) (Section 505 authorizes an award of non-taxable costs in addition to fees).

18 **IV. CONCLUSION**

19           For the foregoing reasons, Mr. DiBiase respectfully requests that the Court order  
20 Righthaven to pay reasonable attorney’s fees of no less than **\$116,687** and **\$2,770** in non-taxable  
21 costs.

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Dated: July 6, 2011

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI  
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**Appendix A**

**Local Rule 54-16(b)(3) Summary**

**(A) The results obtained and the amount involved:** Mr. DiBiase obtained a complete victory when the Court dismissed this action. Righthaven had sought \$75,000 in statutory damages and its attorney’s fees, as well as non-monetary relief.

**(B) The time and labor required:** WSGR attorneys put in more than 181 hours defending Mr. DiBiase in this action, and EFF attorneys put in more than 197 hours.

**(C) The novelty and difficulty of the questions involved:** This action presented difficult litigation circumstances because Righthaven attempted through various artifices to hide the fact that Stephens was the true owner of the copyright at issue. In addition, Righthaven sought an order transferring the domain name of Mr. DiBiase’s website to Righthaven. That remedy is not allowed under the Copyright Act, and therefore, Mr. DiBiase’s attorneys were required to research this novel issue when preparing the original motion to dismiss in this action. This case also presented overarching questions related to fair use, to which Mr. DiBiase’s attorneys devoted much of their discovery efforts.

**(D) The skill requisite to perform the legal service properly:** To perform the legal services properly, an attorney needed to have expertise in copyright law and be prepared to engage in time-consuming efforts to conduct discovery given Righthaven’s unwillingness to provide crucial evidence voluntarily.

**(E) The preclusion of other employment by the attorney due to acceptance of the case:** The EFF and WSGR diverted resources to provide a defense for Mr. DiBiase and would have been working on other matters if they had not undertaken this case.

**(F) The customary fee:** Based on a recent decision in a Righthaven case awarding fees in the amount of \$275 per hour for an associate attorney who joined the bar in 2010, the billing rates charged in this matter are reasonable. So are the number of hours worked. Mr. DiBiase seeks compensation for approximately 42 attorney hours per month for the nine months that this case was in active litigation.



1           **(G) Whether the fee is fixed or contingent:** The EFF and WSGR provided legal  
2 services on a pro bono basis.

3           **(H) The time limitations imposed by the client or the circumstances:** The  
4 circumstances warranted inherent time limitations. Both the EFF and WSGR attorneys working  
5 on this case had other litigation matters that they needed to attend to, and were therefore required  
6 to prioritize the tasks that they performed for this matter.

7           **(I) The experience, reputation, and ability of the attorney(s):** Mr. DiBiase has  
8 provided the biographies of the attorneys working on this matter and respectfully submits that  
9 they are experienced, skilled, and highly regarded in the community.

10           **(J) The undesirability of the case, if any:** This case was “undesirable” in the sense  
11 that the fees expended were virtually guaranteed to exceed a nuisance-value settlement. That  
12 limited the pool of attorneys who could have agreed to take on this representation.

13           **(K) The nature and length of the professional relationship with the client:** Mr.  
14 DiBiase had no prior relationship with the attorney representing him in this case before this  
15 action was filed.

16           **(L) Awards in similar cases:** In *Incorp Services, Inc. v. Nevada Corporate Services,*  
17 *Inc.*, Case No. 2:09-cv-01300-GMN-GWF, 2011 WL 686262, \*2 (D. Nev. 2011), the Court  
18 approved rates of \$400 per hour for law-firm partners, \$350 for an eighth-year associate, \$295  
19 for a fifth-year associate, \$275 for a sixth-year associate and \$250 for a fourth-year associate.  
20 The effective rates sought by this motion compare favorably with those rates. *See also*  
21 *Righthaven v. Leon*, Case 2:10-cv-01672-GMN –LRL, July 5, 2011 Order (Docket No. 52)  
22 (finding \$275 per hour for a reasonable rate for an associate who became a member of the bar in  
23 2010). The hours worked here, 378.4, were reasonable in light of nine months of litigation with  
24 active motion practice and ongoing discovery and case-management demands. *See Autodesk,*  
25 *Inc. v. Flores*, Case No. 10–CV–01917–LHK, 2011 WL 1884694, \*2 (N.D. Cal. May 18, 2011)  
26 (awarding reasonable attorney’s fees for 109.4 hours worked in an action resolved by a default  
27 judgment).

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