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Attorneys For Defendant & Counterclaimant
THOMAS A. DIBIASE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RIGHTHAVEN LLC, a Nevada limited-
liability company,

Plaintiff,

v.

THOMAS A. DIBIASE, an individual,

Defendant.

THOMAS A. DIBIASE, an individual,

Counterclaimant,

v.

RIGHTHAVEN LLC, a Nevada limited-
liability company,

Counter-defendant.

CASE NO.: 2:10-cv-01343-RLH-PAL

**DECLARATION OF KURT OPSAHL IN
SUPPORT OF DEFENDANT THOMAS
A. DIBIASE'S MOTION FOR
ATTORNEY'S FEES AND NON-
TAXABLE COSTS**

1 1. I am an attorney of record for the defendant in this matter and a member in good
2 standing of the State Bar of California, and am admitted to practice before this Court *pro hac*
3 *vice*. I have personal knowledge of the matters stated in this declaration. If called upon to do so,
4 I am competent to testify to all matters set forth herein.

5 2. I am a Senior Staff Attorney at Electronic Frontier Foundation (“EFF”), which is
6 a non-profit corporation organized and existing under the laws of the Commonwealth of
7 Massachusetts with its principal place of business in San Francisco, California. I have been a
8 Senior Staff Attorney at EFF since 2007 and was a Staff Attorney before that beginning in 2004.

9 3. EFF represents clients without charge in precedent-setting litigation of national
10 importance involving novel and complex issues arising from the intersection of new technology
11 with civil liberties. Nevertheless, EFF attorneys have hourly rates for purposes of cases in which
12 EFF is entitled to attorney’s fees. These rates are calculated periodically, based upon the
13 prevailing rates for similarly experienced attorneys.

14 4. My 2010 hourly rate, which is the hourly rate for purposes of this matter, is \$525
15 per hour. On May 1, 2011, EFF set my rate at \$625 per hour. However, this increased rate is not
16 included in the calculations for this matter.

17 5. These rates are calculated periodically, based upon a survey of the prevailing
18 hourly rates in the San Francisco Bay Area for lawyers of comparable education, expertise, and
19 experience who handle matters of the type involved in this litigation.

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

1 7. In 1997, I received my Juris Doctor degree from the University of California at
2 Berkeley School of Law (Boalt Hall), where I was an editor of both the California Law Review
3 and the Berkeley Technology Law Journal.

4 8. Before joining EFF in 2004, I worked for the law firms of Perkins Coie LLP
5 (1999-2004) and Severson & Werson PC (1997-1998). In addition, I was the Research Fellow to
6 Professor Pamela Samuelson at the University of California at Berkeley, School of Information
7 Management & Systems (1998-1999). I have authored more than 15 articles for legal
8 publications, and was a co-editor of the Electronic Media and Privacy Law Handbook (ISBN
9 1879650118). In 2007, I received a California Lawyer of the Year (CLAY) award for Media
10 Law.

11 9. I have litigated in federal court for 14 years, developing extensive experience in
12 copyright litigation while representing defendants in numerous prominent copyright cases
13 including *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), *CoStar Group, Inc. v.*
14 *LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004) and *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S.
15 913 (2005).

16 10. After a careful review of my records on the case, I estimate the minimum number
17 of hours I spent on this litigation as no less than 177.50 hours through the end of June 2011.

18 11. In addition to this time, I have spent numerous hours keeping up with the
19 hundreds of cases that Righthaven filed, reviewing and analyzing Righthaven's arguments and
20 defending related litigation (*Righthaven v. Democratic Underground*, 2:10-cv-01356-RLH -
21 GWF). While some of that work was useful to this matter, none of that time is included in the
22 calculation.

23 12. When reviewing my time records, I took a conservative approach concerning the
24 billed hours for which we would seek compensation. I struck or reduced time entries where the
25 work was duplicative or took longer than might have been expected, and where the work was
26 administrative or of a general nature.

27 13. Corynne McSherry is the Intellectual Property Director at EFF, specializing in
28 intellectual property and free speech issues. Ms. McSherry has 9 years of experience in

1 litigation, primarily in intellectual property. Prior to joining EFF, Corynne was a civil litigator at
2 the law firm of Bingham McCutchen, LLP. Corynne has a B.A. from the University of California
3 at Santa Cruz, a Ph.D from the University of California at San Diego, and a J.D. from Stanford
4 Law School. While in law school, Corynne published *Who Owns Academic Work?: Battling for*
5 *Control of Intellectual Property* (Harvard University Press, 2001).

6 14. Ms. McSherry billed 19.50 hours in this matter, reviewing and revising court
7 submissions and participating in strategy conferences regarding those filings.

8 15. Ms. McSherry's hourly rate for 2010 is \$475.00.

9 16. Other attorneys and staff at the EFF assisted me on this matter, but their time was
10 not billed. We also do not seek fees incurred by Mr. DiBiase's local counsel, Mr. Chad Bowers.

11 17. At my 2010 hourly rate, my attorney's fees through June 30, 2011 amount to
12 \$93,187.50. Ms. McSherry's attorney's fees amount to \$9,262.50 through June 30, 2011. The
13 total EFF attorney's fees are \$102,450.

14 18. EFF paid \$978.65 in costs for the DiBiase matter. *Pro hac vice* fees amounted to
15 \$350, and travel/hotel expenses for the 30(b)(6) deposition of Righthaven cost \$628.65.

16 19. On December 10, 2010, Righthaven offered a settlement by which Mr. DiBiase
17 would pay \$7,500 in exchange for a release of Righthaven's claims against him.

18 20. The records for the time that EFF attorneys billed to this matter for which we seek
19 compensation are attached hereto as **Exhibit A**. Pursuant to Local Rule 54-16(c), I have
20 reviewed and edited Exhibit A and am responsible for the billings reflected in that report. Based
21 on my experience, I believe that these time entries are reasonable. The information contained in
22 Exhibit A is true and correct.

23 I declare under penalty of perjury under the laws of the United States of America that the
24 foregoing is true and correct. Executed this 6th day of July 2011, at San Francisco, California.

25 /s/ Kurt Opsahl
26 Kurt Opsahl
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