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

14 RIGHTHAVEN LLC, a Nevada limited-liability)
15 company,)

16 Plaintiff,)

17 v.)

18 THOMAS A. DIBIASE, an individual,)

19 Defendant.)

20 _____)
21 THOMAS A. DIBIASE, an individual,)

22 Counterclaimant,)

23 v.)

24 RIGHTHAVEN LLC, a Nevada Limited-)
25 Liability Company,)

26 Counter-defendant.)
27 _____)
28

CASE NO.: 2:10-cv-1343-RLH-PAL

**NOTICE OF RIGHTHAVEN'S NON-
OPPOSITION TO JUDGMENT
CREDITOR THOMAS DIABASE'S
MOTION FOR JUDGMENT DEBTOR
EXAMINATION**

1 PLEASE TAKE NOTICE that Judgment Debtor Righthaven LLC (“Righthaven”) has
2 failed to file a memorandum of points and authorities in opposition to Judgment Creditor Mr.
3 DiBiase’s motion for a judgment debtor examination, filed November 18, 2011. *See* Doc. 98.
4 Pursuant to Local Rule 7-2(d), this failure to file an opposition constitutes Righthaven’s consent to
5 the requested order. Therefore, for the reasons stated both in Mr. DiBiase’s previous filing, *see*
6 Doc. 98, as well as the reasons set forth below, he respectfully asks this Court to grant the
7 unopposed motion.

8 **STATEMENT OF FACTS**

9 On October 26, 2011, this Court granted Mr. DiBiase’s motion for attorney fees, ordering
10 Righthaven to pay \$116,718 in fees and \$2,770 in costs. *See* Dkt. No. 96. Judgment was entered on
11 November 2, 2011. Dkt. No. 97. In order to assist Mr. DiBiase in identifying Righthaven’s assets
12 and to aid in the execution of this Court’s judgment, on November 18, 2011 Mr. DiBiase filed a
13 motion asking this Court to issue an order requiring Righthaven to provide documents and for
14 Righthaven’s CEO Stephen Gibson to sit for a judgment debtor examination pursuant to Federal
15 Rule of Civil Procedure 69. *See* Dkt. No. 98.

16 Under District of Nevada Local Rule 7-2(b), “points and authorities in response shall be
17 filed and served by an opposing party fourteen (14) days after service of the motion.” Righthaven
18 was thus required to file a response to Mr. DiBiase’s motion for a judgment debtor examination by
19 December 2, 2011. As of the date of this filing, Righthaven has not filed or served any response in
20 opposition to Mr. DiBiase’s request. Nor has Righthaven moved for, let alone received, a stay of
21 enforcement of the judgment, or filed a notice of appeal in the Ninth Circuit with regard to the
22 attorneys’ fees order.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **A. Righthaven’s Failure to File a Response Constitutes Consent Under District of
25 Nevada Local Rule 7-2(d).**

26 Local Rule 7-2(d) states the “failure of an opposing party to file points and authorities in
27 response to any motion shall constitute a consent to the granting of the motion.” The Ninth Circuit
28 has repeatedly found implicit consent under Local Rule 7-2(d) when a party fails to file an

1 opposition. *See Trice v. Clark County School Dist.*, 376 Fed.Appx. 789, 790 (9th Cir. 2010)
2 (unpublished) (affirming dismissal after party failed to file an opposition with time constraints of
3 Local Rule 7-2(d)); *Powell v. DEF Express, Inc.*, 265 Fed.Appx. 672, 675 (9th Cir. 2008)
4 (unpublished) (same); *Kearns v. Comba*, 252 Fed. Appx. 141 (9th Cir. 2007) (unpublished)
5 (affirming grant of summary judgment in favor of defendants when plaintiffs failed to respond to
6 motion under Local Rule 7-2(d)).

7 Thus, under Local Rule 7-2(d), Righthaven has consented to Mr. DiBiase's motion for a
8 judgment debtor examination.

9 **B. Righthaven's Notice of Appeal of the Dismissal Order Does Not Operate As A**
10 **Notice of Appeal of the Attorney Fees Order.**

11 The Ninth Circuit has made it clear that it "lack[s] jurisdiction to review an order granting
12 attorney fees unless a proper notice of appeal is filed." *Leslie v. Grupo ICA*, 198 F.3d 1152, 1160
13 (9th Cir. 1999) (reversing summary judgment but lacking jurisdiction to reverse fee award because
14 no notice of appeal filed). Because the "award of fees and costs is a collateral issue" the Ninth
15 Circuit has explained its jurisdiction over the merits of an appeal from a district court's order on a
16 substantive motion "does not imbue us with jurisdiction to review the fee award." *Id.* (quoting
17 *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988)).

18 This Court issued its judgment on the attorneys' fees on November 2, 2011. Federal Rule of
19 Appellate Procedure 4 requires a notice of appeal to be filed within 30 days of that order, or by
20 December 2, 2011. As of this filing, Righthaven has failed to file a notice of appeal regarding this
21 Court's order awarding fees and costs to Mr. DiBiase. With the window to appeal the attorneys'
22 fees order now closed, the order is uncontestable.

23 Therefore, Mr. DiBiase respectfully requests this Court grant its uncontested motion for
24 judgment debtor examination. If convenient for the Court, Mr. DiBiase respectfully requests that
25 the judgment debtor examination take place between January 11 and January 13, 2012.¹ One of
26 Mr. DiBiase's counsel has plans to be in the city of Las Vegas that week anyway, and therefore

27 ¹ Mr. DiBiase notes that Righthaven has also failed to oppose a motion for judgment debtor
28 examination in *Righthaven v. Hoehn*, Case No. 2:11-cv-00050-PMP-RJJ. It may be convenient to
schedule both examinations simultaneously.

would appreciate being able to take the debtor examination without the cost of an additional trip to Las Vegas.

CONCLUSION

For the reasons stated in its previously filed motions, and above, Mr. DiBiase respectfully requests that this Court grant his uncontested motion to schedule a Judgment Debtor Examination, as well as order Righthaven to produce the documents previously detailed in Mr. DiBiase's originally filed motion for a judgment debtor examination. A proposed order was attached as Docket No. 98-2.

DATED: December 7, 2011

Respectfully submitted,

/s/ Kurt Opsahl
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Attorneys for Judgment Creditor
THOMAS A. DIBIASE

CERTIFICATE OF SERVICE

1 Pursuant to Federal Rule of Civil Procedure 5(b) and as provided for under the applicable
2 Local Rules of Civil Practice, I certify that on this 7th day of December, 2011, I caused a true and
3 correct copy of NOTICE OF RIGHTHAVEN’S NON-OPPOSITION TO JUDGMENT
4 CREDITOR THOMAS DIABASE’S MOTION FOR JUDGMENT DEBTOR EXAMINATION to
5 be served on all counsel properly registered and appearing in this action as listed in the Court’s
6 ECF system.
7

8
9 /s/ Kurt Opsahl
KURT OPSAHL

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