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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**
10

11 RIGHTHAVEN LLC, a Nevada limited-liability
12 company,

13 Plaintiff,

14 v.

15 DEMOCRATIC UNDERGROUND, LLC, a District
of Columbia limited-liability company; and DAVID
ALLEN, an individual,

16 Defendants.
17

18 DEMOCRATIC UNDERGROUND, LLC, a District
of Columbia limited-liability company,
19 Counterclaimant,

20 v.

21 RIGHTHAVEN LLC, a Nevada limited-liability
company; and STEPHENS MEDIA LLC, a Nevada
22 limited-liability company,

23 Counterdefendants.
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Case No.: 2:10-cv-01356-RLH-GWF

**RIGHTHAVEN LLC'S RESPONSE TO
ORDER TO SHOW CAUSE
CONCERNING COMPLIANCE LOCAL
RULE 7.1-1**

1 Righthaven LLC (“Righthaven”) hereby responds to the Order to Show Cause (Doc. # 116,
2 the “OSC”) concerning its nondisclosure of Stephens Media LLC (“Stephens Media”) as an
3 interested party under Local Rule 7.1-1. Righthaven’s response is based on the below
4 Memorandum of Points and Authorities, the supporting declaration of Shawn A. Mangano, Esq. (the
5 “Mangano Decl.”), the pleadings and papers on file in this action, any permitted oral argument, and
6 any other matter upon which this Court takes notice.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION**

9 The Court’s OSC characterizes Righthaven’s nondisclosure of Stephens Media as an
10 interested party in this action as “factually brazen.” (Doc. # 116 at 15:3-5.) This characterization
11 inaccurately implies that Righthaven intentionally failed to comply with Local Rule 7.1-1.
12 Righthaven did not intentionally, recklessly or willfully fail to comply with Local Rule 7.1-1 in this
13 case or in any other pending action.

14 Rather, former in house counsel for Righthaven apparently failed to consider the full scope of
15 the “direct, pecuniary interest” language under Local Rule 7.1-1 in failing to list Stephens Media on
16 its Certificate of Interested Parties. (Doc. # 5; Mangano Decl. ¶ 7.) Unlike its federal rule
17 counterpart, Local Rule 7.1-1 does not define what constitutes a direct, pecuniary interest and there
18 is an absence of case law addressing the scope of the required disclosures. While the Court has
19 concluded otherwise, it is certainly understandable how Local Rule 7.1-1 could have arguably been
20 reasonably construed to not require the disclosure of Stephens Media’s interest in any recovery in
21 excess of costs under the Strategic Alliance Agreement (the “SAA”).¹

22 The obligation to disclose Stephens Media as an interested party pursuant to Local Rule 7.1-1
23 was certainly not appreciated by Righthaven’s undersigned outside counsel, who has been licensed
24 to practice before this Court since 1998. (Mangano Decl. ¶¶ 4, 7.) Counsel reasonably viewed any
25 contingent payment to Stephens Media under the SAA as constituting an indirect interest that

26 _____
27 ¹ To be clear, Righthaven did not intend hide Stephens Media’s association with this action. The
28 SAA was produced during discovery and designated pursuant to the terms of the Stipulated
Protective Order entered in this case because of the confidential terms contained therein that it did
not want made publicly available to other copyright content enforcement entities.

1 required a two-step payment process assuming any case resulted in a recovery. (Mangano Decl. ¶
2 7.) Simply put, receipt of settlement funds through settlement or recovery by the enforcement of a
3 judgment would be made to Righthaven. (*Id.*) Righthaven would then be contractually obligated
4 under the SAA to subsequently pay Stephens Media any recovered sums over and above costs
5 incurred. (*Id.*) Thus, while counsel certainly appreciates the Court's guidance and will adhere to its
6 decision, there is certainly an arguable and reasonable basis to construe Stephens Media's pecuniary
7 interest as indirect, and not direct, under the SAA. This observation aside, upon reviewing the
8 Court's June 14th Order, Righthaven's undersigned counsel immediately took corrective action by
9 causing almost 120 amended disclosures to be filed in this District and in the District of Colorado.
10 (*Id.* ¶¶ 4, 7.) In short, finding that in house counsel² committed a sanctionable violation by failing to
11 comply with Local Rule 7.1-1 is an extremely harsh and factually unwarranted result. (*Id.* ¶ 5.)

12 As discussed below, the disclosure requirements under the Federal Rules of Civil Procedure
13 and under Local Rule 7.1-1 are imposed for the purpose of enabling the Court to ascertain potential
14 grounds for recusal. *See Plotzker v. Lamberth*, 2008 WL 4706255, at *12 (W.D. Va. Oct. 22, 2008).
15 Although not formally disclosed through Righthaven's Certificate of Interested Parties, the Court
16 was certainly aware of Stephens Media's potential interest in this case upon the filing of Democratic
17 Underground LLC's ("Democratic Underground") counterclaim. (Doc. # 13 at 6-24.) This filing,
18 which occurred only twenty-days after Righthaven filed its Certificate of Interested Parties (Doc. #
19 5), added Stephens Media as a party to this case. (*Id.*) Moreover, Righthaven's Complaint clearly
20 identified the *Las Vegas Review-Journal*, which is owned by Stephens Media, as the publication
21 source for the copyrighted work at issue in this case. (Doc. # 1 at 2-3) Righthaven additionally
22 attached a copy of the work as it originally appeared on the *Las Vegas Review-Journal's* website as
23 an exhibit to the Complaint. (Doc. # 1-1 Ex. 2.) Righthaven's copyright infringement enforcement
24 efforts of Stephens Media owned content has unquestionably received extensive media coverage
25 throughout the country widely since early 2010.

26
27 ² Mr. Coons and Mr. Chu are no longer employed by Righthaven. (Mangano Decl. ¶ 5.) Mr. Coons
28 was admitted to practice in 2007. (*Id.*) Mr. Chu was admitted to practice in 2008. (*Id.*) Mr. Coons
formally withdrew from this case by Court Order. (Doc. # 69.) Mr. Chu has not moved to withdraw
from this case as of this filing.

1 In sum, the facts demonstrate that sufficient information was contained in the record to
2 enable the Court to ascertain Stephens Media’s potential interest in, and eventual formal
3 involvement through Democratic Underground’s counterclaim, shortly after this action was filed.
4 Accordingly, even in view of Righthaven’s former in house counsel’s oversight disclosing Stephens
5 Media on the company’s Certificate of Interested Parties, the Court had ample information before it
6 to ascertain whether recusal was warranted based on Stephens Media’s association with the claims
7 and counterclaims before it. The totality of these circumstances further demonstrates that neither
8 Righthaven nor its counsel, past or present, willfully or otherwise intentionally violated Local Rule
9 7.1-1 in this case or in any other pending case.

10 **II. APPLICABLE STANDARDS**

11 Federal Rule of Civil Procedure 7.1 (“Rule 7.1”) requires a nongovernmental corporate party
12 to identify in a publicly filed disclosure statement “any parent corporation and any publicly held
13 corporation owing 10% or more of its stock.” FED. R. CIV. P. 7.1(a)(1). Local Rule 7.1-1 further
14 provides as follows:

15 Unless otherwise ordered, in all cases except *habeas corpus* cases counsel for
16 private (non-governmental) parties shall identify in the disclosure statement
17 required by Fed. R. Civ. P. 7.1 all persons, associations of persons, firms,
partnerships or corporations (including parent corporations) which have a
direct, pecuniary interest in the outcome of the case.

18 LR 7.1-1(a).

19 “The purpose of the disclosure statements required by Rule 7.1 is to assist the court in
20 making decisions about possible disqualification.” *Plotzker*, 2008 WL 4706255, at *12. “The
21 disclosure requirements are calculated to identify circumstances that are likely to call for
22 disqualification of a judge ‘on the basis of financial information that a judge may not know or
23 recollect.’” *Smith v. Argent Mortgage Co.*, 2006 WL 581157, at *2 (D. Colo. 2006)(citing and
24 quoting Advisory Committee Notes).

25 The Court “may, after notice and opportunity to be heard, impose any and all appropriate
26 sanctions on an attorney or party appearing *in pro se* who, without just cause . . .” fails to comply
27 with the local rules of practice. *See* LR IA 4-1(c). This “relatively mild” sanction power is “implicit
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1 in the right to make rules for the orderly administration of justice” under 28 U.S.C. § 2071 and
2 Federal Rule of Civil Procedure 83. *Zambrano v. Tustin*, 885 F.2d 1473, 1479 (9th Cir. 1989). To
3 support an award of fines payable to the court as a sanction, there must be a showing of “conduct
4 amounting to recklessness, gross negligence, repeated – although unintentional – flouting of court
5 rules, or willful misconduct.” *Id.* at 1480. Sanctions cannot be imposed for mere negligence. *Id.*; *see*
6 *also Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1192, 1209 (11th Cir. 1985). “A practice that
7 punishes mere negligence on the part of counsel is not necessary to the orderly functioning of the
8 court system, especially in light of the availability of other remedies.” *Zambrano*, 885 F.2d at 1480.
9 In order to support an award of attorney fees to opposing counsel, there must be a showing of “bad
10 faith actions or willful disobedience of court orders or rules.” *Id.* at 1481.

11 As argued below, any violation of Local Rule 7.1-1 through Righthaven’s former in house
12 counsel’s failure to disclose Stephens Media’s pecuniary interest in this action does not rise to the
13 level of sanctionable conduct. Moreover, sufficient information concerning Stephens Media’s
14 potential interest in this action since, at least, September 27, 2010 through the company’s addition as
15 a party through Democratic Underground’s counterclaim, which was filed only twenty-days after
16 Righthaven filed its Certificate of Interested Parties. (Doc. # 13 at 6-24; Doc. # 5.) Democratic
17 Underground’s counterclaim was filed only twenty-days after Righthaven filed its Certificate of
18 Interested Parties in this case. (Doc. # 5.) Thus, while technically in noncompliance with Local
19 Rule 7.1-1, the Court was aware of Stephens Media’s alleged interest in this case from a very early
20 date. Finally, Righthaven’s outside counsel proactively responded to the Court’s June 14th Order
21 (Doc. # 116) by supplementing the company’s disclosures in 80 cases pending in this District and
22 another 34 cases pending in the District of Colorado. (Mangano Decl. ¶ 7.) Accordingly, sanctions
23 should not be imposed for violation of Local Rule 7.1-1.

24 **III. ARGUMENT**

25 **A. Righthaven’s Nondisclosure of Stephens Media Under Local Rule 7.1-1 Was Not 26 the Result of Sanctionable Conduct by Counsel.**

27 Righthaven’s nondisclosure of Stephens Media as an interested party under Local Rule 7.1-1
28 was not the result of sanctionable conduct engaged in by its prior in house counsel. Rather, the facts
presented support a finding that this omission was an oversight by the company’s former counsel,

1 which was immediately corrected once called to its current outside counsel's attention in the June
2 14th Order. (Mangano Decl. ¶ 7.)

3 As noted above, to support a sanction award for such a violation, there must be a showing of
4 "conduct amounting to recklessness, gross negligence, repeated – although unintentional – flouting
5 of court rules, or willful misconduct." *See Zambrano*, 885 F.2d at 1480. Sanctions cannot be
6 imposed for mere negligence. *Id.*; *see also Kleiner*, 751 F.2d at 1209. Punishing counsel's arguable
7 negligence does not further the "orderly functioning of the court system, especially in light of the
8 availability of other remedies." *Zambrano*, 885 F.2d at 1480.

9 As a threshold matter, unlike Rule 7.1, which clearly defines the percentage of ownership
10 required for disclosure, Local Rule 7.1-1 contains no such parameters. Rather, Local Rule 7.1-1
11 imposes the duty to disclose the existence of a party that has a "direct, pecuniary interest" in the
12 action. LR 7.1-1(a). There is an absence of case law or other decisional authority that defines
13 "direct, pecuniary interest" under Local Rule 7.1-1 or otherwise. Similarly, there is a fairly limited
14 collection of decisional law under Rule 7.1. Given these circumstances, while Righthaven
15 appreciates and respects the Court's construction of Local Rule 7.1-1, the absence of decisional law
16 supports the conclusion that counsel could arguably reasonably misconstrue the disclosure
17 requirements of Local Rule 7.1-1.

18 The lack of decisional law and the nature of Stephens Media's interests certainly do not
19 justify a finding that in house counsel intentionally or willfully violated Local Rule 7.1-1. In order
20 for prior in house counsel to have committed sanctionable conduct, they first recognize that potential
21 contingent recoveries constitute a "direct, pecuniary interest" under Local Rule 7.1-1. (Mangano
22 Decl. ¶ 7.) Counsel then had to fully appreciate that Stephens Media's potential contingent recovery
23 in excess of litigation costs under the SAA qualified as such a "direct, pecuniary interest" under
24 Local Rule 7.1-1. (*Id.*) This is simply not as clear-cut an analysis as the Court has stated in its OSC.
25 (Doc. # 116 at 15.)

26 In fact, Righthaven's undersigned outside counsel, who has extensive federal court litigation
27 experience, reasonably misconstrued the SAA's impact on the company's disclosure requirements
28 under Local Rule 7.1-1 given the Court's June 14th Order. (Mangano Decl. 7.) Counsel reasonably

1 and in good faith interpreted any contingent payment to Stephens Media under the SAA as
2 constituting an indirect interest that required a two-step payment process assuming any case resulted
3 in a recovery. (Mangano Decl. ¶ 7.) Simply put, receipt of settlement funds through settlement or
4 recovery by the enforcement of a judgment would be made to Righthaven. (*Id.*) Righthaven would
5 then be contractually obligated under the SAA to subsequently pay Stephens Media any recovered
6 sums over and above costs incurred. (*Id.*) Upon reviewing the Court's June 14th Order,
7 Righthaven's counsel took immediate corrective action by causing amended disclosures to be filed
8 in almost 120 pending cases. (*Id.*) There certainly was no intentional, willful or knowing violation
9 of Local Rule 7.1-1 on the undersigned counsel's part in this or any other pending action. The same
10 conclusion should apply to Righthaven's former in house counsel's conduct.

11 Righthaven's former in house counsel's arguable oversight in disclosing Stephens Media
12 pursuant to Local Rule 7.1-1 is further supported by the claims presented to the Court. Righthaven's
13 former in house counsel filed the Complaint in this case. (Doc. # 1.) Righthaven's Complaint
14 clearly identified the *Las Vegas Review-Journal*, which is owned by Stephens Media, as the
15 publication source for the copyrighted work at issue in this case. (*Id.* at 2-3) Righthaven also
16 attached a copy of the work as it originally appeared on the *Las Vegas Review-Journal's* website as
17 an exhibit to the Complaint. (Doc. # 1-1 Ex. 2.) In house counsel additionally secured registration of
18 the work from the United States Copyright Office and attached proof of the registration to the
19 Complaint. (Doc. # 1 at 4; Doc. # 1-1 Ex. 4.) Registration was obtained based on an assignment of
20 rights from Stephens Media. (Doc. # 1-1 Ex. 4.) To conclude that Righthaven's former in house
21 counsel intentionally or willfully violated Local Rule 7.1-1 requires an extremely severe and
22 impractical interpretation of the circumstances presented. Such a conclusion would also be contrary
23 to prior in house counsels' diligence and forthrightness as experienced by Righthaven's undersigned
24 outside counsel. (Mangano Decl. ¶ 6.) Righthaven maintains that these facts do not support a
25 finding that sanctionable conduct occurred in former in house counsel's failure to disclose Stephens
26 Media under Local Rule 7.1-1.

1 **B. Assuming Sanctionable Conduct Occurred, Which It Did Not, LR IA 4-1 Limits**
2 **the Court’s Authority to Impose Sanctions in This Case.**

3 Righthaven maintains that its nondisclosure under Local Rule 7.1-1 was not the result of
4 sanctionable conduct by its former in house counsel. Should the Court conclude otherwise, LR IA
5 4-1 limits the Court’s sanction authority to those not presently before it.

6 LR IA 4-1 authorizes the Court to impose sanctions “on an attorney or party appearing *in pro*
7 *se* who, without just cause . . .” violates the Local Rules. *See* LR IA 4-1(c). Local Rule 7.1-1 is filed
8 pursuant to the certification of counsel of record in the action. *See* LR 7.1-1(a). Thus, a clear
9 interpretation of LR IA 4-1 read in conjunction with Local Rule 7.1-1 empowers the Court to
10 sanction counsel or a “party appearing *in pro se* who, without just cause . . .” executes the defective
11 certification. Moreover, imposition of sanctions for violation of Local Rule 7.1-1 would require a
12 finding that the defective certification constituted “conduct amounting to recklessness, gross
13 negligence, repeated – although unintentional – flouting of court rules, or willful misconduct.” *See*
14 *Zambrano*, 885 F.2d at 1480.

15 Here, Righthaven is not appearing, nor could it appear, *in pro se*. The Certificate of
16 Interested Parties filed in this case was certified by counsel that has been formally terminated by
17 Court Order. (Doc. # 5; Doc. # 69.) On November 12, 2010, Righthaven’s outside counsel formally
18 appeared in this action through the submission of a proposed order to substitute in as counsel of
19 record. (Doc. # 35.) This same counsel is responsible for immediately taking corrective action after
20 reading the Court’s June 14th Order. (Mangano Decl. ¶ 7.) This fact aside, counsel responsible for
21 filing the defective disclosure required by Local Rule 7.1-1 is no longer of record before the Court
22 and Righthaven has never appeared *in pro se*. Accordingly, the plain language of LR IA 4-1 does
23 not leave the Court with authority to issue sanctions for a violation of Local Rule 7.1-1 given the
24 circumstances before it. While the Court could potentially sanction Righthaven’s prior counsel, he
25 should unquestionably be provided with notice and an opportunity to respond before such action is
26 taken.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Righthaven respectfully requests that the Court find its failure to
3 comply with Local Rule 7.1-1 through its former in house counsel does not rise to the level of
4 sanctionable conduct given the circumstances described herein. Moreover, Righthaven has taken
5 corrective action in response to the Court's June 14th Order by filing amended disclosure statements
6 in almost 120 pending cases in within this District and within the District of Colorado.

7 Dated this 28th day of June, 2011.

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I on this 28th day of June, 2011, I attempted to upload the foregoing document on the Court's CM/ECF system, but was unable to effectively do so until the 29th day of June, 2011 due to the CM/ECF's systems unforeseen incompatibility with a recently installed Internet browser software update.

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