THE KINCANNON FIRM

March 3, 2011

VIA EMAIL TO EFENNO@FENNOLAW.COM
Edward T. Fenno
Fenno Law Firm, LLC
171 Church Street, Suite 160
Charleston, SC 29401

Re: Righthaven v. Eiser, Civil Action No. 2:10-CV-3075-RMG

Dear Mr. Fenno:

I am in receipt of your letter of March 2, 2011. It was with absolute disbelief that I read the portion of your letter requesting that I send you a list of things we might sue you for prior to filing suit so as to "help prevent any groundless claims." Did you give my client that opportunity? Did you send Dana Eiser a list of things you were planning to sue her for prior to filing? You should be embarrassed to ask for a courtesy you didn't show my client prior to suing her. Besides, we both know filing frivolous lawsuits with no notice to defendants is part of the Righthaven business model, so as to more effectively leverage settlements out of these folks by causing them the intense emotional stress and financial pressure of retaining and paying an attorney in the extremely short window for responding to a complaint.

This is exactly what Righthaven tried to do to my client. Mrs. Eiser's first notice of a lawsuit against her was when a reporter called to tell her she'd been sued. Her next encounter with the lawsuit was when your process server served her with the summons and complaint. She was forced to file an answer and counterclaim without representation because it took her longer to find an attorney than she had to answer the complaint.

I am genuinely curious as to why we should show you the courtesy of sending you a draft complaint prior to filing suit against you when you afforded my client no such opportunity. It's genuinely funny to me how your perspective has changed now that you are about to be a defendant in a lawsuit. Perhaps this experience will serve you well. Perhaps it will moderate your

impulse to sue first and ask questions later. Then again, that would go against the Righthaven business model of leveraging settlements through intimidation and abusive litigation conduct.

So to answer your question, no, we will not be sending you a list of things we plan to sue you for prior to suing you. We will investigate the claims we plan to assert as required by our professional obligations, draft and file a complaint if we believe such claims to have merit, and if so, serve a summons and complaint on you in accordance with applicable law. I'd suggest you have a lawyer on standby, a luxury Mrs. Eiser did not have when you sued her.

Let me be abundantly clear about another matter. You are shocked that a South Carolina attorney would use sarcasm in an email to you. Need I remind you that your client's co-conspirator Sherman Frederick publicly compared the Righthaven litigation strategy to a scene in a movie where a drug dealer viciously guns down people raiding his compound?[1] Yet you try to make a federal case—literally—out of me sarcastically wishing you luck in litigation. You signed your name to a lawsuit that seeks to deprive my client of practically everything she owns over an essentially worthless newspaper article, yet you bristle at a sarcastic remark in an email. Perhaps you're in the wrong line of work.

You further criticize my client for communicating with the press about this case. Yet your client's CEO—Steven Gibson, a lawyer—had no trouble giving an interview to Fortune Magazine and CNN in January of this year. This was during the pendency of Righthaven v. Eiser and in the interview, Gibson refers to Righthaven defendants—clearly including Eiser—as a "community of thieves" and says "the infringement community" has been "caught" "not obeying the law."[2] Gibson goes on to comment about defenses raised by some defendants, including Eiser, by stating "we don't believe there is a meaningful debate that someone can take an article 100 [percent] verbatim and replicate it on the internet" and "no one out there thinks 100 percent taking is fair use." These statements are simply false; there are certainly situations where reproduction of the entirety of a work can be appropriate and other cases where such action can constitute "fair use."

I am further amazed by your audacity in leveling ethical accusations at me over trial publicity when your client's attorney/CEO has given an interview to the national press where he referred to my client as a member of a community of thieves who has been caught violating the law and where he specifically commented—falsely—that defenses raised by my client and others

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[1] http://www.lvrj.com/blogs/sherm/Protecting_newspaper_content_--_You_either_do_it_or_you_dont.html (referencing the famously climactic scene in the movie "Scarface")

[2] http://tech.fortune.cnn.com/2011/01/06/righthaven-qa-cd-letters-dont-stop-infringement/

are so absurd that "no one thinks" they could be valid. I would strongly suggest you take a look at the very rule you cited, Rule 3.6 of the Rules of Professional Conduct. Section (c) makes quite clear that in a case such as this, a lawyer may respond to protect a client from substantial undue prejudice caused by publicity. If you think this situation doesn't entitle my client to the right of response provided by Rule 3.6(c) of the Rules of Professional Conduct, you must have a different set of the rules than I do.

If you want my client to stop defending herself in the press against your client's false claims, I would strongly suggest you muzzle Sherman Frederick and Righthaven CEO Steven Gibson. What is most troubling to me is that Gibson is an attorney who knows better than to say the things he said to Fortune Magazine and CNN while hundreds of these cases, including my client's, are pending. As long as you all engage the media to press your claims and undermine my client's defenses, we will fully exercise our qualified response rights under Rule 3.6.

But let's be completely clear about why you are so concerned about your emails being sent to the press. It has nothing to do with trial publicity, because you all aren't in the business of taking cases to trial. The real truth is that Righthaven doesn't want the general public to know the sort of abusive litigation tactics used to leverage settlements, nor does Righthaven want other defendants to learn tactics that work in response. The Righthaven business model fails if your targets actually bother to defend themselves instead of paying nuisance value settlements and moving on. You aren't afraid of "trial publicity" resulting from a motion for sanctions. You're afraid that every other Righthaven defendant will make the same motion for sanctions and assert the same or similar defenses and counterclaims that we've asserted. You know that just as well as I do. Your objection isn't about trial publicity, it's about shutting up a Righthaven victim who has found an effective, legitimate way to fight back against your client's abusive, oppressive conduct.

With regard to the website surrender issue, your proposed resolution is unsatisfactory. Your client has stated in a Nevada court filing that "Righthaven concedes that such relief [surrender of a defendant's website] is not authorized under the Copyright Act." Yet now, on behalf of Righthaven, you make a directly contrary claim and a nonsensical one at that. No reasonable person could interpret the statute you cite to support the relief of turning over a website to Righthaven in this case. It is absurd and you know it, and we find unacceptable your proposal to backdoor the website demand through a vague reference to relief provided by a statute wholly inapplicable to this case. At this juncture, I believe the only reasonably practical solution is for you to simply waive the relief of website surrender and move on with the case.

This brings me to an important point. It seems various people and businesses associated with Righthaven have no problem simply lying about what the law requires in a given situation to gain an advantage in these cases. In addition to Mr. Gibson's untruthful statements about fair use and the defenses raised by Righthaven targets, consider the email sent to me by Ikenna Odunze on February 25th. The subject line of Mr. Odunze' email is "CONFIDENTIAL: Righthaven v. Eiser; 2:10-cv-3075-RMG." Mr. Odunze goes on to state in the first paragraph that his email is sent pursuant to "all . . . applicable law/rules protecting the confidentiality [of] settlement discussions/correspondence." The trouble with Mr. Odunze' representation is that there is no such applicable law or any rule making settlement discussions or correspondence confidential. Mr. Odunze is allegedly an attorney licensed by the State of Nevada, and yet he sent an email making blatantly false claims about the confidentiality of abusive settlement demands.

This is troubling for another reason, not limited to our case. Mr. Odunze' email is clearly an adapted form letter sent to all or most Righthaven targets. This is evident from the fact that Mr. Odunze uses the term "defendant(s)" rather than defendant, as there is only one defendant in this case. What that tells me is that Mr. Odunze has sent this "confidential" email, or a version of it, to individuals who are not represented by counsel and who do not realize that Mr. Odunze is lying when he makes a representation that the settlement demand is confidential. It is not a central issue in this case, as Mrs. Eiser is represented by competent counsel who know better than to believe Mr. Odunze' nonsense, but in how many cases has Mr. Odunze or another Righthaven attorney made these false representations to unrepresented litigation targets?

Your overheated response to Mr. Odunze' email finding its way to a reporter again makes quite clear to me that your concern is not with trial publicity but with the fact that a level of sunlight shining on Righthaven's abusive litigation scheme will cause other defendants to step up to the plate and actually defend themselves rather than paying nuisance settlements and moving on. But if you want to complain to someone about the press attention on this matter, I suggest you send a letter to your own client. When Mr. Gibson decided to give an interview to a national press outlet and make false claims about the validity of my client's defenses, he opened the door to everything that you now find so problematic.

On the subject of our Amended Answer and Counterclaim, your assertions are just plain wrong. I know of no other way to put it. My client filed an answer and counterclaim herself before she had counsel. You made a mistake and failed to file a motion to dismiss or reply to the counterclaim. Now you claim your response obligation to the original counterclaim is somehow obviated by the fact that the counterclaim is not, in your opinion, up to snuff from a pleading standpoint. Your argument is so absurd that it is difficult for me to take seriously. Your client's

personal judgment as to the legal sufficiency of a complaint or counterclaim is wholly irrelevant in determining whether you have a responsibility to file a responsive pleading.

If Righthaven believed the original counterclaim filed by Mrs. Eiser "failed to provide the elements of any cognizable cause of action," your proper response was a motion pursuant to Rule 12(b)(6), not to simply pretend as though no counterclaim had been asserted. This is basic civil procedure. Rule 12 states "A party must serve an answer to a counterclaim . . . within 21 days[.]" It does not say "A party must serve an answer to a counterclaim within 21 days if the counterclaim is, in the party's personal opinion, a sufficiently pled and legally cognizable claim."

Your letter also appears to suggest that because Mrs. Eiser's original counterclaim was styled as alternative relief, Righthaven was somehow not obligated to respond to it. I invite you to review Rule 8(d)(2), which allows pleading in the alternative. Mrs. Eiser's counterclaim was filed as an alternative statement of a claim which is perfectly well within the rules. Your obligation to file a reply arose regardless of the legal sufficiency of her claim and you failed to do so. It is as simple as that.

Your mistake with regard to Righthaven's obligation to file a reply likewise has led to your faulty conclusion that our amended pleading was wrongly filed without an accompanying motion to amend. Rule 15(a)(1)(B) governs this situation. It states that when a pleading is one to which a responsive pleading is required—as Mrs. Eiser's original answer and counterclaim was—the time to amend as a matter of course is "21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." As explained above, as of this writing, Righthaven still has not filed a responsive pleading or a motion pursuant to Rule 12(b), (e), or (f) with regard to Mrs. Eiser's original counterclaim. Therefore, both under the Rules of Civil Procedure and the scheduling order entered in this case, our amended answer and counterclaim was properly filed as a matter of course. No motion to amend was required.

You raise another issue in your letter about the terms of use provided by the Denver Post, claiming they establish contractual terms between the Post and users of the Post's website. The "Terms of Use" clearly draw a dichotomy between commercial and non-commercial use.[3] As a matter of fact, the Post's terms of use provide what appears to me to be a blanket authorization for non-commercial uses while heavily—and understandably—restricting commercial uses. You know just as well as I do that the use of the Rosen Letter in this matter was entirely non-

[3] http://www.denverpost.com/termsofuse

commercial. Therefore, the use was authorized by the Post and could not possibly have been infringing.

Even more of an issue is language appearing at the bottom of the Denver Post's website on each page: "This material may not be published, broadcast, rewritten, or redistributed for any commercial purpose." Any normal person reading this language would conclude that because there is an express prohibition on commercial uses, non-commercial uses must be acceptable. This is especially true when taken in combination with the fact that the Denver Post actively encourages users to share its content via various forms of social media and in other ways.

Before you go making various arguments about the text of the terms of use, I would encourage you to remember an age-old maxim of contract law. Ambiguities in the contract are construed against the drafter. The Denver Post's terms of use are an overlawyered, complicated mess. While they seem quite clear to me in containing a blanket authorization for non-commercial uses, even if you put forward some argument that non-commercial uses are restricted, you are not left with clean contractual language that clearly prohibits what my client is alleged to have done. You are instead left with an ambiguous mess where such ambiguities will be construed against the drafter and in favor of Mrs. Eiser.

If the Denver Post wanted to say "You may not use our content in any way, shape, or form except where the law prohibits us from making that sort of restriction," it should have said so in its terms of use and at the bottom of its site's pages. It did not. Instead, the Denver Post's terms of use contain a remarkable amount of language that seems to constitute a blanket authorization for non-commercial uses. And even if the Denver Post did not intend to authorize this specific sort of non-commercial use, that's just too bad. The terms of use are either clearly in my client's favor or at the very least ambiguous, with such ambiguity to be resolved in my client's favor. Frankly, I am glad you brought up the Denver Post's terms of use. I hope you will keep doing so in the course of this litigation.[4]

You also state that you "look forward to building a more amicable and civil relationship" with me as this case progresses. I submit our relationship is perfectly civil right now. But if you

[4] The terms of use also contain this gem: "The Denver Post, LLC makes no representations . . . as to the . . . content . . . indluced [sic: included] on this site." Obviously, a copyright notice is a representation as to the content included on the Denver Post website. Yet the terms of use of the Denver Post's own website disclaim all representations—including copyright notices—without limitation. You cannot make a representation that content is copyrighted, put a disclaimer on your site disclaiming all representations about content, then sue someone for allegedly using the content in violation of a disclaimed copyright.

want to have an amicable relationship with me, I suggest you move to withdraw as Righthaven's counsel, send a letter of apology to my client, stop filing garbage lawsuits against innocent people, and stop trying to leverage cost-of-defense settlements through fear, intimidation, and abuse. What you and your client have done in this case—and what your client has done in other cases—offends me as an officer of the court and as a member of the South Carolina Bar.

I'm frankly curious about how you would feel if someone filed a frivolous lawsuit against you seeking hundreds of thousands of dollars. Would you be amicable towards them? Would you want your lawyer to be amicable towards them, to go slap them on the back after a hearing and go to lunch with them? Many Righthaven lawsuit victims have children or grandchildren to put through college, mortgage payments to make, healthcare expenses to bear, and most appear to be retired folks living on a limited, fixed income. Righthaven's most recent exploits involve suing an autistic gentleman over his use of a single picture from the Denver Post. It amazes me that you would expect anyone to be amicable towards you for being involved in this contemptible scheme, and I'm surprised that a heretofore respectable South Carolina attorney would be a part of it.

In terms of the fear, the worry, and the emotional turmoil that comes with being a defendant in a lawsuit, I expect you will shortly get to experience that yourself. I truly hope the experience enlightens you as to how Righthaven's victims feel about having their livelihoods, their possessions, and their families threatened by abusive Righthaven tactics involving lying about the law and even allusions to physical violence. Sherman Frederick, in his previously cited column, compared Righthaven to an automatic rifle with a grenade launcher used to kill people in a movie about drug dealers. But Steven Gibson, in his aforementioned interview with Fortune Magazine and CNN, suggested that this entire Righthaven enterprise is just his exploration of the limits of federal copyright law in the Internet age. I find no small amount of irony in the fact that you, Mr. Gibson, and various other Righthaven associates are now going to experience my exploration into the limits of South Carolina law on barratry and unfair trade practices committed by lawyers. In the spirit of civility, I will at least promise we will not make threatening allusions to gun violence as we pursue our claims against you.

Or Righthaven could write a check for $500,000 and we can settle the case right now. I trust you will let me know.

Sincerely,

J. Todd Kincannon