

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

Righthaven LLC,

Plaintiff,

v.

Dana Eiser,

Defendant.

C/A No. 2:10-CV-3075-RMG-JDA

**SECOND AMENDED ANSWER  
AND COUNTERCLAIMS**

The Defendant Dana Eiser hereby files this Second Amended Answer to the Plaintiff's Amended Complaint and counterclaims against the Plaintiff Righthaven LLC as follows:

**GENERAL MATTERS**

1. Defendant Eiser apologizes for the length and complexity of this pleading, but given the procedural rules regarding compulsory counterclaims, has no choice but to assert all good-faith claims it has against Righthaven.
2. Further, Righthaven's previously-filed motion to dismiss repeatedly attacked Eiser's counterclaims as factually insufficient. Eiser hopes to have addressed Righthaven's concern with this pleading.
3. Given the extensive factual background associated with this matter, Defendant Eiser has attempted with each defense and cause of action to include only the most salient facts relevant to the defense or cause of action. However, all facts and other material pled herein are to be deemed incorporated into each defense and cause of action unless inconsistent.
4. Defendant asserts several inconsistent theories below. All inconsistent material is

pled in the alternative. Such inconsistent material may—or may not—be specifically designated as such.

5. Given the unusual nature of this case, several requests below constitute novel legal theories presenting issues of first impression. Defendant Eiser is not aware of any binding precedent foreclosing the claims herein, but to the extent there is, Defendant Eiser respectfully seeks that the Court allow good-faith argument for a change in the law.

6. Some allegations against Righthaven are made on the basis of vicarious liability of one form or another. Some vicarious allegations rest on agency theories, while some rest on a theory of joint-and-several liability applicable to joint venturers and co-conspirators.

7. Further, Defendant's position is that as a matter of equity, Righthaven "stands in the shoes" of *The Denver Post* (technically, MediaNews Group, Inc. d/b/a *The Denver Post*) for many of the defenses and claims here. Defendant most definitely seeks a judgment that Righthaven has no right to sue over infringements to the Rosen Letter, but it would be inequitable if Righthaven could come to Court asserting rights it well knows it does not have, then use its lack of those rights to defend against counterclaims or defeat defenses.

8. Similarly, Defendant Eiser submits that, for certain purposes in this litigation, she too is entitled to stand in the shoes of the Lowcountry 9/12 Group. It is an unusual situation where a plaintiff with no standing sues the wrong defendant, but that is the story of this case.

9. For ease of reference, the allegedly infringed work will be referred to as the Rosen Letter.

10. Any exhibits referenced below incorporated herein by reference.

**PARTIES, VENUE, AND JURISDICTION**

11. Defendant Dana Eiser is a resident of Dorchester County, South Carolina.

12. Defendant Eiser is the current president of the Lowcountry 9/12 Project and has been president at all times relevant to this action.

13. Plaintiff Righthaven LLC is a Nevada limited liability company.

14. The following are joint venturers and conspirators of Righthaven. Righthaven is vicariously and jointly and severally liable for their acts associated with the Righthaven scheme.

15. SI Content Monitor LLC is an Arkansas limited liability company. SI Content Monitor is a member of Righthaven and has a direct, pecuniary interest in the outcome of Righthaven litigation. SI Content Monitor is owned by persons associated with the Stephens family, the namesake of Stephens Media LLC.

16. Net Sortie Systems, LLC is a Nevada limited liability company. Net Sortie Systems, LLC is a member of Righthaven and has a direct, pecuniary interest in the outcome of Righthaven litigation. Net Sortie Systems, LLC is owned and managed by Righthaven CEO Steven Gibson.

17. Together, SI Content Monitor LLC and Net Sortie Systems, LLC own 100% of Righthaven.

18. Steve Gibson is a Nevada resident and attorney. Gibson is the CEO and manager of Righthaven. Gibson has worked on this case.

19. Dickinson Wright PLLC is a law firm organized as a professional limited liability company whose principal place of business is in Michigan and a successor in interest to

Gibson Lowry Burris LLP. Gibson Lowry Burris was a Nevada law firm involved with Righthaven.

20. Steve Gibson is presently employed by Dickinson Wright and was a member of Gibson Lowry Burris.

21. Shawn Mangano is a Nevada resident and attorney. Mangano frequently represents Righthaven and has provided notice of intent to seek pro hac vice admission to South Carolina District Court so as to prosecute Righthaven v. Eiser.

22. Shawn A. Mangano, Ltd. is a law firm whose principal place of business is in Nevada. Mangano is the owner and manager of Shawn A. Mangano, Ltd.

23. At all or substantially all times Mangano has been involved with Righthaven, Mangano was in the course and scope of his agency relationship with Shawn A. Mangano Ltd.

24. Steve Ganim is a Nevada resident and a Florida attorney. Ganim is an employee of Righthaven. Ganim has worked on Righthaven v. Eiser.

25. Anne Pieroni is a Nevada resident and attorney. Pieroni is a former employee of Righthaven. Pieroni has worked on Righthaven v. Eiser.

26. John Charles Coons is a Nevada resident and attorney. Coons is a former employee of Righthaven.

27. Joseph Chu is a Nevada resident and attorney. Chu is a former employee of Righthaven.

28. Ikenna-Phillip Odonze is a Nevada resident and attorney. Odonze is a former employee of Righthaven. Odonze has worked on Righthaven v. Eiser.

29. Edward Fenno is a South Carolina attorney residing in Charleston County

previously representing Righthaven in this matter.

30. Fenno is the owner and manager of the Fenno Law Firm, LLC.

31. Fenno Law Firm, LLC is a South Carolina limited liability company whose principal place of business is in Charleston County.

32. Fenno and his firm represented Righthaven in Righthaven v. Eiser until withdrawing on May 18, 2011.

33. The Denver Post, LLC is a Colorado limited liability company.

34. MediaNews Group Inc. is a Colorado for-profit corporation.

35. Upon information and belief, The Denver Post, LLC operates and MediaNews Group Inc. owns *The Denver Post* newspaper in Denver, Colorado.

36. Stephens Media LLC operates the Las Vegas Review-Journal newspaper in Las Vegas, Nevada.

37. Mark Hinueber is a Nevada resident and attorney. Hinueber is Vice President and General Counsel of Stephens Media LLC.

38. Sherman Frederick was at times relevant to this action a CEO and columnist for Stephens Media LLC. Frederick is no longer CEO but remains employed as a consultant and columnist for Stephens Media LLC.

39. Upon information and belief, there are others associated with the Righthaven scheme whose identities are not presently known to Defendant Eiser, including but not limited to persons directly associated with the Righthaven scheme and persons with management responsibilities over Righthaven associates.

40. In addition, Defendant is uncertain exactly who all is an investor, either exactly or through multiple layers of LLC shielding, in Righthaven.

41. Defendant would note that two attorneys and two law firms associated with Righthaven specifically excluded from the allegations of this pleading.

42. South Carolina attorney Edward Bertele and his firm have appeared as outside counsel for Righthaven in this action in the wake of Defendant Fenno's withdrawal.

43. Mr. Bertele has thus far done nothing objectionable or improper in furtherance of the Righthaven scheme.

44. Upon information and belief, Righthaven was not acquainted with Mr. Bertele prior to Fenno's withdrawal, and Defendant makes no negative allegations towards him whatsoever.

45. Another Righthaven attorney, outside counsel Dale Cendali of the New York law firm Kirkland & Ellis, has thus far appeared for Righthaven in other cases and, so far as Defendant is aware, has not been involved in Righthaven v. Eiser.

46. Ms. Cendali was not involved in the original hatching of the Righthaven scheme, and Defendant makes no negative allegations towards her whatsoever.

47. Neither Mr. Bertele nor Ms. Cendali have, so far as Plaintiffs are aware, acted in bad faith or for their own personal motivations. E.g., Stiles v. Onorato, 457, S.E.2d 601 (S.C. 1995).

48. This Court has jurisdiction over the counterclaims asserted by virtue of diversity of citizenship and, in some cases, federal question.

49. Venue is proper in the Charleston Division due to the nature of the action.

**FOR A FIRST DEFENSE**  
RESPONSE TO FACTUAL ALLEGATIONS

50. All allegations of the Complaint are denied unless specifically admitted herein, or pled as fact elsewhere within this pleading.

51. With respect to the allegations of Paragraph 1, Defendant admits that Righthaven has filed an action for copyright infringement.

52. With respect to the allegations of Paragraph 2, Defendant admits that Righthaven is a Nevada limited liability company with its principal place of business in Nevada.

53. With respect to the allegations of Paragraph 3, Righthaven's claim to have been in good standing with the Nevada Secretary of State at all times relevant to this lawsuit is simply false. Righthaven went into default status with the Nevada Secretary of State on February 1, 2011. This default was publicly reported in the Las Vegas media.

54. With respect to the allegations of Paragraph 4, Defendant admits that Mrs. Eiser is a resident of Summerville, South Carolina.

55. With respect to the allegations of Paragraph 5, 6, and 7, Defendant denies the allegations. The nonprofit corporation Lowcountry 9/12 Project owns the website in question, and a member other than Mrs. Eiser maintains the blog and editorial control over it.

56. The preceding paragraph represents an alteration of the Amended Answer and Counterclaim, one substantial enough that the Court is owed an explanation.

57. Defendant was initially unrepresented in this action and filed an Answer and Counterclaim pro se.

58. The undersigned were then retained and had just a few days to file an Amended Answer and Counterclaim prior to the deadline in the original scheduling order in this action—in fact, the Amended Answer and Counterclaim was filed on the deadline, February 25, 2011.

59. As a result of the short time period available to counsel to investigate the case

prior to the deadline, the Amended Answer and Counterclaim unintentionally contained several inaccuracies, which are corrected herein.

60. In fact, counsel was unable to even meet Defendant Eiser in person until after the Amended Answer and Counterclaim had been filed.

61. With respect to the allegations of Paragraph 8, Defendant denies that this Court has subject matter jurisdiction due to Plaintiff's lack of standing.

62. With respect to the allegations of Paragraphs 9 and 10, Defendant denies that Righthaven is the owner of the copyright in question.

63. In fact, Defendant submits that Righthaven's attempt to make such claim constitutes a misrepresentation and a fraud on the Court.

64. Righthaven's claims in this regard have been forcefully rejected by Judge Hunt of the District of Nevada, holding in Righthaven v. Democratic Underground that Righthaven led the judge of that district "to believe that it was the true owner of the copyright in the relevant news articles. Righthaven did not disclose the true nature of the transaction[.]" Exhibit 1 at 10.

65. In issuing a show-cause order in the same document, Chief Judge Hunt stated: "As shown in the preceding pages, the Court believes that Righthaven has made multiple inaccurate and likely dishonest statements to the Court." Id. at 15.

66. Defendant Eiser submits Righthaven is engaged in identical conduct before this Court.

67. With respect to the allegations of Paragraph 11 and 12, Defendant denies these allegations.

68. With respect to the allegations of Paragraphs 13, 14, and 15, Defendant makes no



objection to venue, while reserving all other objections, including objections to standing and subject matter jurisdiction.

69. With respect to the allegations of Paragraph 16, Defendant admits that the Rosen Letter is copyrightable subject matter.

70. With respect to the allegations of Paragraph 17, Defendant denies that Righthaven is the owner of the copyright.

71. With respect to the allegations of Paragraph 18, Defendant admits that the Rosen Letter was originally published on or about September 23, 2010.

72. With respect to the allegations of Paragraph 19, Defendant admits that Righthaven submitted a registration application for the Rosen Letter to the United States Copyright Office. The Rosen Letter now appears in the Copyright Office's online catalogue bearing Registration # TX0007324724.

73. With respect to the allegations of Paragraphs 20, 21, and 22, Defendant denies these allegations.

74. With respect to the allegations of Paragraph 23, Defendant pleads the applicable prior paragraphs in response.

75. With respect to the allegations of Paragraphs 24, 25, 26, and 27, Defendant again denies that Righthaven is the legitimate owner of the copyright or that it holds any rights whatsoever in the copyright.

76. With respect to the allegations of Paragraphs 28, 29, 30, 31, and 32, Defendant denies these allegations.

77. With respect to the allegations of Paragraph 33, Defendant denies Ms. Eiser's acts as alleged and further denies that Righthaven suffered any harm whatsoever.

78. With respect to the allegations of Paragraph 34, Defendant denies that Righthaven will be irreparably harmed without injunctive relief.

79. Upon Eiser being notified of this lawsuit, the Lowcountry 9/12 Project's Blog took down the Rosen Letter and it has stayed down since and will not be reposted.

80. Righthaven's claim that there is some threat of continuing and future harm to Righthaven as a result of Eiser continuing to display the Rosen Letter is wholly without basis in fact or law.

81. Righthaven has no good faith basis whatsoever for seeking a preliminary or permanent injunction in its Amended Complaint.

82. With respect to the entirety of the Prayer for Relief, Defendant denies that Righthaven is entitled to any relief whatsoever for the reasons described herein.

83. With respect to Paragraph 1 of the Prayer for Relief, the request for injunctive relief is absurd and should be denied for the reasons given above.

84. With respect to Paragraph 2 of the Prayer for Relief, this request is in the nature of a discovery request and is not appropriate in a prayer for relief in a copyright action.

85. With respect to Paragraph 3 of the Prayer for Relief, this request is likewise absurd given that the Rosen Letter has been removed from the Lowcountry 9/12 Project Blog and will not be reposted.

86. With respect to the remaining paragraphs of the Prayer for Relief, Righthaven has no entitlement whatsoever to any such relief.

87. With respect to the Demand for Jury Trial, Defendant concurs and seeks a jury trial on all issues in this action asserted by either party that may be tried before a jury.

**FOR A SECOND DEFENSE**  
LACK OF STANDING

88. Righthaven's claims are wholly and forever barred due to Righthaven's lack of standing.

89. A party prosecuting a copyright infringement action must have standing to do so. The Copyright Act does not contain a private attorney general provision, therefore a party prosecuting a copyright infringement action must have some legal right to exploit the work allegedly infringed before it can maintain an action for infringement. E.g., Silvers v. Sony Pictures Entertainment, Inc., 402 F.3d 881 (2005).

90. The right to sue, by itself, is not assignable under copyright law. Id.

91. Righthaven does not have any legal right to exploit the Rosen Letter.

92. Righthaven has engaged in a sham transaction with *The Denver Post*, a d/b/a of MediaNews Group to make it appear as though Righthaven has such rights.

93. Further, Righthaven, MediaNews Group, and Righthaven's other media clients and associates have engaged in a calculated and coordinated attempt to defraud the courts on this point.

94. Every judge to have thus far issued a final ruling on the Righthaven copyright assignments has found them to be illusory transactions. Exhibit 1 (Righthaven v. Democratic Underground); Exhibit 2 (Righthaven v. Hoehn).

95. Not only are they illusory transactions as written, even if Righthaven and its associates wrote a crystal clear, unencumbered assignment, it would still be a complete sham, because Righthaven is not a content licensing business.

96. Righthaven does not purchase intellectual property rights and resell them.

97. Righthaven does not in any way exploit the rights to any copyrights it claims to

hold, not only because it legally cannot but because it has no intention to.

98. Further, Righthaven has engaged in a massive fraud on the courts of the United States even as to its right to sue. Righthaven's agreements with its clients appear to give it the bare right to sue, but even that is a sham.

99. Righthaven has three media clients, Stephens Media LLC (the *Las Vegas Review-Journal* and others), MediaNews Group (*The Denver Post* and others), and WEHCO Media, Inc. (the *Arkansas Democrat-Gazette* and others).

100. Officers of each of these client entities have publicly stated that the media entities, not Righthaven, have the right to dictate who can and cannot be sued.

101. In an article appearing in the *Arkansas Democrat-Gazette*, Stephens Media LLC's General Counsel Mark Hinueber is quoted as saying "I can tell Righthaven not to sue somebody." Exhibit 3 at 3.

102. In the same article, WEHCO Media's President Paul Smith is quoted as saying that if Righthaven discovers someone has violated WEHCO's copyright, "it would be [WEHCO's] decision whether or not to move forward with it[.]" Id.

103. Finally, in *The New York Times*, MediaNews Group's Vice President Sara Glines stated that MediaNews Group "reviewed every violation and only approved actions against sites that carried advertising and were not charities." Exhibit 4 at 3.

104. Not only does Righthaven not possess any of the rights that would allow it to exploit the copyrights it sues over, Righthaven does not even have the right to sue. Righthaven can do nothing without permission from its clients, who dictate its actions.

105. Righthaven has no legal right to exploit the copyrights it sues over. It is therefore without standing to assert a copyright infringement claim over their alleged infringement.

106. Further, Righthaven's conduct suggests now that its fraud over the sham assignments has been discovered, it will keep trying to rewrite the sham assignments until it comes up with one that works.

107. Neither of its two attempts have thus far met with success, being rejected by both judges to have encountered them.

108. In Righthaven v. Democratic Underground, Judge Hunt rejected the original assignment and dismissed Righthaven, though expressed doubt in dicta that the rewritten assignment would pass muster. Exhibit 1.

109. In Righthaven v. Hoehn, Judge Pro rejected both the original assignment and the attempted rewrite. Exhibit 2.

110. No matter how many times, and how many ways, Righthaven attempts to rewrite the document purporting to give it the right to sue over the various copyrights it claims to own, Righthaven's efforts will always be a sham and a fraud on the public and on the court.

111. Righthaven is not a newspaper or a content broker. It is a law firm in disguise attempting to exploit people who cannot afford lawyers.

112. The Defendant respectfully requests the Court recognize Righthaven as a sham plaintiff without standing and accordingly dismiss the Amended Complaint.

**FOR A THIRD DEFENSE**

**NO RIGHT TO SUE**

113. Righthaven's claims are barred because Righthaven has no right to sue Defendant Eiser.

114. A party instituting or maintaining a lawsuit must have a legal right to do so.

115. Righthaven is contractually obligated to obtain permission from its media clients

prior to filing suit.

116. Righthaven is therefore obligated to obtain permission from MediaNews Group prior to filing suit over material in *The Denver Post*.

117. This fact has been confirmed in public statements of Sara Glines, Vice President of MediaNews Group. Exhibit 4 at 3.

118. Glines explicitly stated that MediaNews Group “reviewed every violation and only approved actions against sites that carried advertising and were not charities.” Id.

119. This confirms beyond a shadow of a doubt that *The Denver Post* impliedly licenses its customers to share material noncommercially.

120. The Lowcountry 9/12 Project blog does not carry advertising.

121. The Lowcountry 9/12 Project is an eleemosynary organization.

122. Accordingly, MediaNews Group could not have authorized Righthaven to file the action against Defendant Eiser.

123. As Righthaven has no independent right to file suit, and was not granted any such right by MediaNews Group, Righthaven simply has no right to file or maintain this action against Defendant Eiser.

124. The Defendant respectfully requests the Court recognize Righthaven had no legal right to initiate these proceedings and accordingly dismiss the Amended Complaint.

**FOR A FOURTH DEFENSE**  
FRAUD ON THE COPYRIGHT OFFICE

125. Righthaven’s claims are wholly and forever barred due to Righthaven’s fraud on the U.S. Copyright Office.

126. Fraudulent copyright registration bars infringement actions, at least until the fraudulent registration is corrected.

127. “Absent intent to defraud and prejudice, inaccuracies in copyright registration do not bar actions for infringement.” Harris v. Emus Records Corp., 734 F.2d 1329, 1335 (9th Cir. 1984).

128. The copyright registration of the Rosen Letter is fraudulent for at least one, perhaps two reasons.

129. First, the copyright registration lists Righthaven as the owner of the copyright, having acquired it from MediaNews Group by assignment.

130. This is absolutely false, and an intentionally fraudulent representation made solely for the purpose of allowing Righthaven to pursue litigation against Defendant Eiser, thereby prejudicing her.

131. Second, the copyright registration states that the work is a work for hire, therefore—given the nature of the Rosen Letter—a work done by an employee of MediaNews Group.

132. But Mike Rosen, the author, is not, upon information and belief, an employee of MediaNews Group nor was he at the time.

133. Rosen and *The Denver Post* hold Rosen out as a “freelance columnist,” i.e. an independent contractor.

134. This is important for another reason as well. Rosen has been recently implicated in plagiarism issues associated with work he has done for *The Denver Post* and others. Exhibit 5.

135. Righthaven’s assignment scheme has already been found to be a sham, and Defendant Eiser requests this Court so find.

136. Further, Defendant Eiser demands strict proof that Mike Rosen authored the

Rosen Letter as a work for hire and that none of the material in the Rosen Letter is itself infringing of a prior copyright.

137. The Defendant respectfully requests the Court recognize Righthaven's copyright registration a fraudulent and accordingly dismiss the Amended Complaint.

**FOR A FIFTH DEFENSE**  
ABANDONMENT OF COPYRIGHT

138. Righthaven's claims are wholly and forever barred due to the abandonment of the copyright to the Rosen Letter.

139. A copyright holder may abandon its rights.

140. "The plaintiff's acquiescence in the defendant's infringing acts may, if continued for a sufficient period of time and if manifested by overt acts, result in an abandonment of copyright." Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1540 (S.D.N.Y. 1991).

141. *The Denver Post* (MediaNews Group's d/b/a), by its conduct and statements, knowingly encourages its customers to share material appearing on *The Denver Post* website with only one stated caveat: the use must be noncommercial.

142. *The Denver Post* even takes affirmative steps to make it technologically possible and easy for its customers to do so, making software available on *The Denver Post* website that enables a customer to share material in over 300 different ways, including copying and pasting the entire article.

143. *The Denver Post's* website has operated this way for a substantial period of time.

144. Further, as mentioned above, a vice president of *The Denver Post's* corporate owner has stated, for public relations benefit, that *The Denver Post* does not authorize suits against persons who copy material on sites that do not advertise or are charitable.



145. These acts constitute an abandonment of copyright in the material appearing on *The Denver Post* website as against customers who would copy the material for a noncommercial purpose.

146. As the use of the Rosen Letter by the Lowcountry 9/12 Project was noncommercial, the copyright asserted by MediaNews Group and subsequently “assigned” to Righthaven was abandoned as against noncommercial users.

147. As this lawsuit arises from the Lowcountry 9/12 Project’s use, despite the fact that Righthaven named the wrong Defendant, that use is not actionable due to the described abandonment.

148. The Defendant respectfully requests the Court recognize the copyright to the Rosen Letter has been abandoned with regard to the use complained of by Plaintiff and accordingly dismiss the Amended Complaint.

**FOR A SIXTH DEFENSE**  
COPYRIGHT MISUSE

149. Righthaven’s claims are wholly and forever barred due to Righthaven’s aggressive scheme of copyright misuse.

150. In Lasercomb America, Inc. v. Reynolds, 911 F.2d 970 (1990), the Fourth Circuit Court of Appeals recognized the equitable defense of copyright misuse.

151. The defense of copyright misuse is available to a defendants in a copyright infringement actions where plaintiffs are using copyrights “in a manner contrary to public policy[.]” Id. At 979.

152. The defense of copyright misuse is available even where the plaintiff’s misuse of copyright has not injured the defendant. Id.

153. If the plaintiff has engaged in copyright misuse, i.e. if the plaintiff’s actions vis-à-

vis its copyrights violate public policy, it is completely barred from asserting copyright infringement claims. Id.

154. Accordingly, the only element of the defense of copyright misuse is a showing that a party seeking copyright enforcement has violated public policy with respect to copyright matters.

155. Righthaven's violations of public policy with regard to copyright actions are as numerous as they are extreme.

156. Righthaven has embarked on a nationwide campaign of frivolous lawsuits over copyrights it does not own, claiming ownership through sham assignments that Righthaven knew were legally ineffective.

157. Many if not most Righthaven lawsuits would be frivolous even if filed by the true copyright owner.

158. Many if not most Righthaven lawsuits are made against individuals who clearly qualify for fair use.

159. Righthaven's suits include demands for relief not authorized by the Copyright Act, including but not limited to the following:

160. Righthaven demands \$150,000 in statutory damages as a practice, in most if not all cases without any good faith basis to believe that its targets are not innocent infringers not subject to the \$150,000 penalty.

161. Righthaven demands transfer of its targets' websites, and has continued to do so even after admitting such relief is not authorized by the Copyright Act.

162. Righthaven has tried to silence public criticism of its actions with extortionate litigation and settlement tactics.

163. Upon information and belief, Righthaven has entered into settlement agreements with the intent of violating public policy by stifling criticism against it and expanding its media clients' intellectual property rights beyond that allowed by public policy.

164. Provisions expanding intellectual property rights beyond that allowed by public policy are no more allowed in settlement agreements than in any other type of agreement, and their use constitutes copyright misuse.

165. Further, Righthaven's lawsuits are shams. Righthaven does not file suits to obtain the just and orderly resolution of its claims by the courts of the United States. Righthaven simply uses summonses and complaints as tools to leverage settlements.

166. Righthaven has no intent whatsoever, and never has had any intent, to take any of its cases to trial or obtain adjudications on the merits.

167. Righthaven's sham lawsuit campaign is most certainly copyright misuse.

168. If ever there was a case where copyright misuse should be a valid defense, it is this one.

169. The Defendant respectfully requests the Court recognize Righthaven as engaging in copyright misuse against Defendant and others and accordingly dismiss the Amended Complaint.

**FOR A SEVENTH DEFENSE**  
UNCLEAN HANDS

170. Righthaven's claims are wholly and forever barred due to Righthaven's unclean hands.

171. "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." First Union Nat'l Bank of S.C. v. Soden, 511 S.E.2d 372, 379 (S.C. Ct. App.

1998).

172. The doctrine likewise bars actions at law. Wachovia Bank, N.A. v. Coffey, 698 S.E.2d 244, 248 (S.C. 2010).

173. Righthaven's conduct in this matter has been so abusive, underhanded, and inappropriate that if ever there were a case to apply the doctrine of unclean hands, it is this one.

174. One particular element of the unclean hands defense is Righthaven's unauthorized practice of law.

175. Righthaven is a law firm in disguise, practicing law on behalf of clients in South Carolina federal court.

176. Righthaven's sole business consists of filing lawsuits on behalf of its clients. Any business entity whose sole business is filing lawsuits on behalf of clients is definitionally a law firm.

177. Righthaven's status as a non-law-firm business entity is a sham attempt to avoid the ethical duties and practice restrictions of a law firm and the lawyers within it, duties which would prevent Righthaven from operating as it does.

178. That Righthaven's setup blatantly violates the Rules of Professional Conduct puts this case on all fours with Wachovia Bank cited above, where an action to enforce a mortgage was barred due to the unauthorized practice of law by the bank.

179. Further, at least one employee of Righthaven who has worked on the Eiser case is engaged in the unauthorized practice of law.

180. Righthaven Attorney Steve Ganim is, upon information and belief, only a member of the Florida Bar.

181. Righthaven is located in Nevada, and most of the attorneys that have worked for Righthaven—including Ganim—live in Nevada.

182. Yet, upon information and belief, Ganim is not a member of the Nevada Bar, as required by Nevada law.

183. In fact, Ganim works on many if not all Righthaven cases, none of which are now or have ever been pending in Florida.

184. Accordingly, Ganim is engaged in the unauthorized practice of law in Nevada.

185. Upon information and belief, Ganim does so with Righthaven's knowledge and approval.

186. Ganim is an employee of Righthaven acting in the course and scope of his employment at all times relevant to this matter.

187. Righthaven is therefore itself engaged in the unauthorized practice of law, and assists Ganim in his unauthorized practice of law.

188. Compounding the problem, after Righthaven defendant Michael Leon disseminated this information, Righthaven attorney Shawn Mangano threatened a frivolous defamation action against Leon to shut him up.

189. The Las Vegas Sun reported on the incident:

The suit against Leon has grown contentious, with Mangano saying in court Wednesday he may file libel claims against Leon after, according to Mangano, Leon posted online defamatory and false information about Righthaven, Mangano and Righthaven attorney Steven Ganim on his website. Some of this information was re-posted on at least one other anti-Righthaven website.

"I'm not going to tolerate and allow someone to tarnish my professional reputation" – or make libelous claims about Righthaven and Ganim, Mangano said.

Exhibit 6 at 2.

190. Righthaven's conduct generally and in prosecution of these lawsuits further signals unclean hands.

191. Righthaven has acted horrendously in actions before the federal district courts in Nevada and Colorado.

192. Righthaven has filed a downright fraudulent financial disclosure in about 200 cases in Nevada and is currently subject to a show-cause order as a result. Exhibit 1 at 15.

193. After a judge struck impertinent and immaterial (and abusive) matter from a notice of dismissal Righthaven filed in Colorado, Righthaven simply refiled it, telling the judge he was wrong. Exhibit 7; Exhibit 8.

194. Righthaven's setup involves fee-splitting with non-lawyers.

195. Righthaven seeks settlements that are against public policy.

196. Righthaven files frivolous lawsuits and frequently fails to properly investigate them, including this one.

197. Righthaven misleads unrepresented defendants.

198. Righthaven has engaged in sham structuring of its employees—treating employees as outside counsel—to inflate attorneys' fee awards and gain leverage over its victims.

199. Upon information and belief, this exact tactic was the basis for retaining Righthaven's first counsel in this action, Edward Fenno and the Fenno Law Firm, LLC.

200. Upon information and belief, Fenno was hired as outside counsel for this matter sometime around November 19, 2010, the date the Righthaven applied to the U.S. Copyright Office for a copyright of the Rosen Letter.

201. This case was unusual, in that it was the first case filed outside of Nevada or

Colorado, and the first one to use an attorney who had not been a Righthaven insider.

202. Looking at the facts and circumstances surrounding Righthaven just before Fenno's retention, the circumstantial evidence strongly suggests a sinister intent behind why Righthaven retained new outside counsel instead of using employees for all of the legal work, or at least the bulk of it, as had been Righthaven's prior practice.

203. Righthaven uses a demand for attorney's fees, found in each Righthaven lawsuit, to leverage settlements.

204. On August 26, 2010, Righthaven received what is, so far as Defendant Eiser can determine, the first bit of pushback on the attorney's fee demand from U.S. Magistrate Judge Robert Johnston.

205. Judge Johnston, holding a hearing in Righthaven v. Wong, questioned the propriety of awarding "full freight" attorney's fees to Righthaven for work done by in-house counsel. Exhibit 9.

206. Such questions continued. On October 29, 2010, the Electronic Frontier Foundation and other attorneys representing the defendant in Righthaven v. DiBiase, filed an extremely persuasive brief in support of a motion to dismiss Righthaven's attorney's fee demand over the in-house counsel issue.

207. Defendant Eiser submits that it is no coincidence that just as Righthaven realized it would likely be barred from attorney's fee awards due to all of its lawyers being in-house counsel, Righthaven began focusing on outside counsel to prosecute matters.

208. The only reason for this change in approach was to add settlement leverage for Righthaven cases, inappropriately increasing the value of settlements.

209. Upon information and belief, Fenno was hired to prosecute Righthaven v. Eiser

mere days or weeks after the filing of the EFF brief.

210. Upon information and belief, Righthaven has not hired a single in-house attorney since the EFF brief was filed in Righthaven v. DiBiase.

211. Upon information and belief, Righthaven has retained at least three firms as outside counsel since the EFF brief was filed in Righthaven v. DiBiase, including Fenno.

212. Upon information and belief, Fenno and Righthaven conspired to set up an arrangement where Fenno would perform work as outside counsel that Righthaven had previously done in-house for the sole purpose of enhancing its settlement leverage by demanding attorney's fee awards that were allegedly recoverable.

213. Further supporting these factual allegations, Fenno was not mere local counsel for Righthaven.

214. Fenno was the only named counsel for Righthaven in Righthaven v. Eiser until withdrawing from that action.

215. No Righthaven attorney-employees appeared on the pleadings in this action at all and still have not, a dramatic departure from Righthaven's prior practice.

216. After Fenno's withdrawal, Righthaven retained attorney Edward Bertele of Charleston.

217. However, Bertele's first and only action in the case thus far, outside of filing a notice of appearance, is to seek consent for pro hac vice admission of another Righthaven outside counsel, Shawn Mangano.

218. That Bertele would merely serve as local counsel while Fenno would serve as lead counsel—in fact, Righthaven's only counsel—is strong evidence that Fenno's intended role in Righthaven was extensive and that Fenno's position as outside counsel



was intended as nothing more than a device to skirt around the unrecoverability of in-house attorney's fees.

219. Had Fenno been mere local counsel for Righthaven, as Mr. Bertele presently is, Defendant would not raise these allegations.

220. However, the circumstantial evidence available to Defendant strongly supports a conclusion that Righthaven's hiring of Fenno was done for the express purpose of increasing settlement leverage and recoverable attorney's fees against hapless Righthaven defendants that emerged in South Carolina and perhaps elsewhere, including Eiser.

221. The list of improper conduct by Righthaven goes on and on, and all of it is incorporated in this defense. But one thing is crystal clear under South Carolina law, applicable to this matter as a defense, and it is this: when a party's cause of action is tainted with unauthorized practice of law, that party cannot seek relief in court in South Carolina.

222. The Defendant respectfully requests the Court recognize that Righthaven's unclean hands bar it from the relief it seeks and accordingly dismiss the Amended Complaint.

**FOR AN EIGHTH DEFENSE**  
FAILURE TO JOIN AN INDISPENSIBLE PARTY

223. Righthaven's claims are barred due to Righthaven's failure to join an indispensable party.

224. Under Rule 12(b)(7), Fed.R.Civ.P., the failure to join an indispensable party must result in dismissal or joinder.

225. MediaNews Group d/b/a *The Denver Post* is the true owner of the copyright and the only party with standing to seek its enforcement.

226. Righthaven did not name MediaNews Group as a party to this action for strategic reasons.

227. The Defendant respectfully requests the Court recognize MediaNews Group, Inc. as an indispensable party to this action and either dismiss the Amended Complaint or join MediaNews Group as a party.

**FOR A NINTH DEFENSE**  
FAILURE TO PROSECUTE LAWSUIT IN THE  
NAME OF THE REAL PARTY IN INTEREST

228. Righthaven's claims are wholly and forever barred due to Righthaven's failure to prosecute this lawsuit in the name of the real party in interest.

229. Rule 17(a)(1), Fed.R.Civ.P. requires that actions be prosecuted in the name of the real party in interest.

230. MediaNews Group d/b/a *The Denver Post* is the true owner of the copyright and the only party with standing to seek its enforcement.

231. Accordingly, MediaNews Group is the real party in interest in this litigation.

232. The Defendant respectfully requests the Court recognize that this lawsuit is not being prosecuted in the name of the real party in interest and accordingly dismiss the Amended Complaint.

**FOR A TENTH DEFENSE**  
BARRATRY

233. Righthaven's claims are wholly and forever barred due to Righthaven's barratry.

234. In Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 532 S.E.2d 269 (2000), the South Carolina Supreme Court, while abolishing champerty as a general defense, discussed ways a party faced with a champertous lawsuit could still defend themselves.

235. However, the Osprey Court mentioned that South Carolina's criminal barratry

statute was available for use by a party targeted by barratry.

236. Righthaven's business model exclusively consists of (1) looking for potential infringements of copyrights held by its clients; (2) purchasing (sham) assignments of potentially infringed copyrights from its clients; and (3) filing lawsuits alleging Righthaven's copyright has been infringed.

237. Righthaven does not have any interest in the purportedly assigned copyright because Righthaven is not in the business of selling media.

238. The purpose of the transaction is not to give Righthaven intellectual property rights but to give it a fraudulent veneer of legitimate ownership in the copyright upon which is bases a lawsuit.

239. Righthaven's business model, utilized in this case and all others, constitutes barratry in violation of S.C. Code § 16-17-10(2)(a).

240. Section 16-17-10(2)(a) states: "Any person who shall [w]ilfully bring, prosecute or maintain an action, at law or in equity, in any court having jurisdiction within this State and has no direct or substantial interest in the relief thereby sought [s]hall be guilty of the crime of barratry."

241. Righthaven has no direct or substantial interest in the relief it seeks in its lawsuits, because it has no legal right to profit from or use the copyrights it alleges to be infringed.

242. Therefore, Righthaven's conduct directly violates Section 16-17-10(2)(a).

243. Section 16-17-10(2)(d) states: "Any person who shall [w]ilfully bring, prosecute or maintain an action, at law or in equity, in any court having jurisdiction within this State and directly or indirectly receives any money or other thing of value to induce the bringing of such action [s]hall be guilty of the crime of barratry."

244. Righthaven is a business that has received money from investors to induce it to file the actions it files.

245. Therefore, Righthaven's conduct also constitutes barratry in violation of S.C. Code § 16-17-10(2)(d).

246. The Defendant respectfully requests the Court recognize Righthaven's conduct as violating the South Carolina barratry statutes and accordingly dismiss the Amended Complaint.

**FOR AN ELEVENTH DEFENSE**  
ILLEGAL SYNDICATION OF LAWSUITS

247. Righthaven's claims are wholly and forever barred due to Righthaven's practice of illegal lawsuit syndication.

248. In Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 532 S.E.2d 269 (2000), the South Carolina Supreme Court, while abolishing champerty as a general defense, discussed ways a party faced with a champertous lawsuit could still defend themselves.

249. The Osprey Court indicated that syndication of lawsuits might violate South Carolina public policy, while leaving the issue formally undecided.

250. Defendants respectfully submit that the South Carolina Supreme Court would likely find syndication of lawsuits to be against South Carolina public policy in general.

251. Even if the South Carolina Supreme Court refused to find syndication of lawsuits against general public policy, the Court would almost certainly find the facts of this case to be a type of lawsuit syndication against South Carolina public policy.

252. This case involves a Plaintiff who has not only speculated in lawsuits by purchasing the bare right to sue but has sold shares of lawsuits to investors, including but not necessarily limited to Righthaven LLC's members, SI Content Monitor LLC and Net

Sortie Systems, LLC and their upstream investors.

253. Upon information and belief, other investors have an interest in the action as well, including MediaNews Group and Stephens Media LLC.

254. SI Content Monitor is believed to be owned by investors who are family members of the Stephens family, the namesake of Stephens Media, owner of Righthaven client the *Las Vegas Review-Journal*.

255. Righthaven's business practices illustrate exactly why such arrangements are against public policy in most states and should be in South Carolina.

256. Righthaven files actions without investigation, making frequent embarrassing mistakes.

257. Righthaven's representatives make frequent brazen misrepresentations to courts and to unrepresented parties in aid of the Righthaven scheme.

258. Righthaven is indicative of what happens when lawsuits are syndicated. *The Denver Post* and the *Las Vegas Review-Journal* would never have sued over minor, unintentional infringement, much less in cases where the fair use defense would obviously prevail.

259. Such actions would damage the business goodwill of *The Denver Post* and the *Las Vegas Review-Journal* and benefit no one whatsoever.

260. But the Righthaven scheme not only tolerates but is predicated upon filing absurd, frivolous lawsuits over trifles against anyone it possibly can.

261. The market and legal constraints which keep *The Denver Post* and the *Las Vegas Review-Journal* from clogging the federal courts with ridiculously petty lawsuits are absent with regard to Righthaven.

262. Syndication of lawsuits fosters an environment of sue-first-ask-questions-later that invariably leads to ethical breaches.

263. Syndication of lawsuits against unsophisticated consumers is even more dangerous, allowing predatory firms like Righthaven to exploit anyone who cannot afford to spend \$50,000 to \$100,000 on attorneys for defense, which constitutes the vast majority of Americans.

264. The South Carolina Supreme Court would almost certainly foreclose lawsuit syndication generally, or at least in a way that would apply to this set of facts.

265. The Defendant respectfully requests the Court recognize Righthaven's business model as predicated upon the syndication of lawsuits against public policy and accordingly dismiss the Amended Complaint.

**FOR A TWELFTH DEFENSE**  
RULE OF PROFESSIONAL CONDUCT PROHIBIT ACTION

266. Righthaven's claims are wholly and forever barred because the South Carolina Rules of Professional Conduct prohibit the action.

267. In Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 532 S.E.2d 269 (2000), the South Carolina Supreme Court, while abolishing champerty as a general defense, discussed ways a party faced with a champertous lawsuit could still defend themselves.

268. The Osprey court did indicate that a lawyer may not acquire a proprietary interest in the subject matter of litigation the lawyer is conducting for a client. Such impropriety is not only an ethical issue but, under Osprey and the previously cited Wachovia Bank, N.A. v. Coffey, is likely an equitable defense.

269. Further, the Osprey Court left formally undecided the issue of whether a lawyer may act as financier in a case involving a litigant who is not the lawyer's client.

270. There is no dispute that the Righthaven business model involves lawyers, from Righthaven CEO Steve Gibson on down, purportedly acquiring proprietary interests (though through sham means) in the subject matter of litigation conducted for Righthaven's media clients. This directly violates the law as expressed in Osprey.

271. Alternatively, Righthaven's conduct involves lawyers acting as financiers in cases where the real party in interest is not the lawyer's client. On these facts, the South Carolina Supreme Court would be almost certain to find this arrangement against public policy.

272. The Defendant respectfully requests the Court recognize Righthaven's claims barred as involving violations of legal ethics of a nature and type that bar relief and accordingly dismiss the Amended Complaint.

**FOR A THIRTEENTH DEFENSE**  
PUBLIC POLICY VIOLATIONS

273. Righthaven's claims are wholly and forever barred due to Righthaven's public policy violations.

274. Agreements against public policy are unenforceable, and parties cannot enlist the courts to aid them in enforcing their rights under such agreements.

275. Practically everything about Righthaven's setup violates public policy in a variety of ways as described herein.

276. The Defendant respectfully requests the Court recognize the Righthaven scheme as violating public policy and accordingly dismiss the Amended Complaint.

**FOR A FOURTEENTH DEFENSE**  
CHAMPERTY

277. Defendant respectfully requests the Court consider the status of, and if necessary

adopt, a federal common law champerty defense to copyright infringement claims, unconnected to state law.

278. Alternatively, Defendant respectfully requests the Court find that a champerty defense is an inherent result of the standing requirements for pursuing relief under the Copyright Act.

279. There appears to be a disagreement in the authorities as to whether champerty is a general defense to a copyright action or whether the defense, where available, emanates from state law.

280. Champerty has been abolished as a general state law defense under Osprey, Inc. v. Cabana Ltd. Partnership, 532 S.E.2d 269 (S.C. 2000), though the Osprey court clearly indicated that agreements previously void for champerty could now be found void for a variety of public policy reasons.

281. Though champerty is not directly available as a state law defense in this action, Defendant Eiser pleads champerty as a defense to the extent it is available as a federal common law defense to copyright infringement or as a defense inherent in the standing requirements of plaintiffs asserting the Copyright Act. But see Martin v. Morgan Drive Away, Inc. (5th Cir. 1982.) (declining to adopt champerty as a federal common law defense).

282. Defendant Eiser has located no binding precedent on the matter, though the weight of precedent in other jurisdictions is against the adoption of a federal common law defense of champerty.

283. The question of whether champerty is a defense inherent in the standing requirements of plaintiffs asserting the Copyright Act is also unclear.



284. Defendant Eiser pleads in good faith that this Court should consider adoption of a federal common law defense of champerty limited to copyright actions or find the defense of champerty inherent in the Copyright Act.

285. As the United States Supreme Court has noted:

The purpose of copyright protection, in the words of the Constitution, is to “promote the Progress of Science and useful Arts.” Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create, and that “encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and the useful Arts.’”

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984).

286. Defendant Eiser respectfully submits that the adoption of a champerty defense to copyright infringement is wholly appropriate given the damage done to the Progress of Science and useful Arts by the Righthaven scheme.

287. This case stands as an indisputable testament that allowing champertous arrangements in the area of copyright does not “promote the Progress of Science and useful Arts.” It dramatically inhibits it.

288. Righthaven’s campaign of subjecting people to extortionate lawsuits as a means to leverage cost-of-defense settlements has had a dramatic chilling effect on expression on the Internet. See generally Exhibit 10.

289. Righthaven’s champerty has inhibited people who communicate in the area of core political speech, like Defendant Eiser and the Lowcountry 9/12 Project.

290. Righthaven’s champerty has inhibited people who perform valuable and potentially lifesaving public service efforts, like a website that operates as a central repository of the spread of influenza, something the U.S. government does not do. Id.

291. Righthaven's champerty has chilled First Amendment reporting, as Righthaven has sued at least one reporter for posting one of Righthaven's complaints. Righthaven v. Gardner.

292. Righthaven's scheme poses a unique, nationwide threat to protected expression, and in these rare and narrow circumstances, Defendant Eiser respectfully submits that the adoption of a federal common law defense of champerty limited to the area of copyright infringement actions, or the finding that such defense is inherent in the Copyright Act, is wholly appropriate on these facts.

293. The Defendant respectfully requests the Court to consider whether the defense of champerty is available in this action despite its unavailability under state law and, if such defense is available, recognize Righthaven as engaging in champerty and accordingly dismiss the Amended Complaint.

**FOR A FIFTEENTH DEFENSE**  
MAINTENANCE

294. Defendant respectfully requests the Court consider the status of, and if necessary adopt, a general maintenance defense to copyright infringement claims, unconnected to state law.

295. For identical reasons as those pled in support of a champerty defense, the Defendant respectfully requests the Court to consider whether the defense of maintenance is available in this action despite its unavailability under state law and, if such defense is available, recognize Righthaven as engaging in maintenance and accordingly dismiss the Amended Complaint.

**FOR A SIXTEENTH DEFENSE**

**LICENSE**

296. Righthaven's claims are wholly and forever barred due to the doctrine of license.

297. A license is simply an authorization by the copyright holder to another to make use of a copyrighted work.

298. By encouraging its customers to share its content for noncommercial purposes, *The Denver Post* licensed its customers to share its content for noncommercial purposes.

299. The Lowcountry 9/12 Project relied on that license in sharing the Rosen Letter.

300. Therefore, Righthaven cannot pursue relief over the Lowcountry 9/12 Project's use of the Rosen Letter, as is done in this action despite Defendant Eiser being the party sued.

301. The Defendant respectfully requests the Court recognize Righthaven as a sham plaintiff without standing and accordingly dismiss the Amended Complaint.

**FOR A SEVENTEENTH DEFENSE**

**IMPLIED LICENSE**

302. Righthaven's claims are wholly and forever barred due to the doctrine of implied license.

303. An implied nonexclusive license to reproduce copyrighted material may be granted orally or implied from conduct. Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 749 (D. Md. 2003).

304. Such an implied license, a species of contract implied in fact, does not transfer ownership of the copyright; rather, it simply permits the use of the copyrighted work in a particular manner. Id. at 749-50.

305. While federal copyright law recognizes an implied license from the parties'

course of dealing, state contract law determines its existence and scope. *Id.* at 50.

306. *The Denver Post*, through its conduct, has impliedly licensed its customers to share material on its website for noncommercial reasons.

307. Sara Glines, Vice President for MediaNews Group, *The Denver Post*'s owner, has publicly indicated that MediaNews Group has authority over Righthaven to dictate who it can and cannot sue. Exhibit 4 at 3.

308. Glines explicitly stated that MediaNews Group "reviewed every violation and only approved actions against sites that carried advertising and were not charities." *Id.*

309. This confirms beyond a shadow of a doubt that *The Denver Post* impliedly licenses its customers to share material noncommercially.

310. The Lowcountry 9/12 Project Blog does not carry advertising.

311. The Lowcountry 9/12 Project is an eleemosynary organization.

312. *The Denver Post* has clearly impliedly licensed noncommercial sharing, the only kind of use at issue in this case, and Defendant Eiser is therefore entitled to dismissal.

313. The Defendant respectfully requests the Court recognize the use of the Rosen Letter complained of in this action was pursuant to an implied license granted by the original (and current) copyright owner and accordingly dismiss the Amended Complaint.

**FOR AN EIGHTEENTH DEFENSE**  
EQUITABLE ESTOPPEL

314. Righthaven's claims are wholly and forever barred by the doctrine of equitable estoppel.

315. Equitable estoppel is a defense to copyright actions. *E.g., Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680, 689 (4th Cir. 1992).

316. The elements of equitable estoppel are that the party against whom estoppel is

sought must have (1) misrepresented or concealed material facts, (2) intended or expected that appellants would act upon those misrepresentations or concealments, and (3) had actual or constructive knowledge of the true facts. Id. at 690.

317. Here, *The Denver Post* misrepresented and concealed material facts, including but not limited to the fact that it intended to procure a lawsuit against anyone sharing its content regardless of the noncommercial use.

318. Instead, *The Denver Post* made representations that caused its customers to reasonably believe it authorized and appreciated sharing of content for noncommercial uses.

319. Even after suing Defendant Eiser directly in violation of that policy, a vice president of *The Denver Post's* owner gave an interview to *The New York Times* stating that it had not and did not authorize suits against noncommercial copiers.

320. *The Denver Post* clearly intends for its customers to rely on these representations, even while knowing they are false.

321. The posting of the Rosen Letter complained of in this action was done by a customer reasonably relying on those representations. Accordingly, Plaintiff is estopped from pursuing this action.

322. The Defendant respectfully requests the Court recognize that Righthaven is equitably estopped from pursuing this action and accordingly dismiss the Amended Complaint.

**FOR A NINETEENTH DEFENSE**  
PROMISSORY ESTOPPEL

323. Righthaven's claims are wholly and forever barred due to the doctrine of promissory estoppel.

324. Under promissory estoppel, one who makes a promise that would otherwise be unenforceable may be held to it if the person so promised reasonably relies to his detriment on the promise.

325. Here, *The Denver Post* made representations to its customers on its website that sharing for noncommercial purposes was not only allowed but encouraged.

326. These representations had the character of a promise that if a person so shared the material, and did so only for a noncommercial purpose, *The Denver Post* would take no action against them.

327. The Lowcountry 9/12 Project, as a customer of *The Denver Post*, reasonably relied on those representations.

328. This reliance turned out to be to the detriment of the Lowcountry 9/12 Project, as *The Denver Post* subsequently arranged for and procured a lawsuit against the Lowcountry 9/12 Project's President, Defendant Eiser.

329. This action is therefore prohibited by the doctrine of promissory estoppel, because even though *The Denver Post* made the representations at issue, equity demands that Righthaven be barred from pursuing this action to the same extent *The Denver Post* would be.

330. The Defendant respectfully requests the Court recognize that Righthaven is promissorily estopped from pursuing this action and accordingly dismiss the Amended Complaint.

**FOR A TWENTIETH DEFENSE**

**FAIR USE**

331. Righthaven's claims are wholly and forever barred due to fair use of the Rosen Letter.

332. Fair use is a defense to use of a copyrighted work which otherwise would be copyright infringement if the work is used for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. 17 U.S.C. § 107.

333. Four factors to be considered when determining fair use are as follows:

334. I. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes.

335. II. The nature of the copyrighted work.

336. III. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

337. IV. The effect of the use upon the potential market for or value of the copyrighted work.

338. The Lowcountry 9/12 Project's posting of the Rosen Letter was for noncommercial, nonprofit use.

339. The purpose of the posting was comment, i.e. to foster a discussion on a Tea Party website about the Tea Party.

340. The Rosen Letter is not a "creative work." It has a mix of creative and factual elements, and is a generally generic factual piece about the nature of the Tea Party and Rosen's advice to the movement.

341. Much of the Rosen Letter is just a recitation of facts about the Tea Party or statements of Rosen's opinion on political issues.

342. It is undisputed that the whole of the Rosen Letter was posted on the Lowcountry 9/12 Project Blog.

343. The use by the Lowcountry 9/12 Project had no impact whatsoever on the

marketability of the Rosen Letter.

344. The Lowcountry 9/12 Project made a noncommercial and nonprofit use that in no way impacted the marketability of the Rosen Letter. This mandates a finding of fair use.

345. The Defendant respectfully requests the Court recognize the use of the Rosen Letter complained of by Plaintiff as fair use and accordingly dismiss the Amended Complaint.

**FOR A TWENTY-FIRST DEFENSE**  
DE MINIMIS NON CURAT LEX

346. Righthaven's claims are wholly and forever barred by the doctrine of de minimis non curat lex, "the law does not concern itself with trifles."

347. This doctrine is a bar to proceedings under South Carolina common law and appears to be a generally available defense to copyright infringement actions.

348. South Carolina recognizes the doctrine of de minimis non curat lex as a general bar to any proceeding where the alleged injury is trifling. See Evans v. Atlantic Coast Line R. Co., 95 S.E. 335 (S.C. 1918).

349. Evans involved an appeal over a nickel. The Evans Court affirmed the judgment below, indicating the matter was "a fit case to apply the maxim, 'De minimis non curat lex.'" Id. at 336.

350. The defense appears not to be confined to law or equity. In fact, it is not so much a defense as a general principle that the courts are not available to resolve a dispute where a perceived injury is abysmally slight.

351. Federal courts have likewise recognized de minimis non curat lex as a specific defense to copyright actions. E.g., Knickerbocker Toy Co. v. Azrak-Hamway International, Inc., 668 F.2d 699, 703 (2d Cir. 1982).



352. The posting of the Rosen Letter on the Lowcountry 9/12 Project blog did not harm Righthaven in any ascertainable way, even assuming that Righthaven did have the right to exploit the copyright, which it does not.

353. The Rosen Letter was posted on a blog that is read exclusively or practically exclusively by members and friends of the Lowcountry 9/12 Project residing in and around Dorchester County, South Carolina.

354. There is absolutely no evidence that any of these individuals would have read this piece but for the publication on the blog or that any of these individuals read *The Denver Post* as a habit. (And, given this abusive lawsuit, it is safe to say none will again.)

355. Righthaven cannot show any evidence whatsoever that it—or *The Denver Post*—lost a single penny due to the Rosen Letter being displayed on the blog.

356. No more than approximately 20 people viewed the Rosen Letter while it was on the blog.

357. The amount of money *The Denver Post* makes per website visit from Internet advertising is extremely small.

358. While it is not known to Eiser with certainty, upon information and belief the figure is at best a couple of cents per visitor.

359. While *The Denver Post* charges \$2.95 per reprint of the Rosen Letter, not one of the people who read the item on the Lowcountry 9/12 Project Blog would have purchased a reprint.

360. In fact, but for seeing the Rosen Letter on the blog, the blog visitors would almost certainly not have ever even heard about the Rosen Letter, much less have had a desire to purchase a reprint.

361. Upon information and belief, very few if any reprints of the Rosen Letter have ever been purchased, and if any have, the ratio of reprint-purchases-to-website-views is abysmally small.

362. In fact, during the entire time the Lowcountry 9/12 Project Blog displayed the Rosen Letter, *The Denver Post* has displayed it for free on its website.

363. The Rosen Letter remains displayed for free on *The Denver Post* website as of the filing of this pleading.

364. This is a case that will never and could never lead to a finding that Righthaven or even the true copyright holder has been harmed in any way.

365. Even if it could show that every single person who read the Rosen Letter on the Lowcountry 9/12 Project blog would have read it at *The Denver Post* instead, only then would any actual damages be shown, and they would be in the neighborhood of 40 cents.

366. The South Carolina Supreme Court was offended by a case over five cents in 1918.

367. Adjusting for inflation, five cents in 1918 was worth 72 cents in 2010, when the alleged damages were sustained.

368. The approximately 40 cents of damages suffered (not even by Righthaven) is well within the rule of de minimis non curat lex.

369. The Defendant respectfully requests the Court recognize Righthaven as a sham plaintiff without standing and accordingly dismiss the Amended Complaint.

370. The Defendant respectfully requests the Court find this a fit case to apply the maxim de minimis non curat lex and accordingly dismiss the Amended Complaint.

**FOR A TWENTY-SECOND DEFENSE**  
INNOCENT INFRINGEMENT

371. Righthaven's claims are limited due to the doctrine of innocent infringement.

372. While innocent infringement is not a complete defense to an action for actual damages under the Copyright Act, innocent infringement mandates a limitation on statutory damages of not less than \$750 nor more than \$30,000, as the court considers just.

373. Even if Righthaven had standing to sue and the use of the Rosen Letter was found to be infringing, the facts of this case would in no circumstances whatsoever permit an award of statutory damages in excess of \$750.

374. The Defendant respectfully requests the Court dismiss all statutory damages sought by Righthaven in excess of \$750.

**FOR A TWENTY-THIRD DEFENSE**  
WAIVER

375. Righthaven's claims are wholly and forever barred due to waiver.

376. *The Denver Post*, i.e. MediaNews Group, has the right to waive claims on behalf of Righthaven, as it has the right to determine who can and cannot be sued by Righthaven over content appearing in *The Denver Post*. Exhibit 4 at 3.

377. A vice president of MediaNews Group has publicly stated that it does not and will not pursue or authorize Righthaven to pursue actions where content was copied from *The Denver Post* and posted by persons or organizations that either (a) do not have advertising on their websites or (b) are charitable. Id.

378. The Lowcountry 9/12 Project fits both categories.

379. There is no advertising on the Lowcountry 9/12 Project Blog.

380. The Lowcountry 9/12 Project is an eleemosynary nonprofit corporation.

381. The statements referenced above constitute a waiver of all claims deriving from the Lowcountry 9/12 Project use of the Rosen Letter.

382. The Defendant respectfully requests the Court recognize the claims asserted against Defendant Eiser have been waived and accordingly dismiss the Amended Complaint.

**FOR A TWENTY-FOURTH DEFENSE**

LACHES

383. Righthaven's claims are wholly and forever barred due to laches.

384. Laches is an equitable doctrine, which "arises upon the failure to assert a known right." Ex parte Stokes, 182 S.E.2d 306 (S.C. 1971).

385. "Neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 371 S.E.2d 525, 527 (S.C. 1988).

386. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches." Id.

387. Righthaven and its associates at *The Denver Post* learned that the Lowcountry 9/12 Project's Blog had posted the Rosen Letter well prior to filing and serving the Complaint in this action.

388. Righthaven and its associates at *The Denver Post* had every opportunity to request that the Lowcountry 9/12 Project take down the Rosen Letter from the first moment they became aware of the posting.

389. A reasonable party, suffering the “irreparable harm” Righthaven now claims to have suffered, would have immediately contacted the Lowcountry 9/12 Project and ask that the Rosen Letter be taken down.

390. The delay by Righthaven and *The Denver Post* in asserting their rights sooner, by way of filed complaint or simply contact with Defendant, was unreasonable.

391. Righthaven and *The Denver Post* could have shown diligence with regard to their rights, but they did not.

392. The delay worked injury, prejudice, and disadvantage on the Defendant.

393. If Plaintiff or *The Denver Post* had contacted Defendant upon first becoming aware of the alleged infringement, whatever injury Plaintiff suffered would be that much more insignificant, and Defendant would have a higher probability of success on its de minimis arguments.

394. The delay was inexcusable and has impaired Defendant’s ability to defend herself in this action.

395. Further, Defendant believes that Righthaven and *The Denver Post* took longer to sue Defendant after learning about the posting than the amount of time the posting had been up at that point.

396. The instant anyone associated with the Lowcountry 9/12 Project had any idea that *The Denver Post* objected to their use of the Rosen Letter, the Rosen Letter was taken down.

397. If at any point in time Plaintiff or *The Denver Post* had bothered to communicate with the Lowcountry 9/12 Project about the Rosen Letter, it would have been taken down promptly.

398. There are few, if any, absolute rules in equity, but Defendant submits the following should certainly be one:

399. Where a plaintiff sits on his rights while claiming irreparable injury from a continuing harm for longer than the harm originally persisted, laches should entirely bar an action to vindicate those rights.

400. If the posting of the Rosen Letter really was severely harming Righthaven and *The Denver Post*, they suffered more damage as a result of their own tardiness to come to court than from anything Defendant Eiser or the Lowcountry 9/12 Project did.

401. The Defendant respectfully requests the Court recognize Righthaven's claim as barred due to the doctrine of laches and accordingly dismiss the Amended Complaint.

**FOR A TWENTY-FIFTH DEFENSE**  
FIRST AMENDMENT

402. Righthaven's claims are wholly and forever barred due to the First Amendment.

403. The First Amendment circumscribes copyright law, particularly in the area of core political speech.

404. The Rosen Letter constitutes core political speech and is a letter directed to members of the political movement known as the Tea Party.

405. The Lowcountry 9/12 Project considers itself affiliated with the Tea Party.

406. The publication of the Rosen Letter on the Lowcountry 9/12 Project's Blog was for a political purpose: communicating a message from a speaker, the author Rosen, to his intended audience, the other members and friends of the Lowcountry 9/12 Project.

407. In fact, the posting of the Rosen Letter—an open letter—was done to aid the communication of Rosen's ideas with the reasonable belief that was in accordance with Rosen's wishes as expressed by the letter.

408. The Lowcountry 9/12 Project in Dorchester County, South Carolina, did not repost the letter for any commercial purpose.

409. Though *The Denver Post* apparently believes otherwise, the Lowcountry 9/12 Project is in no way a market competitor of *The Denver Post*.

410. *The Denver Post* suffered no damages whatsoever.

411. Not one of the individuals who viewed the Rosen Letter on the Lowcountry 9/12 Project's blog would have gone out and purchased a reprint but for seeing it on the blog.

412. An imposition of liability on these facts, especially an imposition beyond any proven actual damages, would have a direct and constitutionally impermissible effect of chilling speech.

413. The intersection of strict liability and exemplary damages poses constitutional questions in cases not implicating core political speech and First Amendment rights.

414. In cases implicating core political speech, an award based on strict liability including exemplary damages fails to comport with strict scrutiny. Accord New York Times v. Sullivan 376 U.S. 254 (1964).

415. The core political nature of the Rosen Letter, the open letter form of the Rosen Letter, and the total lack of intent and damage to *The Denver Post* (or Righthaven) all prohibit an imposition of liability on Defendant, particularly an imposition of liability outside of proven actual damages.

416. In fact, given the circumstances of this case, holding anyone at all liable for copyright infringement would violate the First Amendment.

417. The Defendant respectfully requests the Court recognize that to afford Righthaven the relief it seeks in this action would violate the First Amendment and accordingly

dismiss the Amended Complaint or limit Righthaven's available damages

**FOR A TWENTY-SIXTH DEFENSE**  
STATUTORY DAMAGES BARRED BY DUE PROCESS

418. Righthaven's claims for statutory damages are wholly and forever barred by due process.

419. Under the line of cases including BMW v. Gore, 517 U.S. 559 (1996) and State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003), the United States Supreme Court has made clear that extreme awards of exemplary damages, as compared with actual damages, violate due process.

420. Further, awarding exemplary damages on strict liability offenses causing de minimis harm is also potentially violative of due process.

421. In this action, Plaintiff seeks statutory damages of \$150,000 and an award of attorney's fees likely to be orders of magnitude greater than any possible actual damages suffered by Plaintiff.

422. Assuming for the sake of argument that Plaintiff truly owned the copyright to the Rosen Letter and Defendant truly infringed it, the damage to Plaintiff is nowhere near \$150,000.

423. As described above, a generous figure for actual damages in this action is 40 cents, even ignoring the myriad legal and factual reasons why there was no actual damage at all.

424. An imposition of \$150,000 in statutory damages for wilful infringement, or even \$750 in statutory damages on a strict liability theory, would horrendously violate due process as expressed by the Supreme Court in the BMW v. Gore line of cases.

425. The Copyright Act's statutory damages remedies are not facially unconstitutional,



but they are certainly unconstitutional as applied in a case of unintentional, innocent infringement causing, at best, de minimis actual damage.

426. Under BMW v. Gore and its progeny, the outer limit of an exemplary damages award in a case featuring like this be in the neighborhood of two to three times actual damages, if the imposition of exemplary damages were even allowed at all.

427. For similar reasons, an award of attorney's fees to Righthaven would likewise violate due process.

428. An award of reasonable attorney's fees almost never, if ever, runs afoul of due process.

429. But in a case such as the one at bar, the expenditure of any attorney's fees at all is unreasonable, due to the de minimis nature of the harm even if all Plaintiff's allegations are proved true.

430. Plaintiff is not expending attorney's fees so as to vindicate its rights under law.

431. Plaintiff is expending attorney's fees as part of a scheme to make money off of filing trifling claims and leveraging settlements.

432. Due process cannot allow an award of attorney's fees to parties who are using the judicial system for a purpose other than the good faith vindication of their rights, even if the attorney's fees sought represent what would, in another case, be a reasonable figure.

433. Put simply, due process does not ordinarily allow a party to recover thousands or tens of thousands of dollars in attorney's fees over a case where the harm was unintentional and the actual damages, making all possible assumptions in favor of Plaintiff, are still likely less than a dollar.

434. Attorneys' fees are not a backdoor method for escaping the BMW v. Gore

prohibition on judgments wildly unconnected to basic principles of fairness and equity.

435. The Defendant respectfully requests the Court recognize that any imposition of damages in this case outside of proven actual damages with a low, single-digit multiplier of exemplary damages would violate due process. Defendants request the Court accordingly dismiss Plaintiff's claims for statutory damages and attorney's fees.

**FOR A TWENTY-SEVENTH DEFENSE**  
FAILURE TO TIMELY REGISTER

436. Righthaven's claims are wholly barred due to Righthaven's failure to timely register a copyright in the Rosen Letter.

437. Under 17 U.S.C. § 411, a copyright infringement plaintiff other than the original author must preregister or register its copyright as a condition precedent to maintaining a copyright infringement action.

438. Under 17 U.S.C. § 412, a copyright infringement plaintiff other than the original author cannot be awarded statutory damages or attorney's fees unless registration is made within three months after the first publication of the work.

439. Righthaven does not own the copyright to the Rosen Letter.

440. Righthaven's submission to the U.S. Copyright Office was fraudulent and of no legal effect.

441. Righthaven cannot have brought this action because registration is a condition precedent to maintaining a copyright infringement action.

442. The Rosen Letter was first published on or about September 23, 2010.

443. Well more than three months have passed since this initial publication.

444. No legal registration of the copyright to the Rosen Letter has been made or attempted.

445. Therefore, no copyright claimant may ever seek statutory damages or attorney's fees over an alleged infringement of the Rosen Letter.

446. Upon information and belief, Righthaven's submission to the U.S. Copyright Office is fatally flawed in another way.

447. The submission states that the author of the Rosen Letter is MediaNews Group, and that the work was a "work made for hire."

448. Given the nature of the Rosen Letter, it could only be a work made for hire if the author, Mike Rosen, was an employee of MediaNews Group and within the course and scope of his employment when he wrote the Rosen Letter.

449. However, Rosen is and, upon information and belief, always has been an independent contractor of MediaNews Group

450. Further, *The Denver Post* website refers to Mike Rosen as a "freelance columnist."

451. A "freelance" columnist would seem to be an independent contractor, not an employee.

452. Therefore, upon information and belief, Righthaven's submission to the Copyright Office is flawed and invalid for another reason.

453. The Defendant respectfully requests the Court recognize the copyright registration of the Rosen Letter to have been fraudulently obtained and accordingly dismiss the Amended Complaint.

**FOR A TWENTY-EIGHTH DEFENSE**  
FAILURE TO MITIGATE DAMAGES

454. Righthaven's claims are barred, in whole or in part, due to the failure to mitigate damages.

455. The common law imposes on an injured party the obligation to take reasonable measures to mitigate damages.

456. Righthaven and its associates at *The Denver Post* learned that the Lowcountry 9/12 Project's Blog had posted the Rosen Letter well prior to filing and serving the Complaint in this action.

457. Righthaven and its associates at *The Denver Post* had every opportunity to request that the Lowcountry 9/12 Project take down the Rosen Letter from the first moment they became aware of the posting.

458. A reasonable party, suffering the "irreparable harm" Righthaven now claims to have suffered, would have immediately contacted the Lowcountry 9/12 Project and asked that the Rosen Letter be taken down.

459. Had that happened, the Lowcountry 9/12 Project would have immediately removed the Rosen Letter, as was done upon learning of this lawsuit.

460. The Lowcountry 9/12 Project's Blog contains multiple ways to contact persons associated with the Lowcountry 9/12 Project.

461. No person associated with Righthaven or *The Denver Post* made any attempt whatsoever to contact the Lowcountry 9/12 Project or anyone associated with it, including Defendant Eiser, until this lawsuit had been filed.

462. The reason for this is that the Rosen Letter is worthless or has a purely de minimis value, and Plaintiff's only concern with it being posted by the Lowcountry 9/12 Project was so Plaintiff could try to extract monies in a copyright infringement action.

463. Plaintiff's purpose in not sending a pre-suit takedown request to Defendant or the Lowcountry 9/12 Project was to maximize the shock value of the service of the Summons

and Complaint on Defendant and to prejudice Defendant in her ability to find counsel in time to respond.

464. Righthaven's business model depends on taking advantage of its targets, and Righthaven's tactics endeavor to put its under as much duress as possible.

465. The Defendant respectfully requests the Court recognize Righthaven has failed to mitigate damages and accordingly dismiss the Amended Complaint or otherwise limit Righthaven's ability to obtain relief.

**FOR A TWENTY-NINTH DEFENSE**  
FAILURE TO STATE A CLAIM

466. Righthaven's claims are wholly barred due to Righthaven's failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Fed.R.Civ.P.

467. Under Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. \_\_\_, 129 S.Ct. 1937 (2009), mere recitations of the elements of a cause of action are insufficient to survive dismissal pursuant to Rule 12(b)(6), Fed.R.Civ.P.

468. Righthaven has failed to make any showing whatsoever that it actually owns the copyright to the Rosen Letter.

469. Righthaven's claims of ownership are merely conclusory and consist of mere recitations of the elements of ownership of a copyright.

470. From the face of the Amended Complaint, there is plenty of reason to believe Righthaven is not the owner of the copyright.

471. The Rosen Letter was written by Mike Rosen—not Righthaven—and published in *The Denver Post*—also not Righthaven.

472. While it is theoretically possible that Righthaven owns the copyright at issue here, it was likewise theoretically possible that the defendants in Twombly had made an

agreement not to compete.

473. A mere possibility is not sufficient to save a complaint with conclusory allegations from dismissal pursuant to Rule 12(b)(6).

474. The mere possibility that Righthaven actually owns the copyright should likewise be insufficient to save this Complaint from dismissal.

475. Given Righthaven's litigation conduct in cases in Nevada and Colorado, this is not merely a theoretical concern or nitpicking of an otherwise-legitimate complaint.

476. Plaintiff will suffer no prejudice if its Complaint is dismissed without prejudice.

477. After adding sufficient factual detail to the Complaint to establish the basis of its claim to ownership of the copyright to the Rosen Letter, Plaintiff can refile.

478. The Defendant respectfully requests the Court recognize the Amended Complaint in this action fails to state a claim upon which relief can be granted and accordingly dismiss the Amended Complaint.

**FOR A THIRTIETH DEFENSE**  
FRIVOLOUS PROCEEDING

479. Righthaven's claims are wholly and forever barred due to the fact that this proceeding is a frivolous action.

480. Frivolous suits are barred under Rule 11, Fed.R.Civ.P. and other law, including the fundamental, inherent authority of a court to require good faith of those who appear before it.

481. The Courts of the United States maintain broad equitable powers to sanction litigants for misconduct in litigation.

482. Defendant Eiser submits that not only has Righthaven engaged in blatant litigation misconduct in this case, Righthaven has done so as a pattern and practice before

the Courts of the United States.

483. Defendant Eiser respectfully requests that the Court fashion such remedy as is appropriate, not only with regard to the action against her but to protect others who may be victims of the Righthaven scheme in the future.

**FOR A THIRTY-FIRST DEFENSE**  
SHAM TRANSACTION DOCTRINE

484. Righthaven's claims are wholly and forever barred due to the sham transaction doctrine.

485. The sham transaction doctrine is a defense typically found in tax cases. There is no great mystery to it: where a transaction is found to be a sham, a court disregards it.

486. This concept is by no means unknown in other areas of law, and has been understood at least since the adoption of the Statute of Elizabeth in England in 1571.

487. Whatever it happens to be called in the area of law under consideration, the point is that courts do not tolerate litigants who engage in sham transactions for the purpose of prejudicing others.

488. Defendant Eiser respectfully requests the Court recognize the sham nature of the copyright assignments to Righthaven and accordingly dismiss the Amended Complaint.

**FOR A THIRTY-SECOND DEFENSE**  
BETTERMENT

489. Righthaven's claims are barred or should be set off due to the doctrine of betterment.

490. Where a defendant's conduct has in some way aided a plaintiff, the defendant is entitled to wholly or partially avoid liability to the extent equitable. E.g., Restatement (Second) of Torts § 920.

491. For example, suppose a stockbroker negligently purchases the wrong stock on behalf of a client, but upon discovery of the mistake by the client, the wrongly-purchased stock has outperformed the intended stock.

492. In such a situation, the client cannot maintain an action. In fact, in most jurisdictions the client cannot even maintain an action if the wrong purchase was done intentionally and would constitute a breach of fiduciary duty had the client been harmed.

493. When the Rosen Letter was posted on the Lowcountry 9/12 Project Blog, a link back to the original posting on *The Denver Post* website was included.

494. Upon information and belief, several of the visitors to the Lowcountry 9/12 Project blog followed the link to *The Denver Post*.

495. Upon information and belief, more traffic was driven to *The Denver Post* than diverted from *The Denver Post* as a result of the posting.

496. Further, the Rosen Letter generated goodwill for *The Denver Post* as a result of its posting, since it was complimentary of the Tea Party political movement, and persons frequenting the Lowcountry 9/12 Project blog consider themselves to be members or allies of the Tea Party movement.

497. Not only did the posting of the Rosen Letter work no net harm to *The Denver Post*, the posting of the Rosen Letter actually benefitted *The Denver Post*.

498. The Defendant respectfully requests the Court find that the posting of the Rosen Letter worked a benefit to Plaintiff and *The Denver Post* and deny Plaintiff relief to the extent of such benefit.

**FOR A THIRTY-THIRD DEFENSE**  
CHARITABLE IMMUNITY

499. Righthaven's claims are wholly and forever barred due to the charitable immunity



doctrine.

500. Partial charitable immunity is the public policy of South Carolina and is codified in statute at S.C. Code § 33-56-180.

501. Where an agent of a charitable organization was acting within the course and scope of the agency relationship, suit may not be maintained unless it can be shown and specifically found that the agent acted recklessly, wilfully, or grossly negligently. Id.

502. Righthaven cannot show that Defendant Eiser acted recklessly, wilfully, or grossly negligently, because she did not.

503. Defendant admits some level of uncertainty as to whether the South Carolina charitable immunity statute is applicable to a copyright infringement action in federal court, and has been able to locate no precedent on the matter, binding or persuasive.

504. Even if the statute itself does not provide a direct defense, a plaintiff's remedies for copyright infringement are generally subject to state law defenses of general application, unrelated to copyright law.

505. The Defendant respectfully requests the Court consider the applicability of South Carolina's charitable immunity statute to this action and apply it if applicable.

506. The Defendant respectfully requests that in the event the Court determines the charitable immunity statute directly inapplicable, the Court consider finding this action barred, in whole or in part, based on South Carolina public policy expressed by the statute.

**FOR A THIRTY-FOURTH DEFENSE**  
**FOR A FIRST CAUSE OF ACTION**  
CIVIL CONSPIRACY

507. Defendant Eiser asserts a cause of action for civil conspiracy by way of

counterclaim against Plaintiff Righthaven.

508. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

509. A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thus causing special damage. Peoples Fed. Sav. and Loan Ass'n of South Carolina v. Res. Planning Corp., 596 S.E.2d 51, 56-57 (S.C. 2004).

510. A conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. Id.

511. Importantly, a civil conspiracy is an act, which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence. Id.

512. As a unique feature of the tort of civil conspiracy, “an action for civil conspiracy will not lie if a plaintiff has obtained relief through other avenues.” Kuznik v. Bees Ferry Assocs., 538 S.E.3d 15, 31 (S.C. Ct. App. 2000), cert. dismissed (January 1, 2004).

513. “Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.” Todd v. South Carolina Farm Bureau Mut. Ins. Co., 278 S.E.2d 607, 611 (S.C. 1981) (quoting 15A C.J.S. Conspiracy § 33, at 718).

514. However, a plaintiff may join as alternate claims as many claims, legal or equitable, as he has against the opposing party, even if the claims are inconsistent. Harper v. Ethridge, 348 S.E.2d 374, 377 (S.C. Ct. App. 1986); See Rule 8(e)(2), SCRPC (“A party may set forth two or more statements of a cause of action or defense

alternatively or hypothetically . . . regardless of consistency and whether based on legal or on equitable grounds or on both.”).

515. Righthaven joined with others, including but not limited to MediaNews Group and *The Denver Post* for the purpose of injuring the Defendant and all other Righthaven victims.

516. The purpose of this combination was to extract monies from Defendant and others in settlement of frivolous and fraudulent claims.

517. The various bad acts done in furtherance of this conspiracy are complained of throughout this pleading.

518. Righthaven’s conduct, in all cases, occurs with one or more conspirators.

519. Defendant Eiser has suffered special harm actually and proximately caused by Righthaven’s conduct as described herein.

520. In the event Defendant is unable to obtain all the relief sought on every claim herein, Defendant respectfully requests the Court grant such relief as is available through the tort of civil conspiracy.

**FOR A THIRTY-FIFTH DEFENSE  
FOR A SECOND CAUSE OF ACTION  
DECLARATORY JUDGMENT**

521. Defendant Eiser asserts a cause of action for declaratory judgment by way of counterclaim against Plaintiff Righthaven.

522. “Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, a district court ‘may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.’ The Act, however, gives the court the discretion to decline issuing the judgment.” NGM Ins. Co. v. Evans, 642 F.

Supp. 2d 511, 515 (W.D.N.C. 2009).

523. The court's discretion must be balanced by considerations of federalism, efficiency, and comity. Id.

524. In this action, efficiency will be greatly served if the Court make a declaration as to the legality of Righthaven's business model.

525. Further, Righthaven has taken a "damn the torpedoes, full speed ahead" approach to the tremendously damaging rulings they have received in recent days, indicating it intends to keep trying to find a way that its scheme can operate.

526. Whether this is serious or simply for the purpose of appearing publicly unfazed by the repeated adverse rulings against Righthaven, Defendant does not know.

527. However, it would appear that Righthaven intends its reign of terror to continue until someone puts a permanent stop to it.

528. Because of that, Defendant Eiser requests the Court's indulgence in a declaratory judgment counterclaim.

529. Specifically, Defendant Eiser respectfully requests the Court declare that Righthaven's business model is illegal, at least in South Carolina.

530. Finally, Defendant Eiser respectfully requests the Court, in its discretion and to the extent justice requires, declare any other matter of fact or law appearing in, or necessarily related to, those matters appearing in the pleadings in this action.

**FOR A THIRTY-SIXTH DEFENSE  
FOR A THIRD CAUSE OF ACTION  
FRAUD**

531. Defendant Eiser asserts a cause of action for fraud by way of counterclaim against Plaintiff Righthaven.

532. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

533. Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence. In order to prove fraud, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Ardis v. Cox, 431 S.E.2d 267, 269 (S.C. Ct. App. 1993).

534. A second species of fraud exists, fraudulent concealment. As the South Carolina Supreme Court explained:

In the case of Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 23 S.E.2d 372, we held that where either party to a transaction conceals some material fact within his own knowledge, which it is his duty to disclose, he is guilty of actual fraud. Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction.

Lawson v. Citizens & S. Nat. Bank of S.C., 193 S.E.2d 124, 126 (S.C. 1972).

535. Nondisclosure is fraudulent when there is a duty to speak. Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction. Pitts v. Jackson Nat. Life Inc. Co., 574 S.E.2d 502, 510 (2002) (citations and quotations omitted).

536. The duty to disclose may be reduced to three distinct classes as follows:

537. First, a duty to disclose is present where it arises from a preexisting definite fiduciary relation between the parties. Id.

538. Second, the duty exists where one party expressly reposes a trust and confidence

in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied. Id.

539. Finally, the duty to disclose is found where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties. Id.

540. *The Denver Post* made representations to its customers indicating that they could share material on *The Denver Post's* website without penalty so long as the use was noncommercial and, arguably, so long as attribution was given.

541. This representation was false, as there certainly was a penalty—*The Denver Post* then procured a third party to sue the Lowcountry 9/12 Project.

542. This representation was material to the Lowcountry 9/12 Project's conduct in sharing the Rosen Letter.

543. *The Denver Post* knew that its representations were false.

544. *The Denver Post* intended for its representations to be acted upon.

545. In fact, *The Denver Post* had specialized software operating on its website to facilitate sharing of content which an agent of the Lowcountry 9/12 Project used to share the Rosen Letter.

546. The Lowcountry 9/12 Project was totally ignorant of the fact that *The Denver Post's* exhortations to share its content were false.

547. The Lowcountry 9/12 Project relied on those representations.

548. As a customer of *The Denver Post* with no notice of the deception, the Lowcountry 9/12 Project had every right to so rely.

549. After sharing the Rosen Letter for a noncommercial purpose as encouraged by *The Denver Post*, *The Denver Post* procured Righthaven (or vice versa) to file a lawsuit against the president of the Lowcountry 9/12 Project, resulting in consequent and proximate injury.

550. Further, *The Denver Post* had a duty to disclose to its customers that its exhortations to share content noncommercially were bogus.

551. From the circumstances of this case, the nature of the dealings between a newspaper and its customers, and their position towards each other, such a trust and confidence in this particular case is necessarily implied, as follows:

552. *The Denver Post* is well aware that most of its customers are not intellectual property experts.

553. *The Denver Post* is well aware that its customers likely have broad misconceptions as to the dictates of intellectual property law.

554. In particular, *The Denver Post* is well aware that most people believe any level of copying is acceptable so long as attribution is given.

555. *The Denver Post* in fact furthers this misconception by using software to automatically including attribution information in material copied from its website.

556. While its customers have misconceptions, *The Denver Post* can be expected to be extremely familiar with intellectual property issues given the nature of its industry.

557. Customers of *The Denver Post* go to its website and find exhortations to share content with only a single restriction: the shared content must be used noncommercially.

558. In this situation, *The Denver Post* has led unsophisticated (and even sophisticated) customers to believe they can do something that *The Denver Post* believes is actionable

copyright infringement.

559. Under the facts and circumstances of this case, *The Denver Post* has a duty not to conceal the fact that it would procure a lawsuit over noncommercial sharing even though its website actively encourages it.

560. *The Denver Post's* customers trust and rely on it when it encourages them to share its content noncommercially.

561. Instead of rectifying the situation with a clarification of some sort prior, *The Denver Post* instead arranges to have its customers served with no-warning lawsuits when they do exactly what they thought *The Denver Post* had authorized.

562. Because of the relationship between Righthaven and *The Denver Post*, it is vicariously liable on this claim.

563. Defendant respectfully requests the Court grant such relief as is available through the tort of fraud.

**FOR A THIRTY-SEVENTH DEFENSE  
FOR A FOURTH CAUSE OF ACTION  
CONSTRUCTIVE FRAUD**

564. Defendant Eiser asserts a cause of action for constructive fraud by way of counterclaim against Plaintiff Righthaven.

565. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

566. The elements of constructive fraud are the same as those for fraud sans intent. Pitts v. Jackson Nat. Life Ins. Co., 574 S.E.2d 502, 509 (S.C. 2002).

567. This cause of action is asserted in the event Defendant is unable to meet her burden of proof on the intent element of the fraud cause of action.



568. Defendant respectfully requests the Court grant such relief as is available through the tort of constructive fraud.

**FOR A THIRTY-EIGHTH DEFENSE  
FOR A FIFTH CAUSE OF ACTION  
NEGLIGENT MISREPRESENTATION**

569. Defendant Eiser asserts a cause of action for negligent misrepresentation by way of counterclaim against Plaintiff Righthaven.

570. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

571. To maintain a claim for negligent misrepresentation, a plaintiff must show by a preponderance of the evidence: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation. McLaughlin v. Williams, 665 S.E.2d 667, 670 (S.C. Ct. App. 2008)

572. *The Denver Post's* representations on its website that content could be shared for any noncommercial purpose were false and were made to the Lowcountry 9/12 Project.

573. *The Denver Post* is a for-profit concern, a d/b/a of MediaNews Group, and it has a pecuniary interest in the representations it makes on its website. The reason for putting sharing tools and encouraging sharing is because of the perceived pecuniary benefit associated with increased traffic to the website as a result of its customers sharing content and linking back.

574. *The Denver Post* has a duty to its customers not to provide them with false information that it will later sue them over.

575. *The Denver Post* breached that duty by failing to exercise due care with the design and content of its website and the material there. *The Denver Post's* failure to exercise due care resulted in customers believing *The Denver Post* authorized and encouraged sharing of content for noncommercial purposes when in reality *The Denver Post* apparently viewed such conduct as illegal copyright infringement.

576. The Lowcountry 9/12 Project relied to its detriment on the representations of *The Denver Post* and its President has now been sued as a result.

577. Defendant respectfully requests the Court grant such relief as is available through the tort of negligent misrepresentation.

**FOR A THIRTY-NINTH DEFENSE  
FOR A SIXTH CAUSE OF ACTION  
LANHAM ACT**

578. Defendant Eiser asserts a cause of action for a violation of Section 43(a)(1), Subsections (A) and (B), of the Lanham Act<sup>1</sup> by way of counterclaim against Plaintiff Righthaven.

579. The material within this cause of action is also pled as a setoff defense,

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<sup>1</sup> The majority of courts have held, as does the Fourth Circuit, that consumers cannot bring claims pursuant to Section 43(a) of the Lanham Act. E.g., Made in the USA Foundation v. Phillips Foods, Inc., 365 F.3d 278 (4th Cir. 2004). It would therefore appear at first blush that Defendant Eiser does not have standing to assert this claim. However, Defendant Eiser respectfully submits that Plaintiff should be estopped from objecting to Eiser's standing under the Lanham Act because Plaintiff's basis for haling Defendant into court is an allegation that Defendant interfered with Plaintiff's limited monopoly in a copyright, a fundamentally competitive act. The fact is Plaintiff never owned the copyright in question and Defendant did not interfere with it. But where a party asserts a bogus claim alleging illegal competition, that party should not be able to object that there really was no competition when a Lanham Act claim is asserted in response.

recoupment defense, and reduction defense.

580. Section 43(a)(1)(A) of the Lanham Act is codified at 15 U.S.C. § 1125.

581. As relevant to this action, the elements of a claim are as follows:

582. A party is liable to anyone who is or is likely to be damaged where that party (1) in connection with any goods or services (2) uses in commerce any false or misleading description or representation of fact which (3) is likely to cause confusion, or to cause mistake, or to deceive (a) as to the affiliation, connection, or association of such person with another person or (b) as to commercial activities by another person.

583. Section 43(a)(1)(B) of the Lanham Act is codified at 15 U.S.C. § 1125.

584. As relevant to this action, the elements of a claim are as follows:

585. A party is liable to anyone who is or is likely to be damaged where that party (1) in connection with any goods or services (2) uses in commerce any false or misleading description or representation of fact which (3) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.

586. Righthaven has made a variety of statements to Defendant Eiser and others in connection with articles and other content appearing in newspapers.

587. These articles and other content constitute "goods" as that term is used in the Lanham Act.

588. Righthaven has made its statements in commerce, as Righthaven is a for-profit entity whose business is filing lawsuits over newspaper articles and other content.

589. Preparing and filing lawsuits and attempting to negotiate paid settlements constitutes "commerce" as that term is used in the Lanham Act.

590. In particular, Righthaven claims that it is the true owner of the copyright to articles and other content.

591. Righthaven's claim to own the copyrights is a false and misleading representation of fact.

592. This representation of fact is likely to cause confusion, to cause mistake, or to deceive as to Righthaven's affiliation, connection, and association with the owners of the newspapers whose content it falsely claims to own.

593. In fact, Righthaven's claim to be the owner of copyrights has induced a variety of individuals to pay monies to Righthaven.

594. Righthaven's claim has induced others, including Defendant Eiser, to spend money defending Righthaven's claims on various grounds when no such defense was necessary, as Righthaven's representations as to its ownership of copyrights is false.

595. In dismissing Righthaven's copyright claims in Righthaven v. Democratic Underground, Judge Hunt found Righthaven to have made false or misleading descriptions or representations of facts that induced federal district judges in the District of Nevada to make procedural rulings in Righthaven's favor. Exhibit 1 at 10.

596. In rejecting Righthaven's citation to prior favorable rulings, Chief Judge Hunt wrote "As the undersigned issued one of the orders Righthaven cites for this argument, the undersigned is well aware that Righthaven led the district judges of this district to believe that it was the true owner of the copyright in the relevant news articles. Righthaven did not disclose the true nature of the transaction[.]" Id.

597. For the purposes of advertising and promotion, Righthaven's agents have made numerous claims to media and others that it owns copyrights in the works it sues over,

such claims being false and misleading representation of fact.

598. Righthaven has likewise made false and misleading representations of fact with regard to those who allegedly infringe Righthaven's copyrights.

599. For example, Righthaven's CEO Steve Gibson gave an interview to CNN and Fortune Magazine that was published on January 6, 2011. The interview, titled "Righthaven Q&A: C&D letters don't stop infringement," is Exhibit 11.

600. In the interview, Gibson refers to Righthaven defendants as "the infringement community" that "was caught . . . not obeying the law" and is "a community of thieves." Exhibit 11 at 2.

601. These statements are false and misleading representations with respect to Plaintiff Eiser, who was widely known as a Righthaven defendant when these statements were published. Mrs. Eiser's case received even more attention than the usual Righthaven cases because it was the first case brought outside of Nevada or Colorado, the locations of Righthaven's major client publications the Las Vegas Review-Journal and The Denver Post.

602. Gibson published these statements to CNN and Fortune Magazine and intended them to be published worldwide by CNN and Fortune Magazine, which they were.

603. The false and misleading claims of copyright infringement, breaking the law, and thievery against those one claims are competitors misrepresented the nature of Eiser's activities.

604. Agents of Righthaven have made similar claims in a variety of other promotional and advertising venues.

605. A party successfully asserting a Section 43(a) claim is entitled to equitable relief

including injunctions and a recovery of defendant's profits or damages sustained by the plaintiff together with the costs of the action. 15 U.S.C. §§ 1116 & 1117. Further, "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a).

606. Defendant Eiser has incurred various costs and obligations associated with responding to, and defending herself from, Plaintiff's false claims.

607. Defendant respectfully requests the Court grant such relief as is available based upon the violations of the Lanham Act described herein.

**FOR A FORTIETH DEFENSE  
FOR A SEVENTH CAUSE OF ACTION  
BREACH OF CONTRACT**

608. Defendant Eiser asserts a cause of action for breach of contract by way of counterclaim against Plaintiff Righthaven.

609. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

610. The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. Fuller v. E. Fire & Cas. Ins. Co., 124 S.E.2d 602, 610 (S.C. 1962).

611. This is an unusual situation in which to assert a breach of contract claim. Defendant Eiser had never heard of Righthaven until they had already filed a lawsuit against her, so it is understandably difficult to conceive of how Righthaven's actions breach a contract with Eiser. The basis for the claim is as follows.

612. On or about September 23rd, 2010, an individual associated with the Lowcountry 9/12 Project—not Dana Eiser—went to *The Denver Post* website within the scope of that

volunteer capacity and copied and posted the Rosen Letter.

613. When an agent of the Lowcountry 9/12 Project went to *The Denver Post* website, the Lowcountry 9/12 Project became a customer of *The Denver Post*, creating privity.

614. Other agents of the Lowcountry 9/12 Project, including its President Dana Eiser, were therefore in privity with *The Denver Post* as well so long as they were acting within the course and scope of their agency relationship with the Lowcountry 9/12 Project.

615. When Dana Eiser was sued over the Rosen Letter, Eiser was within her agency relationship with the Lowcountry 9/12 Project.

616. Further, Righthaven in this action has been acting as an agent, joint venture, and co-conspirator of *The Denver Post*, a d/b/a of MediaNews Group

617. MediaNews Group d/b/a *The Denver Post* is in privity with its customers, including the Lowcountry 9/12 Project and its agents.

618. MediaNews Group cannot breach its contract with its customers either directly or through an agent, Righthaven.

619. The terms of the contract, so far as the Lowcountry 9/12 Project understood them, were that articles could be viewed on *The Denver Post* website with advertising.

620. Further, *The Denver Post* took three actions which would have made any reasonable person in the position of the Lowcountry 9/12 Project believe posting the Rosen Letter was not just allowed but encouraged by *The Denver Post*.

621. First, every page of *The Denver Post* website displays this notice: "This material may not be published, broadcast, rewritten or redistributed for any commercial purpose."

622. This notice leads customers of *The Denver Post* to believe that they may indeed use material for noncommercial purposes.

623. Second, *The Denver Post* encourages the sharing of stories on its website by providing software tools to do just that.

624. *The Denver Post* utilizes a “Bookmark & Share” feature encouraging the sharing of the Rosen Letter on more than 300 websites and social media outlets.

625. Third, *The Denver Post* website allows highlighting-and-copying and utilizes software to insert a trackback-style link on any copy-paste operation inserting the text “Read more:” with the title of the story and a link to the story.

626. This not only signals that *The Denver Post* is aware copying and pasting occurs, but creates a belief in the mind of any reasonable person that *The Denver Post* not only has no objection but encourages its customers do copy-and-paste so as to generate link traffic for the website.

627. Put simply, the fact that *The Denver Post* website inserted text signaling approval of copying and pasting made that expectation a part of the relationship between *The Denver Post* and its online customers.

628. *The Denver Post* established a relationship in the nature of a contract with its customer the Lowcountry 9/12 Project that Righthaven, as an agent of *The Denver Post*, was bound to respect.

629. Righthaven, standing in the shoes of *The Denver Post*, in fact did not respect the contours of that relationship and instead filed a lawsuit against the President of the Lowcountry 9/12 Project for conduct *The Denver Post* had authorized explicitly and implicitly.

630. Defendant respectfully requests the Court grant such relief as is available for breach of contract.



**FOR A FORTY-FIRST DEFENSE  
FOR AN EIGHTH CAUSE OF ACTION  
BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT**

631. Defendant Eiser asserts a cause of action for breach of contract accompanied by a fraudulent act by way of counterclaim against Plaintiff Righthaven.

632. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

633. The action for breach of contract accompanied by a fraudulent act is an action for breach of contract wherein punitive damages are available. Lister v. NationsBank of Delaware, N.A., 494 S.E.2d 449, 454 (S.C. Ct. App. 1997).

634. To recover punitive damages for breach of contract accompanied by a fraudulent act, the plaintiff must prove three elements: (1) A breach of contract. (2) Fraudulent intent relating to the breaching of the contract and not merely to its making. Fraudulent intent is normally proved by circumstances surrounding the breach. (3) A fraudulent act accompanying the breach. The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character. Id.

635. The breach of contract by *The Denver Post* by and through its agent Righthaven was accompanied by a fraudulent act.

636. *The Denver Post*, by its conduct, lured an agent of the Lowcountry 9/12 Project to copy and paste the Rosen Letter on the Lowcountry 9/12 Project Blog.

637. *The Denver Post* actively encouraged customers to share its content, but when they did, *The Denver Post* arranged to have them sued by Righthaven.

638. *The Denver Post* engaged in a variety of sham transactions with Righthaven so as

to make it appear that Righthaven had a right to sue when Righthaven did not.

639. Righthaven, acting as an agent of *The Denver Post*, committed a variety of fraudulent acts as well, including but not limited to its representations that it owned the copyright to the Rosen Letter when it did not.

640. Both Righthaven and *The Denver Post* d/b/a MediaNews Group had a fraudulent intent at the time of committing the fraudulent acts herein complained of.

641. Defendant respectfully requests the Court grant such relief as is available for breach of contract accompanied by a fraudulent act.

**FOR A FORTY-SECOND DEFENSE  
FOR A NINTH CAUSE OF ACTION  
BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING**

642. Defendant Eiser asserts a cause of action for breach of the duty of good faith and fair dealing by way of counterclaim against Plaintiff Righthaven.

643. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

644. A contract between vendor and customer carries with it an implied covenant of good faith and fair dealing. E.g., *RoTec Services, Inc. v. Encompass Services, Inc.*, 597 S.E.2d 881, 884 (S.C. Ct. App. 2004).

645. The breach of the duty of good faith and fair dealing is a type of breach of contract action. Id.

646. The RoTec court treated the allegations related to the breach of the duty of good faith and fair dealing as a part of the breach of contract claim in that case.

647. Defendant Eiser has no objection to the allegations of those two causes of action being merged into one for submission to the jury in accordance with RoTec.

648. An agent of the Lowcountry 9/12 Project, acting in the course and scope of that agency relationship, visited *The Denver Post* website, read the Rosen Letter, and posted it on the Lowcountry 9/12 Project Blog.

649. Visitors to *The Denver Post* website are customers of *The Denver Post*.

650. Accordingly, *The Denver Post* owes its customers the implied duty of good faith and fair dealing.

651. After an agent of the Lowcountry 9/12 Project visited *The Denver Post* website, *The Denver Post* owed to the Lowcountry 9/12 Project the duty of good faith and fair dealing.

652. Every page of *The Denver Post* website displays this notice: “This material may not be published, broadcast, rewritten or redistributed for any commercial purpose.”

653. This notice leads customers of *The Denver Post* to believe that they may indeed use material for noncommercial purposes.

654. The Lowcountry 9/12 Project is a noncommercial, nonprofit entity.

655. The Lowcountry 9/12 Project’s Blog, at <http://lowcountry912.wordpress.com/>, does not sell advertising and never has.

656. The noncommercial nature of the Lowcountry 9/12 Project is immediately ascertainable from a visit to its website.

657. *The Denver Post*, after discovering the Lowcountry 9/12 Project’s blog displayed the Rosen Letter, never attempted to communicate to the Lowcountry 9/12 Project that the notice on *The Denver Post* website was misleading and contrary to *The Denver Post*’s own position.

658. Further, *The Denver Post* takes a variety of steps to actively encourage users to

share material on *The Denver Post* website, including but not limited to providing electronic tools to enable sharing of material in over 300 different ways.

659. These actions give rise to a reasonable expectation on the part of *The Denver Post* website customers that noncommercial sharing of material is acceptable to and encouraged by *The Denver Post*.

660. After learning that the Lowcountry 9/12 Project blog had posted an article from *The Denver Post*, instead of operating in good faith and fair dealing by contacting the Lowcountry 9/12 Project and asking that the article be removed, *The Denver Post* instead arranged for a third party, Righthaven, to sue the President of the Lowcountry 9/12 Project.

661. *The Denver Post* could have easily determined that the Lowcountry 9/12 Project in no way intended to harm *The Denver Post* by its posting.

662. The posting gave full credit to *The Denver Post* and included a link back to the story on *The Denver Post* website.

663. Regardless of whether the Lowcountry 9/12 Project's posting of the article constitutes actionable copyright infringement, no reasonable person could have believed the Lowcountry 9/12 Project was operating in bad faith.

664. However far the duty of good faith and fair dealing goes, it must clearly go this far: a business cannot lead—or mislead—a customer to believe he or she may do something, then arrange to have the customer sued without warning when they do the “something” in question. And it does not matter what the “something” is.

665. Further, a business in a superior position of knowledge about its industry has an obligation under the duty of good faith and fair dealing to recognize that its customers are

not in a similar position.

666. *The Denver Post* is in the newspaper business and its agents are allegedly familiar with intellectual property law.

667. *The Denver Post* is likewise well aware that the vast majority of their customers are not at all familiar with intellectual property law.

668. *The Denver Post* has an obligation under the duty of good faith and fair dealing not to exploit this position of superior knowledge to the detriment of their customers who unintentionally violate *The Denver Post's* rights, especially those who do so in a clearly de minimis and unintentional fashion.

669. Defendant respectfully requests the Court grant such relief as is available for breach of the duty of good faith and fair dealing.

**FOR A FORTY-THIRD DEFENSE**  
**FOR A TENTH CAUSE OF ACTION**  
BREACH OF THE DUTY OF GOOD FAITH AND FAIR  
DEALING ACCOMPANIED BY A FRAUDULENT ACT

670. Defendant Eiser asserts a cause of action for breach of the duty of good faith and fair dealing accompanied by a fraudulent act by way of counterclaim against Plaintiff Righthaven.

671. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

672. Just as the claim for the breach of the duty of good faith and fair dealing should likely be consolidated with the claim for breach of contract for submission to the jury, so should this claim be consolidated with the breach of contract accompanied by a fraudulent act claim for submission to the jury. See RoTec Services, Inc. v. Encompass Services, Inc., 597 S.E.2d 881, 884 (S.C. Ct. App. 2004).

673. This claim is set apart in the pleadings for the convenience of the court and the other parties.

674. In addition to the material pled in support of the breach of the duty of good faith and fair dealing, *The Denver Post* committed fraudulent acts accompanying the breach.

675. *The Denver Post* used software to surreptitiously insert a code on material copied and pasted from *The Denver Post* website.

676. For example, when an agent of the Lowcountry 9/12 Project copied the Rosen Letter from *The Denver Post* and pasted it, the following text was inserted automatically by *The Denver Post's* software: "Read more: Rosen: A letter to the Tea Partyers – The Denver Post [http://www.denverpost.com/opinion/ci\\_16147229#ixzz10NYc7ACn](http://www.denverpost.com/opinion/ci_16147229#ixzz10NYc7ACn)".

677. The first portion, i.e. "Read more: Rosen: A letter to the Tea Partyers – The Denver Post," indicates to a reasonable person that *The Denver Post* is aware the text has been copied and pasted and simply wishes to insert a link back to the article on *The Denver Post's* website.

678. Not so. In fact, upon information and belief, that text is inserted merely as a Trojan horse.

679. The real reason for the text is so that it can insert the characters appearing after the pound sign, ixzz10NYc7ACn.

680. This is a unique per-customer code generated to allow *The Denver Post* to associate a particular pasted copy with a specific customer's IP address for the purpose of identifying defendants for prosecution—and persecution—by Righthaven.

681. All of this is done without any notice to *The Denver Post's* customers.

682. In fact, the "Read more" text appears to be inserted only to give the impression

that the customer performing the copy-paste is doing nothing wrong, when in reality it is merely cover for the Trojan horse tracking code that *The Denver Post* will later use to assist Righthaven in litigation against the customer.

683. *The Denver Post's* software could easily be configured to insert "Notice: You are violating *The Denver Post's* copyright."

684. Instead, the software tricks unknowing users into believing they have done nothing wrong while simultaneously helping Righthaven sue them later.

685. This is a fraudulent act accompanying Righthaven's breach of the duty of good faith and fair dealing, as Righthaven stands in the shoes of *The Denver Post* for the purposes of these claims.

686. Defendant respectfully requests the Court grant such relief as is available for breach of the duty of good faith and fair dealing accompanied by a fraudulent act.

**FOR A FORTY-FOURTH DEFENSE  
FOR AN ELEVENTH CAUSE OF ACTION  
ABUSE OF PROCESS**

687. Defendant Eiser asserts a cause of action for abuse of process by way of counterclaim against Plaintiff Righthaven.

688. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

689. The essential elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding. Huggins v. Winn-Dixie Greenville, Inc., 153 S.E.2d 693 (1967).

690. Some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process is required.

691. There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. Id.

692. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself. Id.

693. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. Id.

694. Righthaven's lawsuits are sham proceedings. Righthaven does not have the right to sue over any copyrights, and yet it does.

695. Righthaven does not file lawsuits with the intent of seeking the just resolution of legitimate or arguably legitimate claims before a court.

696. Righthaven's purpose, instead, is to scare victims with legal process into paying settlements Righthaven is not entitled to.

697. Righthaven's ulterior purpose, therefore, is to gain funds through settlements of claims it has no right to compromise nor had any right to file suit over in the first place.

698. Further, Righthaven makes a threat not authorized by the process of even a frivolous copyright infringement action, a threat that its victim will be ordered by a court transfer its website to Righthaven.

699. The website transfer demand is not a legitimate objective of a copyright infringement lawsuit.

700. Righthaven's lawsuits, website transfer demand and all, are archetypal examples of abusive process: they involve the use of process as a threat or club to obtain the payment of money to which Righthaven is absolutely not even arguably entitled.



701. Defendant respectfully requests the Court grant such relief as is available through the tort of abuse of process.

**FOR A FORTY-FIFTH DEFENSE  
FOR A TWELFTH CAUSE OF ACTION  
MALICIOUS PROSECUTION**

702. Defendant Eiser provisionally asserts a cause of action for malicious prosecution by way of counterclaim against Plaintiff Righthaven.

703. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

704. To maintain an action for malicious prosecution, a party must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the the party against whom the claim is asserted; (3) termination of such proceedings in favor of the party asserting the malicious prosecution claim; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. Law v. South Carolina Dept. of Corrections, 629 S.E.2d 642, 648 (S.C. 2006).

705. The court went on to explain that the term “malice” in malicious prosecution proceedings is a term of art with a different meaning than the dictionary definition:

Malice is defined as “the deliberate intentional doing of an act without just cause or excuse.” Malice does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition, although such an attitude certainly may indicate malice. Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Malice also may be implied in the doing of an illegal act for one’s own gratification or purpose without regard to the rights of others or the injury which may be inflicted on another person. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution.

Id. at 649 (citations omitted).

706. Righthaven has instituted and continued original judicial proceedings against Eiser in the nature of a copyright infringement action.

707. This cause of action is asserted provisionally in the event Righthaven's copyright infringement action against Defendant is terminated in Defendant's favor.

708. Righthaven lacked probable cause to institute the proceedings because Righthaven knew it did not have legal standing to pursue copyright infringement actions.

709. While a lack of probable cause suffices to provide an inference of malice, other facts show malice as well.

710. Righthaven ally Sherman Frederick has expressly acted out of spite with regard to the Righthaven matters by, among other things, making allusions to physical violence and calling Righthaven victims "thieves." Exhibit 12.

711. As Judge Hunt noted, "Stephens Media's then CEO, Sherman Frederick, generally threatened potential defendants that he would send his 'little friend called Righthaven' after them." Exhibit 1 at 14.

712. The "little friend" remark is a reference to the famously climactic scene in the movie "Scarface," where drug dealer Tony Montana viciously guns down people raiding his compound with an M-16 rifle equipped with a grenade launcher.

713. Another example is Stephens Media employee and associate of Sherman Frederick and Righthaven, columnist Vin Suprymowicz.

714. A reader write to Suprymowicz to decry his association with Righthaven. Suprymowicz responded:

I don't think I will miss you. I have a far lower opinion of thieves than you appear to have. In fact, watching them copy my columns while

interpolating their own content and pretending it's mine, watching them throw small merchants on the verge of bankruptcy by switching price tags and otherwise stealing merchandise below cost, I hate them with a passion. Lawsuits? They should have their godd\*\*ned hands cut off and nailed to the wall of City Hall.

715. Sherman Frederick ran this note, clearly ratifying it and signaling his agreement and approval, in a column on September 2, 2010.

716. Righthaven CEO Steve Gibson has likewise expressed malice towards Righthaven victims, calling them thieves.

717. In one example, Gibson gave an interview to CNN and Fortune Magazine that was published on January 6, 2011. Exhibit 11.

718. Righthaven's conduct in other cases shows that "malignant disposition" is a company policy.

719. Righthaven has gone after an autistic gentleman named Brian Hill (Righthaven v. Hill), pursued satisfaction of claims out of social security benefits directly in violation of 42 U.S.C. § 407 (Righthaven v. Hill and, upon information and belief, others), served a lady with a complaint that made no reference to her (Righthaven v. Leon), and even sued a reporter for posting a copy of a court pleading (Righthaven v. Gardner).

720. Judging by the actions of Righthaven CEO Steve Gibson and Stephens Media's former CEO Sherman Frederick, both would appear to have ill-regulated minds.

721. Given the actions of Righthaven, in this case and others, it is beyond clear that Righthaven and its associates are not sufficiently cautious before causing injury to others and disregard the consequences of their injurious acts.

722. For example, after serving military nurse Denise Nichols with a lawsuit not naming her, Righthaven objected to paying her attorney's fees after the inevitable

dismissal, absurdly stating: “Nichols’ motion should also be denied because it is nothing short of an attempt at trying to extract blood money in the form of an attorney’s fee award to which she is not entitled.” Exhibit 13.

723. Righthaven performs illegal acts for its own gratification—monetary gratification—without regard to the rights of others or the injury these lawsuits inflict on other their victims.

724. These illegal acts include filing frivolous lawsuits, lying to the court, wholesale violations of the mandates of legal professionalism, the list goes on and on.

725. Defendant respectfully requests the Court grant such relief as is available through the tort of malicious prosecution, in the event the Plaintiff’s copyright infringement action is terminated in Defendant’s favor.

**FOR A FORTY-SIXTH DEFENSE  
FOR A THIRTEENTH CAUSE OF ACTION  
FAIR DEBT COLLECTION PRACTICES ACT**

726. Defendant Eiser asserts a cause of action for a violation of the Fair Debt Collection Practices Act (“FDCPA”) by way of counterclaim against Plaintiff Righthaven.

727. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

728. The FDCPA, codified at 15 U.S.C. § 1692 et seq., regulates consumer debt collection.

729. The FDCPA defines “debt collector” as “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or

indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6).

730. The FDCPA applies to attorneys, even during litigation, if such attorneys regularly attempt to collect consumer debts. Heintz v. Jenkins, 514 U.S. 291, 293 (1995); see also Sayyed v. Wolpoff & Abramson, 485 F.3d 225 (4th Cir. 2007) (foreclosing practically all common law privilege defenses to FDCPA actions by attorneys or others engaged in litigation).

731. The FDCPA contains express prohibitions and rules regarding debt collection.

732. Further, the FDCPA contains a blanket prohibition on unfair or unconscionable debt collection practices.

733. Righthaven uses instrumentalities of interstate commerce and the mails in the conduct of its business.

734. The principle purpose of Righthaven’s business is to collect monies from persons it claims infringed on copyrights.

735. These alleged infringements occur, by and large, when a customer of a newspaper visits the newspaper’s website and copies material found there.

736. Righthaven then claims that copyright infringement has occurred, files a lawsuit against the customer, typically seeking statutory damages of \$150,000, attorney’s fees, and control of the customer’s website.

737. What Righthaven seeks is to collect on a “debt” as that term is used in the FDCPA. The FDCPA defines “debt” as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services of which are the subject of the transaction are primarily for

personal, family, or household purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C. § 1692a(5).

738. Practically all customers of newspapers are consumers with regard to the material found within a newspaper.

739. The subject of transactions between a customer obtaining the news from a newspaper—i.e., the newspaper article or other newspaper content—is ordinarily primarily for personal, family, or household purposes.

740. Righthaven’s claims that its targets have an obligation to pay money arising out of these transactions.

741. While Righthaven claims the debts are owed to it, in reality any such debts, to the extent they were legitimate obligations, be owed or due, in whole or in part, to the newspaper in question.

742. This is true as a matter of law and as a matter of Righthaven’s contractual relationship with newspapers.

743. Righthaven is therefore a debt collector.

744. Righthaven habitually violates various provisions of the FDCPA as follows:

745. Righthaven communicates with third parties about the debt in violation of 15 U.S.C. § 1692c(b).

746. Agents of Righthaven have repeatedly made statements to the press and to other third parties about Righthaven’s actions and the alleged debts of its targets, including Eiser. Exhibit 11.

747. Agents of Righthaven have used such statements as vehicles to collectively denigrate its targets and their legal defenses. Id.

748. Such statements have denigrated Eiser and her legal defenses.

749. Righthaven engages in conduct to harass, oppress, and abuse its targets in connection with collections. This conduct violates 15 U.S.C. § 1692d.

750. Righthaven makes demands that are wholly divorced from any realistic debt owed by its targets, who in many cases owe no debt whatsoever, such as Eiser.

751. Righthaven makes demands that are unlawful, including but not limited to demands that its targets turn over control of their websites to Righthaven. Righthaven did this to Eiser.

752. Righthaven's conduct is designed to, and often does, abuse and oppress its targets, who are cowed by the litigation Righthaven promulgates.

753. Righthaven's conduct in filing lawsuits without warning or pre-litigation demand is designed to cause its targets mental anguish to induce them to pay.

754. Righthaven uses false, deceptive, and misleading representations and means in connection with collections. This conduct violates 15 U.S.C. § 1692e.

755. As described above, Righthaven frequently makes false representations as to the character, amount, and legal status of debts it claims.

756. Righthaven did this with Eiser, falsely claiming she owed any debt at all and falsely claiming entitlement to remedies Righthaven knew were unlawful in any possible scenario. This conduct violates 15 U.S.C. § 1692e(2)(A).

757. Righthaven likewise falsely represents that it is not a debt collector but is the sole real party in interest with respect to the debt.

758. Righthaven did this with Eiser. This conduct generally violates 15 U.S.C. § 1692e but specifically violates Subsection (2)(B), in that by claiming to be the sole real party in

interest, Righthaven falsely represents the compensation it receives for collecting the debt.

759. In every known debt collection by Righthaven, including Eiser's case, Righthaven represents that the nonpayment of the debt will result in seizure and attachment of the target's website.

760. Righthaven makes such claims solely for leverage, having no intention of actually taking ownership of its target's websites.

761. Further, such action is unlawful in that the Copyright Act does not allow website seizure. Such conduct violates 15 U.S.C. § 1692(e)(4).

762. Righthaven regularly makes threats to take action it cannot legally take (e.g., the website seizure demand) and that it does not intend to take.

763. Righthaven is not in the business of trying copyright cases, Righthaven is only in the business of filing lawsuits to scare defendants into payment, rightly or wrongly.

764. Because Righthaven does not intend to try cases, the demands it makes for jury trials—and other similar demands—constitute threats to action Righthaven does not intend to take. This violates 15 U.S.C. § 1692e(5).

765. Righthaven frequently falsely accuses its targets of the commission of copyright infringement. Such is the case with Eiser.

766. Such actions are done to disgrace the target and—given the fact that such accusations are embodied in public lawsuits—accomplish their goal.

767. The purpose of this action is to induce targets into paying. This violates 15 U.S.C. § 1692e(7).

768. Righthaven, at least through the Denver Post, uses deceptive means associated



with the copy-and-paste functionality of the Denver Post website to collect and attempt to collect debts and to obtain information concerning consumers. This violates 15 U.S.C. § 1692e(10).

769. Righthaven's methods, as described herein and as employed against Eiser, are unfair and unconscionable in violation of 15 U.S.C. § 1692f.

770. Righthaven's conduct vis-à-vis target websites violates 15 U.S.C. § 1692f(1) in that Righthaven seeks to collect something—its targets' websites—that is neither expressly authorized by any agreement nor permitted by law.

771. Righthaven's conduct violates 15 U.S.C. § 1692g in that it does not, within five days after the initial communication with a target, send a written notice which fails to state various pieces of information.

772. Righthaven does not send a written notice indicating the name of the creditor to whom the debt is owed, violating Subsection (2).

773. Righthaven does not send a written notice including any statements regarding disputing the debt, violating Subsections (3) and (4).

774. Righthaven does not send a written notice including a statement that the debt collector will provide the consumer with the name and address of the original creditor, in violation of Subsection (5).

775. Defendant respectfully requests the Court grant such relief as is available for violations of the FDCPA.

**FOR A FORTY-SEVENTH DEFENSE**  
**FOR A FOURTEENTH CAUSE OF ACTION**  
NEGLIGENT SUPERVISION

776. Defendant Eiser asserts a cause of action for negligent supervision by way of

counterclaim against Plaintiff Righthaven.

777. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

778. The tort of negligent supervision holds a master liable for acts of agents outside the course and scope of the agency relationship where an agent intentionally harms another when he: is upon the premises in possession of the employer or upon which the employee is privileged to enter only as his employee or is using a chattel of the employer, and the employer knows or has reason to know that he has the ability to control his employee, and knows or should know of the necessity and opportunity for exercising such control. Degenhart v. Knights of Columbus, 420 S.E.2d 495, 496 (S.C. 1992) (citing Restatement (Second) of Torts § 317.

779. The original statement of the tort was more or less stated in terms of physical injury by laborers, but the tort is not so limited. For example, a master aware that an employee uses extortion to collect debts, despite having ordered him not to use such tactics, will still be held liable if his negligence allowed the employee to continue using the illegal tactics.

780. Righthaven is a business enterprise whose employees are in the business of leveraging settlements out of people with sham copyright litigation.

781. It would appear that all the bad conduct engaged in by Righthaven's employees is fully within the course and scope of their agency relationship with Righthaven.

782. However, in the alternative that agents of Righthaven are found to have been outside the course and scope of their agency relationship when doing some or all of the bad acts alleged herein, Defendant Eiser seeks to hold Righthaven liable on theories of

negligent supervision, negligent retention, negligent entrustment, and negligent hiring. Defendant also asserts gross negligence and recklessness for each of the preceding as well.

783. Defendant respectfully requests the Court grant such relief as is available through the tort of negligent supervision and the related torts described herein.

**FOR A FORTY-EIGHTH DEFENSE  
FOR A FIFTEENTH CAUSE OF ACTION  
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

784. Defendant Eiser asserts a cause of action for intentional infliction of emotional distress by way of counterclaim against Plaintiff Righthaven.

785. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

786. Under South Carolina law,

In order to state a claim for intentional infliction of emotional distress, a party must establish (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Williams v. Lancaster County Sch. Dist., 631 S.E.2d 286, 293 (S.C. Ct. App. 2006)

787. Righthaven's entire scheme consists of filing frivolous, sham lawsuits as nothing more than a vehicle to force settlement payments.

788. As Judge Hunt noted,

Righthaven and Stephens Media have attempted to create a cottage industry of filing copyright claims, making large claims for damages and then settling claims for pennies on the dollar, with defendants who do not want to incur the costs of defending the lawsuits, are now offended when someone has turned the tables on them and insisting on a judgment in their

favor rather than a simple dismissal of the lawsuit.

Exhibit 14.

789. To that end, Righthaven employs a variety of practices designed to inflict emotional distress on its victims.

790. For example, Righthaven files and serves its lawsuits with no warning to its victims nor any attempt to work out a resolution pre-filing.

791. This is done intentionally so as to cause emotional distress as the answer deadline looms, particularly given the fact that most of Righthaven's victims are unable to find or afford counsel in the 30 day answer window.

792. Because Righthaven has no right to sue over the copyrights it sues over, all of its demands are extreme and unsupported by law.

793. However, even if Righthaven were the true copyright holder, many of its demands are still outlandish, including but not limited to its blatantly illegal website domain transfer demand.

794. Righthaven associates have, on at least one occasion, employed allusions to physical violence towards its victims. As Judge Hunt noted, "Stephens Media's then CEO, Sherman Frederick, generally threatened potential defendants that he would send his 'little friend called Righthaven' after them." Exhibit 1 at 14.

795. The "little friend" remark is a reference to the famously climactic scene in the movie "Scarface," where drug dealer Tony Montana viciously guns down people raiding his compound with an M-16 rifle equipped with a grenade launcher.

796. Righthaven's attorneys intentionally misrepresent to defendants, particularly unrepresented ones, that settlement negotiations are automatically confidential.

797. Righthaven does this so that its victims will not discuss the matter with family and friends, or will feel inhibited while doing so, so as to keep its victims in an emotionally perturbed state.

798. All of the above-complained of actions were done by Righthaven to Defendant Eiser with the intent to inflict severe emotional distress.

799. Righthaven's conduct is so extreme and outrageous that it exceeds all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community.

800. Righthaven's tactics have been met with near universal condemnation and outrage. Law Professor Eric Johnson of the University of North Dakota School of Law has called for the Nevada Bar to investigate Righthaven's CEO for misconduct. Exhibit 15.

801. In addition, at least two websites have sprung up dedicated to aiding the victims of Righthaven, the Righthaven Victims Blog and RighthavenLawsuits.com.

802. It would be impractical if not impossible to list all examples of community outrage towards Righthaven's conduct, but suffice it to say Righthaven's tactics exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community.

803. Righthaven's actions towards Eiser caused her severe emotional distress, and the distress suffered was so severe that no reasonable person could be expected to endure it.

804. Righthaven's actions put Eiser in fear that she would lose her possessions, her home, and her livelihood. Righthaven's actions were in fact calculated to have that effect and did so.

805. Ordinarily, the service of a summons and complaint and settlement negotiations would not be actionable even if they did induce severe emotional distress, as they often do.

806. However, South Carolina and federal law recognize exceptions to that rule that Righthaven's conduct is squarely within. Righthaven's frivolous lawsuits, sham arrangements, and pattern of dishonesty to the various courts where it files its claims prevent it from enjoying the safe harbor of litigation privileges.

807. Defendant respectfully requests the Court grant such relief as is available through the tort of intentional infliction of emotional distress.

**FOR A FORTY-NINTH DEFENSE  
FOR A SIXTEENTH CAUSE OF ACTION  
ANTICYBERSQUATTING CONSUMER PROTECTION ACT**

808. Defendant Eiser asserts a cause of action for violations of the Anticybersquatting Consumer Protection Act by way of counterclaim against Plaintiff Righthaven.

809. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

810. The Anticybersquatting Consumer Protection Act, codified at 15 U.S.C. § 1125(d), that broadly prohibits cybersquatting, the practice of registering, trafficking in, or using domain names with bad faith intent to profit from the goodwill of a trademark, service mark, or other mark belonging to someone else.

811. "Under the Anticybersquatting Consumer Protection Act (ACPA), the owner of a protected mark has a cause of action 'against anyone who registers, traffics in, or uses a domain name that is identical or confusingly similar to [the owner's] [mark] with the bad faith intent to profit from the good will associated with the [mark].'" Retail Services Inc.

v. Freebies Publishing, 364 F.3d 535, 549 (4th Cir. 2010).

812. The term “traffics in” is explained within the ACPA as referring to “transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration.” 15 U.S.C. § 1125(d).

813. The Fourth Circuit has applied a broad construction to the term “traffics in,” indicating that it applies to extortionate behavior where a sale was attempted but not completed. Virtual Works, Inc. v. Volkswagen of America, Inc., 238 F.3d 264, 270 (2001).

814. The Fourth Circuit explained:

Moreover, the facts in the summary judgment record affirmatively support the claim that Virtual Works had a bad faith intent to profit when it attempted to sell vw.net to Volkswagen. It is true that a mere offer to sell a domain name is not itself evidence of unlawful trafficking. H.R. Conf. Rep. No. 106-464, at 111 (1999). The ACPA was not enacted to put an end to the sale of all domain names. This case, however, involves much more than a plain vanilla offer to sell a domain name.

Indeed, the second piece of direct evidence regarding Virtual Works' intent is the terms of its offer to Volkswagen. Virtual Works told Volkswagen that vw.net would be sold to the highest bidder if Volkswagen did not make an offer within twenty-four hours. Virtual Works also stated that others would jump at the chance to own a valuable domain name like vw.net because Internet users would instinctively associate the site with Volkswagen. Virtual Works knew, both when it registered vw.net and when it offered to sell the site, that consumers would associate vw.net with Volkswagen. It sought to maximize the advantage of this association by threatening to auction off the site. And it hoped that in an effort to protect its mark, Volkswagen would respond with a hefty offer of its own.

Id.

815. It stands to reason that if a bad faith attempt to sell a domain name constitutes trafficking under the ACPA, a bad faith attempt to acquire a domain name would

likewise constitute trafficking.

816. The Lowcountry 9/12 Project's website, lowcountry912.wordpress.com, is a domain name constituting a mark, i.e. "lowcountry912."

817. Righthaven has attempted, in bad faith, to acquire the lowcountry912.wordpress.com domain name.

818. The Prayer for Relief in Righthaven's original complaint against Eiser sought to obtain the lowcountry912.wordpress.com domain name, despite Righthaven having conceded in other litigation that such relief is not authorized by the Copyright Act.

819. "Righthaven concedes that such relief [transfer of a defendant's website] is not authorized under the Copyright Act." Exhibit 16 at 5 (Righthaven's Opposition to Thomas A. DiBiase's Motion to Dismiss in Righthaven v. DiBiase).

820. Righthaven, unbelievably, went on to argue in the same document that it should nonetheless be able to seek transfer of the defendant websites. Id.

821. The trouble with Righthaven's position is that, since at least 1889, it has been black letter law in the United States that copyright infringement remedies are only those authorized by the Copyright Act.

822. No less an authority than the United States Supreme Court stated: "The remedies for infringement 'are only those prescribed by Congress,'" Sony Corp of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (quoting Thompson v. Hubbard, 131 U.S. 123, 151 (1889)).

823. By coincidence, Righthaven filed the above-referenced document in Righthaven v. DiBiase on December 2, 2010, the exact same day it filed the original complaint in this action.



824. And yet while conceding no authorization under the Copyright Act for the relief demanded, and in the face of black letter law from the U.S. Supreme Court, Righthaven nonetheless sought a transfer of the Lowcountry 9/12 Project's domain.

825. Just as attempting to attempting the sale of a domain name in an extortionate way was illegal trafficking under the ACPA, so too should attempting to obtain a domain name in an extortionate way likewise violate the ACPA.

826. Righthaven clearly had a bad faith intent to profit from the Lowcountry 9/12 Project's domain. Righthaven is a for-profit entity whose only intent is to separate its targets from their money.

827. Had Righthaven obtained the website, Righthaven's plan was to profit from it by trying to sell it back to its rightful owner—or someone else—using the same scheme attempted by the Defendant in Virtual Works, Inc. v. Volkswagen of America, Inc.

828. In addition, Righthaven used the illegal website transfer demand with full knowledge of its illegality as leverage in settlement negotiations.

829. With regard to the bad faith intent factors listed in 15 U.S.C. § 1125(d)(1)(B)(i), seven of nine factors are present:

830. Factor I: Righthaven has no trademark or intellectual property rights in the domain name.

831. Factor II: The domain name is wholly different from the legal name or other names used to identify Righthaven.

832. Factor III: Righthaven has never made a prior use of the domain name of any type.

833. Factor IV: Righthaven has no noncommercial intent whatsoever. Righthaven does

not and would not use the site for any sort of fair use if it were able to obtain it.

834. Factor VI: Righthaven has every intent to offer to transfer, sell, or otherwise assign the domain name to the mark owner or a third party for financial gain without have used or having the intent to use the domain name in the bona fide offering of any goods or services. Further, Righthaven has a pattern of doing this: upon information and belief, it has made this website demand in every single case it has filed.

835. Factor VIII: As described with regard to Factor VI, Righthaven has a pattern of doing this: upon information and belief, it has made this website demand in every single case it has filed.

836. Factor IX: The mark in question is distinctive.

837. Righthaven therefore has a bad faith intent to profit from the marks associated with the website transfer demands.

838. This conduct constitutes trafficking in a domain name that is identical or confusingly similar to the mark in question.

839. Righthaven's conduct is violative of both the letter of the Anticybersquatting Consumer Protection Act and the public policy established by Congress forbidding the financial exploitation of domain names containing intellectual property belonging to others.

840. Defendant respectfully requests the Court grant such relief as is available for a violation of the Anticybersquatting Consumer Protection Act.

**FOR A FIFTIETH DEFENSE**  
**FOR A SEVENTEENTH CAUSE OF ACTION**  
SOUTH CAROLINA UNFAIR TRADE PRACTICE ACT

841. Defendant Eiser asserts a cause of action for violations of the South Carolina

Unfair Trade Practices Act by way of counterclaim against Plaintiff Righthaven.

842. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

843. The South Carolina Unfair Trade Practices Act (“UTPA”) declares “unfair or deceptive acts or practices in the conduct of any trade or commerce . . . unlawful.” S.C. Code § 39-5-20(a).

844. The terms “trade” and “commerce” “include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and include any trade or commerce directly or indirectly affecting the people of this State.” S.C. Code § 39-5-10(b).

845. “An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive.” Wogan v. Kunze, 623 S.E.2d 107, 120 (S.C. Ct. App. 2005).

846. To recover in an action under UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive acts. S.C. Code §§ 39-5-10 to -560.

847. Righthaven is a business presently operating in South Carolina.

848. Righthaven’s business model exclusively consists of (1) looking for potential infringements of copyrights held by its clients; (2) purchasing what Righthaven claims to be assignments of potentially infringed copyrights from its client; and (3) filing lawsuits

alleging Righthaven's copyright has been infringed.

849. Righthaven does not have any interest in the purportedly assigned copyright because Righthaven is not in the business of selling media.

850. Accordingly, Righthaven's business model constitutes barratry as described above.

851. Righthaven's business model depends entirely on Righthaven's commission of barratry and lawsuit syndication in violation of public policy.

852. Because barratry is a criminal act in South Carolina and therefore violates public policy, a business whose business model depends entirely on barratry commits unfair trade practices.

853. Likewise, as lawsuit syndication is a violation of South Carolina public policy, a business whose business model depends entirely on lawsuit syndication commits unfair trade practices.

854. Righthaven has engaged in a variety of other unfair trade practices as well, detailed in other areas of this action.

855. Righthaven's activities affect the public interest. Righthaven has filed 275 lawsuits to date and threatens to file many more. Righthaven's fraudulent settlement practices have become a story of national interest.

856. In addition, Righthaven's activities have the effect of chilling free speech. Exhibit 10.

857. Righthaven's trade practices are in violation of the South Carolina Unfair Trade Practices Act, including but not limited to S.C. Code § 39-5-20.

858. Righthaven's actions are a willful violation of the South Carolina Unfair Trade

Practices Act, including but not limited to S.C. Code § 39-5-20, as “willful violation” is defined by S.C. Code § 39-5-140(d).

859. Defendant Eiser has suffered monetary and property loss as a result of Righthaven’s unfair trade practices.

860. Eiser has had hire attorneys to defend her in a frivolous lawsuit, just as she had to incur expense to defend the action herself prior to her attorneys making an appearance.

861. Further, Eiser has lost identifiable business opportunities as a result of Righthaven’s unfair trade practices.

862. Defendant respectfully requests the Court grant such relief as is available for violations of the South Carolina Unfair Trade Practices Act.

**FOR A FIFTY-FIRST DEFENSE  
FOR AN EIGHTEENTH CAUSE OF ACTION  
DEFAMATION**

863. Defendant Eiser asserts a cause of action for defamation by way of counterclaim against Plaintiff Righthaven.

864. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

865. The elements of a cause of action for defamation include: (1) a false and defamatory statement concerning another, (2) an unprivileged publication to a third party, (3) fault on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Holtzscheiter v. Thomson Newspapers, Inc., 506 S.E.2d 497 (S.C. 1998) (Toal, J., concurring).

866. All libel is actionable per se. Holtzscheiter v. Thomson Newspapers, Inc., 506

S.E.2d 497, 502.

867. Steve Gibson is Righthaven's CEO. In the course and scope of that position, Gibson gave an interview to CNN and Fortune Magazine that was published on January 6, 2011.

868. The interview, titled "Righthaven Q&A: C&D letters don't stop infringement," is attached as Exhibit 11.

869. Upon information and belief, this interview was given after Righthaven v. Eiser had been filed on December 2, 2010.

870. In the interview, Gibson refers to Righthaven defendants as "the infringement community" that "was caught . . . not obeying the law" and is "a community of thieves."

871. These statements are false and defamatory with respect to Plaintiff Eiser, who was widely known as a Righthaven defendant when these statements were published.

872. Mrs. Eiser's case received even more attention than the usual Righthaven cases because it was the first case brought outside of Nevada or Colorado, the locations of Righthaven's major client publications the *Las Vegas Review-Journal* and *The Denver Post*.

873. Gibson published these statements to CNN and Fortune Magazine and intended them to be published worldwide by CNN and Fortune Magazine, which they were.

874. No privilege attached to the making of the statements.

875. While the statements referenced defendants to a lawsuit (persons Righthaven had "caught"), they were not made in connection with any sort of judicial or legal process, i.e. in open court or in a pleading or settlement demand, etc.

876. Gibson is at fault for the publication.

877. The statements are libel and therefore actionable without a showing of special harm.

878. Even if the statements were determined to be slanderous, they involve claims of copyright infringement, breaking the law, and thievery and are therefore actionable irrespective of special harm.

879. Defendant respectfully requests the Court grant such relief as is available through the tort of defamation.

**FOR A FIFTY-SECOND DEFENSE  
FOR A NINETEENTH CAUSE OF ACTION  
SHERMAN ACT**

880. Defendant Eiser asserts a cause of action for antitrust in violation of the Sherman Act by way of counterclaim against Plaintiff Righthaven.

881. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

882. Section 1 of the Sherman Act, codified at 15 U.S.C. § 1, declares every contract, combination, or conspiracy in restraint of trade to be illegal.

883. One method of prevailing on a Sherman Act Section 1 claim is to prove the following elements: (1) a contract, combination, or conspiracy (2) that imposed an unreasonable restraint of trade.

884. Section 2 of the Sherman Act, codified at 15 U.S.C. § 2, prohibits monopolies, attempts to monopolize, and combinations and conspiracies to monopolize.

885. Other requirements of a Sherman Act complaint are: (1) factual specificity, Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); (2) economic plausibility, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); and (3) antitrust

standing, Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519 (1983).

886. If the claim is based on litigation conduct, the plaintiff must show the case fits within an exception to the Noerr-Pennington doctrine.

887. So far, the only exception to Noerr-Pennington formally recognized by the U.S. Supreme Court is the “sham” exception. E.g., California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

888. In California Motor Transport, the Supreme Court expressly stated that “[u]se of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws[.]” Id. at 512 (citing Walker Process Equipment v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965)).

889. This action involves the hub and one spoke of a “hub-and-spoke” conspiracy.

890. Righthaven and Stephens Media LLC jointly form the hub while MediaNews Group and WEHCO Media, Inc. are the major known spokes.

891. Pursuant to the Fourth Circuit’s holding in Dickson v. Microsoft Corp., 309 F.3d 193 (2002), the hub and each spoke make up individual conspiracies. See also Kotteakos v. United States, 328 U.S. 750 (1946).

892. In accordance with Dickson, this action is directed at the hub, Righthaven and Stephens Media, and only one spoke, MediaNews Group.<sup>2</sup>

893. Righthaven is the result of a joint venture between Stephens Media and Steve

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<sup>2</sup> While WEHCO Media is, or was, a client of Righthaven, Righthaven has never filed a copyright infringement action over content appearing in a WEHCO newspaper. Defendant has no reason to believe at this point that WEHCO has engaged in any actionable conduct associated with the Righthaven scheme, though WEHCO has provided favorable news coverage to Righthaven. WEHCO has an association with Stephens Media and thus became a Righthaven client as a result.



Gibson and others.

894. Stephens Media and its agents, including former Stephens Media CEO Sherman Frederick, arranged for financing for Righthaven and are conspirators.

895. Stephens Media and MediaNews Group are privately owned media companies whose major holdings are newspapers.

896. Stephens Media owns or otherwise has an interest in approximately 64 newspapers in nine states along with approximately 10 other media properties.

897. Stephens Media owns the *Las Vegas Review-Journal*.

898. MediaNews Group owns or otherwise has an interest in approximately 75 newspapers in 12 states along with approximately 8 other media properties.

899. MediaNews Group owns *The Denver Post*.

900. While it seems ludicrous to consider small-time bloggers and the rest of Righthaven's usual targets as competitors to major newspapers, Righthaven and its conspirators in fact view them that way.

901. The purpose of the Righthaven litigation is not only to extort settlements out of people but is also intended to choke off competition from bloggers.

902. Righthaven associates have made a variety of statements indicating the purpose of the Righthaven campaign was financial and to shut down competitors, who Righthaven associates typically refer to as "thieves."

903. In an alternate universe where Righthaven legally has standing to file its lawsuits, did not file frivolous actions simply to leverage settlement, and did not engage in blatant copyright misuse, no Sherman Act claim would be viable.

904. But on these facts, it is clear that Righthaven and its conspirators were engaged in

a conspiracy to choke off competition without regard to whether such competition was legitimate or not and make some money at the same time.

905. This claim would ordinarily be barred by the Noerr-Pennington doctrine, which, in some contexts, provides immunity to parties based on the filing of lawsuits. E.g., Otter Tail Power Company v. United States, 410 U.S. 366 (1973). However, Righthaven’s conduct is squarely within the sham exception to Noerr-Pennington immunity.

906. In Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993), the Supreme Court established a two-part test to determine whether litigation conduct was within the sham exception.

907. “Since California Motor Transport, we have consistently assumed that the sham exception contains an indispensable objective component. We have described a sham as ‘evidenced by repetitive lawsuits carrying the hallmark of *insubstantial* claims.’” Id. at 58 (citation omitted).

908. “We regard as sham ‘private action that is not genuinely aimed at procuring favorable government action,’ as opposed to ‘a valid effort to influence government action.’” Id.

909. “We now outline a two-part definition of ‘sham’ litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” Id.

910. The second prong of the sham analysis is subjective, and focuses on intent.

911. “Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process—as opposed to

the outcome of that process—as an anticompetitive weapon.” Id. at 60-61 (citations and quotations omitted).

912. Righthaven’s cases are objectively baseless because no reasonable litigant could realistically expect success on the merits. In Righthaven v. Democratic Underground, Judge Hunt held in no uncertain terms that Righthaven’s “copyright assignment” is a sham document:

[T]he undersigned is well aware that Righthaven led the district judges of this district to believe that it was the true owner of the copyright in the relevant news articles. Righthaven did not disclose the true nature of the transaction by disclosing the SAA or Stephens Media's pecuniary interests. As the SAA makes abundantly clear, Stephens Media retained the exclusive rights, never actually transferring them to Righthaven regardless of Righthaven's and Stephens Media's current contentions.

Order of June 14, 2011 at 10.

913. Righthaven never intended any of its cases to get to the point that judges would scrutinize the documents and discover the sham nature of the copyright assignments.

914. Righthaven’s plan was to simply file its sham lawsuits, dismiss any where the going got tough, and settle the rest.

915. As Judge Kane wrote in Righthaven v. Hill, “[Righthaven’s] wishes to the contrary, the courts are not merely tools for encouraging and exacting settlements from Defendants cowed by the potential costs of litigation and liability.” Righthaven v. Hill, Order of April 7, 2011.

916. And as U.S. District Judge Roger Hunt held:

Righthaven and Stephens Media have attempted to create a cottage industry of filing copyright claims, making large claims for damages and then settling claims for pennies on the dollar, with defendants who do not want to incur the costs of defending the lawsuits, are now offended when someone has turned the tables on them and insisting on a judgment in their favor rather than a simple dismissal of the lawsuit.

Exhibit 14.

917. The preceding demonstrates the objective baselessness of the lawsuits. Righthaven's suits had no basis whatsoever in law or fact, and Righthaven hoped its file-and-settle-or-dismiss strategy would prevent discovery of the fact that Righthaven has no standing to file these suits because of the sham nature of its client arrangement.

918. The evidence in favor of the second part of the Noerr-Pennington sham test is likewise strong.

919. Righthaven's sole purpose in these actions was to extract money from people its clients viewed as competitors.

920. Righthaven's clients' purpose was to stifle and shut down competition, without regard to whether the people Righthaven sued were within their rights to use the content in question or not.

921. Righthaven's actions, under the direction of its clients, were intended to directly harm Righthaven defendants by causing them to remove material from their websites without regard to whether such demands were legal and to pay money to Righthaven in compromise of claims Righthaven knew it had no legal right to compromise.

922. Righthaven has never come to court seeking an adjudication of its rights by a duly-appointed judge and a duly-qualified jury.

923. Righthaven's lawsuits are mere tools for collecting protection money and stifling what its clients view (wrongly) as competition.

924. Because the lawsuits themselves are objectively frivolous, and because of the obvious bad intent behind the suits, Righthaven is outside any and all privileges for its wrongful conduct.

925. In fact, if Righthaven's conduct is not within the sham exception to Noerr-Pennington, it is difficult to know what possibly could be.

926. To the extent these allegations remain outside the sham exception to Noerr-Pennington, Defendant requests the Court consider whether this is an appropriate case in which to adopt a misrepresentation exception, an exception that has remained theoretical but which the Supreme Court has suggested might exist on the right facts.

**FOR A FIFTY-THIRD DEFENSE  
FOR A TWENTIETH CAUSE OF ACTION  
CIVIL RICO**

927. Defendant Eiser asserts a cause of action for relief under the Racketeer Influenced and Corrupt Organizations Act by way of counterclaim against Plaintiff Righthaven.

928. The material within this cause of action is also pled as a setoff defense, recoupment defense, and reduction defense.

929. The Racketeer Influenced and Corrupt Organizations Act, codified at 18 U.S.C. § 1962(c), allows suit against members of a criminal enterprise when certain designated predicate acts have occurred within a ten year time period.

930. Defendant submits those connected with the Righthaven scheme formed an Enterprise, which was at all relevant times engaged in interstate commerce.

931. Defendant Righthaven was obviously associated with the Righthaven scheme and conducted a pattern of racketeering activity.

932. The racketeering activity consisted of extortion, mail fraud, and wire fraud in violation of 18 U.S.C. §§ 1951, 1341, and 1343.

933. Specifically, Righthaven engaged in an intentional scheme to extort and defraud its targets and to obtain money or property from them through false or fraudulent

pretenses, representations, threats, and promises.

934. Righthaven used the mails and wires to further and execute the scheme by communicating with its targets and others in furtherance of the scheme.

935. The extortion tactics and fraudulent conduct detailed in this Complaint each constitute a predicate act under RICO of (1) extortion, because such communication were threats intended to obtain money or property premised upon legal action that was a complete sham; and (2) fraud, because each mailing, phone call, and email furthered and executed the scheme to defraud Righthaven's targets.

936. Righthaven has a knowing, willful, and specific intent to defraud its targets into entering into settlement agreements under the threat of fraudulent claims.

937. The predicate acts establish a pattern of racketeering activity, which damaged practically all of Righthaven's targets by forcing them, at a minimum, to pay underserved settlements, retain lawyers unnecessarily, or both.

938. Defendant respectfully requests the Court grant such relief as is available for violations of the Racketeer Influenced and Corrupt Organizations Act.

**FOR A FIFTY-FOURTH DEFENSE  
FOR A TWENTY-FIRST CAUSE OF ACTION  
VEIL PIERCING**

939. Defendants seeks to pierce the veil against Righthaven and impose personal liability on its owners.

940. Upon information and belief, Righthaven is grossly undercapitalized for the purposes of the undertaking involved, given the following facts:

941. Righthaven's business model involves filing poorly researched lawsuits in attempts to leverage cost-of-defense settlements.

942. Righthaven is also facing a variety of counterclaims for money damages, including one seeking class action certification for 57 lawsuits Righthaven filed in Colorado.

943. Righthaven observers estimate Righthaven's earnings so far to be in the neighborhood of \$500,000.

944. Upon information and belief, Righthaven has employed approximately four lawyers during most of its approximately 15 month existence.

945. The median salary for a Las Vegas attorney is approximately \$87,450 according to PayScale.com. If Righthaven pays its attorneys at the median, its salary overhead alone can be estimated at \$437,250.

946. Many attorneys have ceased their associations with Righthaven for undisclosed reasons, possibly involving pay.

947. Edward Fenno, Righthaven's prior counsel in this action, potentially cited a failure of Righthaven to pay for his services as a basis for dissociating.

948. In his motion to withdraw as Righthaven's counsel in this matter, Fenno referenced Rule 1.16(b)(5) of the South Carolina Rules of Professional Conduct: "Withdrawal is permissible [where] 'the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's service or payment. . . .'"

949. The lawsuits Righthaven files—275 so far—are all, to this point, copyright infringement lawsuits.

950. The trouble with barratry based on poorly-investigated copyright infringement suits is that the Copyright Act allows an award of attorney's fees not just to a successful plaintiff but to the prevailing party. 17 U.S.C. § 505.

951. Based on this statute, defendants who have successfully defended Righthaven actions are now seeking attorneys fees from Righthaven, and are likely to get them. E.g., Righthaven v. Democratic Underground, (case involving obviously successful fair use defense where website commenter posted four paragraphs out of a 34 page story and linked back to the story); Righthaven v. Hill, 1:11-cv-211-JLK (D.Colo) (case against an autistic, disabled gentleman named Brian D. Hill).

952. Additionally, Righthaven is now facing an order to show cause why it should not be sanctioned for flagrant misrepresentations to the Nevada District Court in approximately 200 cases filed in that district. Based on the show-cause order, the imposition of sanctions appears likely. Exhibit 1.

953. Were Righthaven a bona fide copyright holder and its suits well-investigated and grounded in fact and law, Righthaven would have nothing to fear from its cases.

954. However, Righthaven's shoot-first-ask-questions-later approach will very likely prove financially fatal as defendants, including Eiser, begin receiving attorney's fee awards.

955. Further, Defendant is informed and believes that a variety of previously-settled Righthaven defendants are planning class action or mass action claims against Righthaven similar to the ones asserted in this Counterclaim.

956. Righthaven's barratry business model is marginally profitable with regard to successful cases, i.e. settlements, but is horrendously undercapitalized when liabilities are taken into account.

957. In fact, Righthaven's corporate setup—an LLC owned by two LLCs—appears entirely predicated upon the possibility that it will be subject to large awards, of



attorney's fees or other damages, that it does not intend to pay. This is a hallmark of undercapitalization.

958. One reason Righthaven operates the way it does, as opposed to functioning as a legitimate law firm prosecuting cases in its clients' own names, is because its clients seek to insulate themselves from the potential liability that would result if they were to bring these suits themselves.

959. As it turns out, filing copyright infringement lawsuits is a losing proposition if each case has to be properly investigated.

960. Because Righthaven's clients are understandably not interested in losing money on litigation, Righthaven steps in to file cases for them without proper investigation.

961. The idea is that Righthaven will take the risk of adverse consequences, even while Righthaven's clients retain the authority to dictate who Righthaven sues.

962. "One fact which all the authorities consider significant in the inquiry, and particularly so in the case of the one-man or closely-held corporation, is whether the corporation was grossly undercapitalized for the purposes of the corporate undertaking." Hunting v. Elders, 359 S.C. 271, 597 S.E.2d 803 (Ct. App. 2004) (citation and quotation omitted).

963. Stripping away the layers of corporate lawyering, Righthaven is most certainly a "one-man or closely-held" company.

964. If Defendant Eiser's conclusions about Righthaven's financial situation are correct, even granting the fact that these conclusions are based on circumstantial evidence, Righthaven's horrendous undercapitalization and equitable issues associated with leaving innocent, prevailing defendants' attorney's fees and damages unpaid

justifies veil-piercing against Righthaven.

965. Defendant respectfully requests the Court order the corporate veil applicable to Righthaven pierced.

**FOR A FIFTY-FIFTH DEFENSE  
FOR A TWENTY-SECOND CAUSE OF ACTION  
PERMANENT INJUNCTION**

966. Defendant Eiser asserts a cause of action for permanent injunction by way of counterclaim against Plaintiff Righthaven.

967. A party seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A party must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the parties, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. Monsanto Co. v. Geertson Seed Farms, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2743, 2747-48 (2010).

968. Defendant Eiser seeks a permanent injunction prohibiting Righthaven from operating in South Carolina or harassing citizens of South Carolina with lawsuits without preclearance from this Court prior to filing.

969. Defendant Eiser's injury has been irreparable and inadequately compensated for by money damages.

970. Whenever Eiser's name is typed into a search engine, she will always and forever be associated with copyright infringement she did not commit as a result of Righthaven's frivolous, sham lawsuit against her.

971. Defendant Eiser comes before the Court blameless.

972. Plaintiff Righthaven comes before the Court in the wake of a pattern of misrepresentation, abusive conduct, and outright lying in various other courts and in this one.

973. Not only will the public interest not be disserved by the injunctive relief sought, the public interest will definitely be served by the granting of injunctive relief.

974. Righthaven's abusive conduct has had nationwide impact, and Righthaven vows to keep going.

975. These sorts of orders are not uncommon with regard to serial filers of frivolous lawsuits, who are typically mentally ill persons or inmates with far too much time on their hands.

976. Righthaven's conduct, however, is far worse than a mentally unbalanced person suing the President pro se or an inmate filing lawsuit after lawsuit because the food in jail is not up to his culinary expectations.

977. Righthaven's conduct is far worse, and has victims far beyond the court staff who have to deal with the suits. If a prisoner wasting court resources with frivolous actions is worthy of an injunction, a predatory organization like Righthaven most certainly is.

978. Defendant Eiser respectfully requests this Court protect her and her interests but also protect the citizens of South Carolina from Righthaven's outrageous abusive conduct.

979. Defendant Eiser respectfully requests this Court retain jurisdiction over Righthaven to enforce the terms of any order of permanent injunctive relief.

**FOR A FIFTY-SIXTH DEFENSE**  
**FOR A TWENTY-THIRD CAUSE OF ACTION**  
INDEMNIFICATION

980. Defendant Eiser asserts a cause of action for permanent injunction by way of counterclaim against Plaintiff Righthaven, by virtue of Righthaven's association with *The Denver Post*.

981. Equitable indemnification arises where a party wrongfully causes an innocent person to be a defendant in litigation or places him in a situation where it becomes necessary to incur expenses to protect the innocent party's interests. Addy v. Bolton, 183 S.E.2d 708 (S.C. 1971).

982. There are no hard and fast rules as to the nature of the sort of relationship or the sort of actions that will give rise to equitable indemnification. As an equitable doctrine, it is imposed whenever it is fair to do so.

983. In the case at bar, Defendant Eiser seeks equitable indemnification from Righthaven, due to the fact that she has such rights against *The Denver Post*, for expenses incurred defending this action and any eventual judgment against her.

984. Defendant Eiser is blameless in this matter, having had nothing to do with the posting of the Rosen Letter.

985. Further, the Rosen Letter was posted due to *The Denver Post's* repeated representations that led an agent of the Lowcountry 9/12 Project—then a customer of *The Denver Post*—to believe sharing content was allowed so long as it was noncommercial.

986. After leading the Lowcountry 9/12 Project to believe it could share material noncommercially, *The Denver Post* then arranged to have the President of the Lowcountry 9/12 Group, Dana Eiser, sued for copyright infringement.

987. In the meantime, *The Denver Post's* Vice President told *The New York Times* it had not and would not file such lawsuits.

988. Under such circumstances, it is clear the *The Denver Post* owes Defendant Eiser and equitable indemnification associated with this Righthaven matter.

989. Because Righthaven is a joint venturer with regard to *The Denver Post* with respect to its lawsuits, is liable to the same extent *The Denver Post* would be.

990. Defendant respectfully requests the Court grant equitable indemnification to Defendant to extinguish Plaintiff's for damages in setoff and to order Plaintiff to pay all of Defendant's expenses associated with defending this action.

#### **DAMAGES**

991. Defendant Eiser has suffered a variety of damages as a result of Righthaven's conduct.

992. Defendant Eiser has incurred obligations of attorney's fees to her attorneys, which Defendant Eiser submits are recoverable as damages, recoverable in equity, and pursuant to several statutes.

993. Defendant Eiser incurred personal expense defending herself from Righthaven prior to finding counsel to represent her.

994. Defendant Eiser has suffered extreme mental anguish.

995. Defendant Eiser has lost employment opportunities.

996. Defendant Eiser has suffered damage to her good name and reputation.

997. Defendant Eiser seeks all available recoveries and relief, in the maximum amount possible, that are available under the causes of action asserted in this action and recoverable for a successful defense of Righthaven's complaint.

998. Righthaven's previously asserted position is that even if the Court finds Righthaven attempted to harm Eiser, it was unsuccessful in doing so because she did not settle, and so there are no recoverable damages.

999. Righthaven should be equitably barred from denying damages is that if Defendant had settled, she might very well have no case at this point. This is because Righthaven demands releases of all claims known and unknown as a condition of settlement.

1000. Essentially Righthaven's argument is that anyone who has damages can't sue, and anyone who can sue has no damages. This is exactly the sort of unfair catch-22 that a court of equity can overcome.

1001. Even a court exclusively considering an action at law can make this judgment. For example, the tort of defamation, when actionable per se, has codified this concept as a rule of common law called "presumed damages."

1002. Accordingly, Defendant Eiser respectfully requests the Court equitably bar Righthaven from arguing a lack of ascertainable damages with regard to some or all of her claims.

#### **PRAYER FOR RELIEF**

1003. Wherefore, having fully answered and pled the causes of action within, Eiser demands a jury trial on each portion of the case which may properly be submitted to the jury and an order granting all relief sought herein or otherwise available under applicable principles of law and equity.

Respectfully submitted,

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