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March 2, 2011

Via Facsimile and E-Mail

J. Todd Kincannon, Esquire
The Kincannon Firm
1329 Richland Street
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**Re: Righthaven v. Eiser, U.S. District Court, District of South Carolina, Charleston
Division, Case No. 2:10-CV-3075-RMG-BM**
File: RIG001-1

Dear Mr. Kincannon:

This letter responds to your emails of Friday, February 25, 2011 at 7:43 p.m. and Sunday, February 27, 2011 at 11:10 a.m. relating to the above-referenced lawsuit.

We have received service of your un-filed Motion for [Rule 11] Sanctions Regarding Website Seizure Claim. Please be advised that the request for transfer of the website domain name was not entered frivolously or without legal support. In Central Point Software, Inc. v. Nugent, 903 F. Supp. 1057 (E.D. Tex. 1995), the defendant was found to have violated the plaintiffs' copyrights by posting copies of plaintiffs' software on the defendant's "Electronic Bulletin Board System." As part of the plaintiffs' remedy for infringement, the Eastern District of Texas transferred from the defendant to the plaintiffs "all computer hardware and software used to make and distribute the unlicensed or unauthorized copies of the plaintiffs' copyrighted software. The covered items include, but are not limited to, modems, disk drives, central processing units, and all other articles by means of which such unauthorized or unlicensed copies were made." Nugent, 903 F. Supp. at 1061. The court cited 17 U.S.C. §503(b) as authority for this decision, and specifically quoted the statute as follows:

As part of a final judgment or decree, the court may order the "destruction *or other reasonable disposition* of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, *and* of all plates, molds, matrices, masters, tapes, film negatives, *or other articles* by means of which such copies or phonorecords may be reproduced.

Nugent, 903 F.Supp. at 1061 (citing 17 U.S.C. §503(b) (emphasis added)).

Based on these legal authorities, Righthaven's request for transfer of control of the website which contained Ms. Eiser's infringing copy, and which was one means by which Ms. Eiser violated

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Righthaven's exclusive rights of copying and display of the copyrighted work, was reasonable – and certainly not sanctionable.

Nonetheless, Righthaven agrees to move to amend its Complaint to remove Paragraph 3 of Righthaven's Prayer for Relief, and replace it with language from 17 U.S.C. §503(b) instead – so it will now read:

3. Pursuant to 17 U.S.C. §503(b), as part of a final judgment or decree, order the destruction or other reasonable disposition of all copies found to have been made or used in violation of Righthaven's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies may be reproduced.

I trust that this resolves your Rule 11 claims, but in the event that you contend that this is not an appropriate correction, please let me know immediately.

Turning to the other issues raised in your emails, both emails include threats or warnings of a lawsuit that you are “likely” to file against me, my firm and/or Christina Humphries “as a result of [our] participation in this matter.” What legal basis do you have for such a lawsuit? I simply filed a Complaint for copyright infringement on behalf of my client, Righthaven. You may disagree with the merits of the suit, but that is no grounds for a lawsuit against me or my firm. And as for the merits of Righthaven's suit, it seems clear that your client or her agents copied and displayed copyrighted materials without permission (an offer of a link, if there was such an offer by the *Denver Post*, is by no means a license to copy and post the entire story – as any website ad salesperson will tell you). Righthaven is the owner of the copyrights (we will gladly forward the assignment agreement to you once there is an appropriate protective order in place). So, there is certainly a reasonable basis for a claim by Righthaven against your client and by no means any wrongdoing by my firm or myself in filing such a claim (in fact, despite the information that you have provided about your client after Righthaven's Complaint was filed, it still does not appear to me that your client's “fair use” defense and other arguments are likely to prevail in this case – but that is a matter to be decided as part of this case, and not a grounds for a separate lawsuit against the lawyers). This precludes any sort of abuse of process or malicious prosecution claim against my firm. Moreover, there can be no grounds for a defamation claim (or any derivative, such as unfair trade practices) based on the alleged falsity of the allegations in the pleadings – since the statements made in a lawsuit complaint are absolutely privileged. See, e.g., Crowell v. Herring, 301 S.C. 424, 466-467 (Ct. App. 1990).

So, if you are considering filing suit against my firm or me, I request that you set forth the grounds in a letter to my attention (or even in a draft complaint for my review) and give us a chance to explain our side of the facts and law before you actually proceed with filing a suit. That should help prevent any groundless claims, and should also serve to prevent unnecessary tangential litigation relating to the present dispute. (And no, by the way, Christina Humphries was not involved in drafting Righthaven's Complaint against your client, or in any other way involved in Righthaven's suit.)

As to the allegations made in your Amended Answer and Counterclaims, Righthaven will file the appropriate responses in a timely manner – but it seems to me that several specific allegations should be addressed early on.

First, with respect to your contention in Paragraph 14 of your Amended Answer and Counterclaims that Ms. Eiser did not receive notice of any copyright infringement prior to Righthaven's lawsuit, please be advised that on November 14, 2010, more than two weeks prior to Righthaven filing suit against Ms. Eiser, the *Denver Post* published a "Notice to readers about Denver Post copyright protections" on denverpost.com. A copy of the Notice is enclosed herewith, and it reads in relevant part as follows:

Notice to readers about Denver Post copyright protections

The Denver Post has always taken copyright issues very seriously, both as a creator of content and as a user of other people's content. In fact, everything that appears in a typical edition of the newspaper is copyright protected.

Nonetheless, our work is illegally reproduced everyday on websites across the country. The federal Copyright Act protects our right and our readers' rights to make fair use of copyrighted content. We have no issue with people who quote a small amount of a Post story so as to comment on it, perhaps even criticize us. That's the essence of free speech in a vigorous democracy.

But fair use of our content restricts those who want to reference it to reproduce no more than a headline and up to a couple of paragraphs or a summary of the story. (We also request users provide a link to the entire work on our website). The fair use rule generally does not entitle users to display the whole story or photograph on their website. To do so is a violation of our copyright and we will use all legal remedies available to address these infringements. We understand people may want to share what they find interesting in our publication. This is a reminder that there is a right way to do it.

Since Ms. Eiser evidently followed the *Denver Post*'s website closely enough that she copied the "Letter to the Tea Partyers" article on the same day that it was published (Defendant's Amended Answer, Para. 11), it is surprising that she failed to notice the Notice. Even the Terms of Use of the *Denver Post* website prohibit the actions taken by Ms. Eiser (see: www.denverpost.com/termsfuse), as do the Terms of Use of most newspaper websites. So, Ms. Eiser should not have been surprised that her actions might subject her to a legal claim from the *Denver Post* or one of its successors in interest.

Second, with respect to your apparent pursuit of a default or default judgment relating to Ms. Eiser's alleged "counterclaim" in her original Answer (see Amended Answer and Counterclaims, Para. 34), please be reminded that on its face the Answer did not make a counterclaim. Instead, the Answer read "Eighth Defense/or in the Alternative Counterclaim." The language of the Answer then failed to provide the elements of any cognizable cause of action. Moreover, the original Answer was titled "Answer," not "Answer and Counterclaims." As a result, Righthaven does not consider any counterclaim to have been made – thus no response to it necessitated.

Third, as to your apparent contention in Paragraphs 21-23 of your Amended Answer and Counterclaims that it is "improper" or "frivolous" for Righthaven (or its attorney) to file suit to

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enforce a copyright simply because Righthaven is not the original owner of the copyright and has (allegedly) not yet attempted to earn money by displaying or distributing the copyrighted content, please be advised that pursuant to 17 U.S.C. § 501(b) either the legal owner or the beneficial owner of an exclusive right under a copyright is entitled to bring an action for copyright infringement. There is no requirement that either of those owners be the original owner or anticipate any further display or distribution of the copyrighted content.

Fourth, please be reminded that Rule 15 of the Federal Rules of Civil Procedure only allows amendment of pleadings as a matter of course within 21 days after service of the pleading or 21 days after service of a responsive pleading or motion (F.R.C.P. 15(a)(1)). In all other situations, a party must have the opposing party's written consent or the court's leave to amend a pleading (F.R.C.P. 15(a)(2)). By my calculation, the Amended Answer and Counterclaims you filed on Friday, February 25, 2011 were filed more than 21 days after your client served her Answer (on January 18, 2011), and no responsive pleading was filed. We did not consent to your amendment of Ms. Eiser's Answer (in fact, you failed to ask – as is required under Local Rule 7.02), nor is there any record of the court granting you leave for the amendment, so we believe this amendment was improperly made. Nevertheless, if you would agree, we would be willing to consent to both parties being allowed to amend their pleadings. This will give us a chance to amend in response to your Rule 11 motion, and would avoid your having to seek leave from the court to file the current Amended Answer and Counterclaims. It would also allow you to revisit whether your claims and defenses are truly meritorious in light of our previous comments.

With respect to the depositions you propose in your February 27th email, few of the deponents on your list appear to have personal knowledge of any of the facts of the present case. As such, their testimony would be irrelevant and would not lead to the discovery of admissible evidence. With that in mind, Righthaven does not agree to exceed the 10 deposition limit, and if necessary will seek a protective order to prevent any depositions that you attempt to schedule that are outside the proper scope of discovery.

Another topic that we should cover at this juncture is the distribution of your Rule 11 Motion and the parties' settlement correspondence to the news media. Neither Righthaven nor I provided such materials to the press, and as you know South Carolina Rule of Professional Conduct 3.6 prohibits "a lawyer who is participating ... in the investigation or litigation of a matter" from making any "extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of a public communication and will have substantial likelihood of prejudicing an adjudicative proceeding." Moreover, my understanding of one of the purposes of Rule 11's "safe harbor" provision is to give attorneys time to remedy their pleadings before their alleged malfeasance becomes a matter of public record. For these reasons, we would appreciate it if you would not make any un-filed materials available to the press – either directly or through your client. And to the extent that you contend that it was your client, not you, that provided the materials to the press, you are now aware of her proclivity to do so – so you "reasonably should know" that she might "disseminate by means of a public communication" any future materials that you provide to her.

Finally, with respect to your published proclamation to my client ("Welcome to South Carolina litigation, and let me be the first to say good luck. You all are definitely going to need it."), the South Carolina lawyers that I know would not have made such a proclamation, nor would they pursue Rule 11 sanctions against opposing counsel in a case like this (if in any case at all), and they would certainly not threaten to sue their legal counterpart. I look forward to building a more amicable and civil relationship with you and your co-counsel as this case progresses.

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Thank you for your attention to this matter.

Very truly yours,

FENNO LAW FIRM, LLC

A handwritten signature in black ink, appearing to read 'Edward T. Fenno', is written over the text 'FENNO LAW FIRM, LLC'.

Edward T. Fenno

Enclosure

cc (w/encl., via email):

Jared Q. Libet, Esq.
Bill Connor, Esq.
Thad T. Viers, Esq.