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11
12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF NEVADA**

14 RIGHTHAVEN LLC, a Nevada limited-
liability company,

15
16 Plaintiff,

17 v.

18 THOMAS A. DIBIASE, an individual,
19 Defendant.

Case No.: 2:10-cv-01343-RLH-PAL

**RIGHTHAVEN LLC’S OPPOSITION TO
THOMAS A. DIBIASE’S MOTION TO
DISMISS**

20
21 **AND RELATED COUNTERCLAIM**
22

23 Plaintiff Righthaven LLC (“Righthaven”) hereby opposes Thomas A. DiBiase’s
24 (“DiBiase”) Motion to Dismiss. (Doc. # 17.)

25 Righthaven’s submission is based on the below Memorandum of Points and Authorities,
26 the Declaration of Shawn A. Mangano, Esq. (the “Mangano Decl.”), the pleadings and papers on
27 file in this action, any oral argument allowed by this Court, and on any other matter of which this
28 Court takes notice.

1 Dated this 1st day of December, 2010.

2 SHAWN A. MANGANO, LTD.

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20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION**

22 DiBiase does not ask this Court to dismiss, pursuant to Federal Rule of Civil Procedure
23 12(b)(6) (“Rule 12(b)(6)”), the copyright infringement claim asserted against him by
24 Righthaven. (Doc. # 17.) Rather, DiBiase attacks some, but not all, of the forms of relief
25 sought in this action for his infringing conduct. (*Id.* at 2.) Specifically, DiBiase asks the Court
26 to dismiss with prejudice: (1) Righthaven’s request for attorney’s fees based on the mistaken
27 assumption it is represented only by in-house counsel; and (2) its request for transfer of the
28 domain name used to infringe the work at-issue. (*Id.*)

DiBiase’s motion to dismiss must be denied because Righthaven is represented by
outside counsel in this action. As such, the Court must not decide the issue of whether in-
house counsel’s fees are recoverable under Rule 12(b)(6) because Righthaven has properly
alleged recovery of attorney fees to which it must be presumed to be entitled at this stage of the
proceedings. That said, Righthaven certainly maintains that in-house counsel fees are

1 recoverable in this action. Such a determination, however, is inappropriate in deciding DiBiase's
2 motion to dismiss in view of the facts before the Court.

3 DiBiase's attack on Righthaven's request for transfer of the domain used to commit the
4 alleged infringement also is not subject to dismissal pursuant to Rule 12(b)(6). While such relief
5 admittedly is not expressly authorized in copyright infringement actions, the Court is still
6 equitably empowered to grant such relief under a variety of circumstances. Given the nascent
7 stage of this action, including the fact absolutely no discovery has been conducted, dismissal
8 with prejudice of Righthaven's domain transfer request is improper. If the facts in this action
9 reveal such relief is improper and that the Court should not order transfer of the domain, then it
10 should not do so and DiBiase will suffer absolutely no harm. In contrast, the Court must be
11 certain of its need to deny Righthaven the right to at least seek such relief at this stage of the
12 proceedings under Rule 12(b)(6). Righthaven asserts the Court should not do so at this stage of
13 the proceedings under a Rule 12(b)(6) analysis. Accordingly, Righthaven respectfully asks the
14 Court to deny DiBiase's motion to dismiss.

15 16 **II. FACTS**

17 Righthaven filed this copyright infringement action on August 9, 2010. (Doc. # 1.)
18 Righthaven asserts that it is the owner of the copyrighted literary work entitled: "Man who killed
19 wife sought ultimate sentence" (the "Work"). (Doc. # 1-1 at 3-5; Compl. Ex. 2.) The Work was
20 granted registration by the United States Copyright Office on July 27, 2010. (Doc. # 1-1 at 12-
21 13; Compl. Ex. 4.)

22 Righthaven contends that DiBiase is the owner of the Internet domain, and maintains
23 control of the content posted at same, found at <nobodycases.com> (the "Website"). (Doc. # 1
24 at 2; Compl. at 2.) Righthaven further asserts that on or about June 11, 2010, DiBiase displayed
25 an unauthorized 100% reproduction of the Work on the Website. (Doc. # 1 at 2, Doc. 1-1 at 6-8;
26 Compl. at 2, Ex. 3.) Based on the alleged infringement of the Work, Righthaven seeks, among
27 other things, entry of a permanent injunction and an award of statutory damages against DiBiase.
28 (*Id.* at 5-6.) Righthaven has demanded a jury trial in this case. (*Id.* at 6.)

1 On October 29, 2010, DiBiase answered the Complaint. (Doc. # 19.) DiBiase’s answer
2 specifically denied that he had committed copyright infringement. (*Id.* at 2 ¶ 10, “Mr. DiBiase
3 denies that he has committed copyright infringement.”). DiBiase’s answer also asserted
4 numerous affirmative defenses, including failure to state a claim upon which relief can be
5 granted and innocent intent. (*Id.* at 4-5.) DiBiase’s responsive pleading additionally asserted a
6 Counterclaim, which Righthaven has moved the Court to dismiss or strike. (*Id.* at 5-9; Doc. #
7 25.)

8 Concurrently with answering the Complaint, DiBiase filed the instant motion to dismiss
9 (the “Motion”). (Doc. # 17.) As stated above, the Motion does not challenge the substance of
10 Righthaven’s copyright infringement claim. Rather, the Motion challenges Righthaven’s
11 entitlement to allege certain forms relief in the Complaint. (*Id.* at 2.) Specifically, the Motion
12 challenges Righthaven’s right to allege the recovery of attorney’s fees in this case based on
13 DiBiase’s alleged copyright infringement. (*Id.*) The Motion also challenges Righthaven’s
14 ability to allege surrender of the Website as a form of relief in its Complaint. (*Id.*) Righthaven
15 maintains DiBiase’s Motion should be denied in its entirety as argued below.

16 17 **III. STANDARDS APPLICABLE TO DIBIASE’S MOTION TO DISMISS**

18 Rule 12(b)(6) authorizes a party to bring a motion to dismiss on the basis that asserted
19 allegations fail to state a claim upon which relief can be granted. FED.R.CIV.P. 12(b)(6). Federal
20 pleadings merely require a short and plain statement of the claim and the factual grounds upon
21 which it rests so as to provide the defending party with fair notice of the allegations made against
22 it. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Conley v. Gibson*, 355 U.S. 41, 47
23 (1957). In deciding a Rule 12(b)(6) motion, the court must accept all material allegations in the
24 complaint – as well as any reasonable inferences to be drawn from them – as true. *Doe v. United*
25 *States*, 419 F.3d 1058, 1062 (9th Cir. 2005); *Ecology v. United States Dep’t of Air Force*, 411
26 F.3d 1092, 1096 (9th Cir. 2005). Dismissal with prejudice is only appropriate when permitting
27 amendment of the allegations would prove futile. *In re Silicon Graphics, Inc. Sec. Litig.*, 183
28

1 F.3d 970, 991 (9th Cir. 1999). Righthaven asserts that application of the foregoing standards to
2 DiBiase's Motion in view of the arguments contained herein should result in its denial.

3
4 **IV. ARGUMENT**

5 ***A. Dismissal of Righthaven's Request for an Award of Attorney's Fees is***
6 ***Inappropriate Given That Outside Counsel has Been Engaged.***

7 DiBiase's Motion asserts that Righthaven is not entitled to allege the recovery of
8 attorney's fees under section 505 of the Copyright Act based on the alleged absence of an
9 independent attorney-client relationship. (Doc. # 17 at 12.) Righthaven's request for an award
10 of attorney's fees in this action cannot be dismissed under Rule 12(b)(6) because it has engaged
11 outside counsel in this action. (Mangano Decl. ¶ 3.) As such, an independent attorney-client
12 relationship exists in this case, thereby defeating DiBiase's Motion as to this ground.

13 That said, Righthaven certainly does not concede in-house fees are unrecoverable in this
14 action. In fact, Righthaven maintains that in-house fees are recoverable. This dispute, however,
15 need not be decided by the Court under Rule 12(b)(6) because Righthaven has alleged relief, the
16 recovery of attorney's fees, to which it is entitled under section 505 of the Copyright Act should
17 it prevail in this action. The amount of recovery for said fees, or the source of work upon the
18 fees are predicated, is immaterial for purposes of the Court's inquiry under Rule 12(b)(6).
19 Accordingly, DiBiase's request for dismissal with prejudice of Righthaven's request for an
20 award of attorney's fees must be denied.

21
22 ***B. Dismissal of Righthaven's Request for Transfer of the Website is Authorized***
23 ***Under the Court's Inherent Authority and is Inappropriate at This Stage of the***
24 ***Proceedings.***

25 DiBiase's Motion also attacks Righthaven's request for surrender of the Website as a
26 form of relief in this action. (Doc. # 17 at 2.) Righthaven concedes that such relief is not
27 authorized under the Copyright Act. That concession aside, Righthaven maintains the Court is
28 empowered to grant such relief under appropriate circumstances. Given the procedural posture

1 of this action, however, Righthaven is unable to ascertain whether surrender of the Website is
2 appropriate. Accordingly, dismissal of such relief is inappropriate under a Rule 12(b)(6)
3 analysis.

4 Righthaven has unquestionably asked this Court to enter equitable relief in the form of a
5 preliminary and permanent injunction. (Doc. # 1 at 5.) Righthaven has also requested this
6 Court enter such relief as it deems just and appropriate in this action. (*Id.*) Thus, it is beyond
7 question Righthaven has asked for and alleged facts sufficient to invoke the Court's equitable
8 powers. More importantly for purposes of deciding the Motion, Righthaven has not sought
9 transfer of the Website as a form of relief exclusively authorized by the Copyright Act. In fact,
10 Righthaven acknowledges that such relief would be subject to the Court's discretion and only
11 upon the presentation of evidence which would justify transfer of the Website.

12 It cannot be disputed that federal courts are authorized to freeze assets in the aid of
13 ultimately satisfying a judgment in a case. *See* FED. R. CIV. P. 64. Such action may be taken
14 pursuant to federal law or state law. *Id.* The freezing or seizure of assets may be warranted
15 where damages are sought in addition to equitable relief. *See United States ex rel. Rahman v.*
16 *Oncology Assocs., P.C.*, 198 F.3d 489, 498 (4th Cir. 1999). In fact, a district court may freeze
17 assets before trial to secure the payment of attorney's fees. *See Commodity Futures Trading*
18 *Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 774-75 (9th Cir. 1995). As recognized by the
19 panel in *Oncology Associates*, "when the plaintiff . . . asserts a cognizable claim . . . or seeks a
20 remedy involving those assets, a court may in the interim preserve the *status quo* pending
21 judgment . . ." 198 F.3d at 496.

22 As the above cited authorities reveal, the Court is empowered to take action to preserve
23 and marshal assets prior to entry of judgment. The obviously corollary of this is the power to
24 take such action upon the presentation of evidence and entry of judgment. That said, Righthaven
25 has not asked the Court to transfer the Website as part of a preliminary injunction. In fact,
26 Righthaven has not conducted any discovery in this case and has not ascertained whether transfer
27 of the Website is appropriate at any stage of the proceedings or if it will ultimately ask the Court
28 for such relief. Dismissal pursuant to Rule 12(b)(6) at the inception of this case and in view of

1 the Court's inherent ability to grant relief directed to a defendant's assets, which in this case
2 would potentially include the Website, is wholly improper. To the extent the Court determines
3 that additional allegations or claims for relief are required to support the requested surrender of
4 the Website, Righthaven asks for leave to amend its Complaint in view of any such decision.

5
6 **V. CONCLUSION**

7 For the foregoing reasons, Righthaven respectfully requests the Court dismiss DiBiase's
8 Motion in its entirety. To the extent the Court determines the request for transfer of the Website
9 is not properly alleged in this action, Righthaven respectfully requests the grant leave to amend
10 to assert appropriate allegations to support such a request. Righthaven additionally asks the
11 Court grant such other relief as the deemed proper and just.

12 Dated this 1st day of December, 2010.

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am a representative of Righthaven LLC and that on this 1st day of December, 2010, I caused the **RIGHTHAVEN LLC’S OPPOSITION TO THOMAS A. DIBIASE’S MOTION TO DISMISS** to be served by the Court’s CM/ECF system.

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