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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

**COUNTER-DEFENDANT RIGHTHAVEN  
LLC’S REPLY TO COUNTERCLAIM**

20  
21 **AND RELATED COUNTERCLAIM**  
22

23 Counter-defendant Righthaven LLC (“Righthaven”) has moved this Court to dismiss or,  
24 alternatively, strike Thomas A. DiBiase’s (“DiBiase”) Counterclaim pursuant to Federal Rule of  
25 Civil Procedure 12(b)(6) (“Rule 12(b)(6)”) and Federal Rule Civil Procedure 12(f) (“Rule 12(f)”)   
26 (Doc. # 27, “Righthaven’s Motion to Dismiss”). The undersigned and newly substituted counsel,  
27 however, was unaware that language contained in a stipulation and order granting certain  
28 extensions of time included reference to Righthaven filing an “answer” and which omitted the

1 customary language “or other response” with regard to a December 1, 2010 filing deadline.  
2 (Doc. # 25 at 2.) While Righthaven’s counsel apologized for any misunderstanding and  
3 continues to maintain that Righthaven’s Motion to Dismiss obviates the need for this filing, upon  
4 opposing out-of-state counsel’s demand, nevertheless agreed to honor the apparent spirit of the  
5 stipulation and hereby files this pleading even though a response to the Counterclaim is  
6 technically termed a “reply” and not an “answer” as described in the stipulation.

7 As the Court will hopefully appreciate, Righthaven’s Motion to Dismiss is directed at  
8 illustrating the unnecessary and redundant nature of DiBiase’s Counterclaim. (Doc. # 25.)  
9 Righthaven asserts DiBiase’s Counterclaim should be dismissed or stricken in view of the  
10 pleadings already before the Court. (*Id.*) That said, and in honoring the spirit of the stipulation  
11 between the parties before the undersigned counsel entered an appearance that apparently  
12 contemplated this filing, Righthaven replies to DiBiase’s Counterclaim as follows:

13  
14 **REPLY TO SPECIFIC COUNTERCLAIM PARAGRAPHS**

15  
16 1. Righthaven denies the allegations contained in paragraph 1 of the Counterclaim.  
17 As set forth in Righthaven’s Motion to Dismiss, discretionary jurisdiction over the Counterclaim  
18 under the Declaratory Judgment Act, 28 U.S.C. section 2201, should not be exercised because  
19 the Counterclaim is redundant in view of the pleadings already before the Court. (Doc. # 25.)  
20 These pleadings include Righthaven’s Complaint (Doc. # 1) and DiBiase’s answer and  
21 affirmative defenses (Doc. #19 at 1-5:13).

22 2. Righthaven asserts that paragraph 2 of the Counterclaim, which is entitled  
23 “Introduction,” does not require a formal response as it is merely a self-serving, factually  
24 inaccurate diatribe asserted purely for scandalous purposes and which have no bearing on the  
25 merits of the claims or defenses before the Court. To the extent it is determined that a formal  
26 response is required to this paragraph, Righthaven denies all allegations contained therein and  
27 further asserts that DiBiase is liable for copyright infringement as alleged in the Complaint.  
28

1           3.       Righthaven asserts that paragraph 3 of the Counterclaim merely paraphrases the  
2 allegations contained in paragraphs 6-7, 18-20 and Exhibit 4 to the Complaint, thereby  
3 demonstrating the duplicative and unnecessary contents of DiBiase's Counterclaim. (Doc. # 1 at  
4 2,-3; Doc. 1-1 at 13.) To the extent the allegations contained in paragraph 3 accurately reflect  
5 the contents of the above-listed paragraphs of Righthaven's Complaint and the information set  
6 forth in Exhibit 4 attached thereto, Righthaven admits same. To the extent paragraph 3  
7 otherwise inaccurately describes the allegations of Righthaven's Complaint or its associated  
8 exhibits, Righthaven denies all such inaccurate or otherwise remaining allegations.

9           4.       Righthaven asserts that paragraph 4 of the Counterclaim does not require a formal  
10 response as it is alleged purely for scandalous purposes and which have no bearing on the merits  
11 of the claims or defenses before the Court. To the extent it is determined that a formal response  
12 is required to this paragraph, Righthaven denies all allegations contained therein.

13           5.       In answering paragraph 5 of the Counterclaim, Righthaven is without information  
14 and belief as to what information DiBiase has based his belief in making the allegations  
15 contained therein. Righthaven's inability to speculate as to DiBiase's mental processes and  
16 intellectual vacillations aside, Righthaven asserts that paragraph 5 of the Counterclaim does not  
17 require a formal response as it is alleged purely for scandalous purposes and which have no  
18 bearing on the merits of the claims or defenses before the Court. To the extent it is determined  
19 that a formal response is required to this paragraph, Righthaven denies all allegations contained  
20 therein.

21           6.       In answering paragraph 6 of the Counterclaim, Righthaven is without information  
22 and belief as to what information DiBiase has based his belief in making the allegations  
23 contained therein. Righthaven's inability to speculate as to DiBiase's mental processes and  
24 intellectual vacillations aside, Righthaven asserts that paragraph 6 of the Counterclaim does not  
25 require a formal response as it is alleged for purely scandalous purposes and which have no  
26 bearing on the merits of the claims or defenses before the Court. To the extent it is determined  
27 that a formal response is required to this paragraph, Righthaven denies all allegations contained  
28 therein.

1           7.       In answering paragraph 7 of the Counterclaim, Righthaven is without information  
2 and belief as to what information DiBiase has based his belief in making the allegations  
3 contained therein. Righthaven's inability to speculate as to DiBiase's mental processes and  
4 intellectual vacillations aside, Righthaven asserts that paragraph 7 of the Counterclaim does not  
5 require a formal response as it is alleged for purely scandalous purposes and which have no  
6 bearing on the merits of the claims or defenses before the Court. To the extent it is determined  
7 that a formal response is required to this paragraph, Righthaven denies all allegations contained  
8 therein.

9           8.       In answering paragraph 8 of the Counterclaim, Righthaven is without information  
10 and belief as to what information DiBiase has based his belief in making the allegations  
11 contained therein. Righthaven's inability to speculate as to DiBiase's mental processes and  
12 intellectual vacillations aside, Righthaven asserts that paragraph 8 of the Counterclaim does not  
13 require a formal response as it is alleged purely for scandalous purposes and which have no  
14 bearing on the merits of the claims or defenses before the Court. To the extent it is determined  
15 that a formal response is required to this paragraph, Righthaven denies all allegations contained  
16 therein.

17           9.       In answering paragraph 9 of the Counterclaim, Righthaven is without information  
18 and belief as to what information DiBiase has based his belief in making the allegations  
19 contained therein. Righthaven's inability to speculate as to DiBiase's mental processes and  
20 intellectual vacillations aside, Righthaven asserts that paragraph 9 of the Counterclaim does not  
21 require a formal response as it is alleged purely for scandalous purposes and which have no  
22 bearing on the merits of the claims or defenses before the Court. To the extent it is determined  
23 that a formal response is required to this paragraph, Righthaven denies all allegations contained  
24 therein.

25           10.      In answering paragraph 10 of the Counterclaim, Righthaven asserts that it lacks  
26 sufficient information to form a belief as to the allegations asserted therein and on that basis  
27 denies same. Righthaven admits, however, that DiBiase has held himself out as having the  
28 professional credentials alleged in connection with his operation of the Internet domain and his

1 control of the content appearing on same, which is the dissemination source for the unauthorized  
2 replication of the copyrighted work at-issue alleged in the Complaint.

3 11. In answering paragraph 11 of the Counterclaim, Righthaven asserts that it lacks  
4 sufficient information to form a belief as to the allegations asserted therein and on that basis  
5 denies same. Righthaven admits, however, that DiBiase has held himself out as having the  
6 professional credentials alleged in connection with his operation of the Internet domain and his  
7 control of the content appearing on same, which is the dissemination source for the unauthorized  
8 replication of the copyrighted work at-issue alleged in the Complaint.

9 12. In answering paragraph 12 of the Counterclaim, Righthaven asserts that it lacks  
10 sufficient information to form a belief as to the allegations asserted therein and on that basis  
11 denies same. Righthaven admits, however, that DiBiase has described a “no body” murder case  
12 as alleged in connection with his operation of the Internet domain and his control of the content  
13 appearing on same, which is the dissemination source for the unauthorized replication of the  
14 copyrighted work at-issue alleged in the Complaint.

15 13. In answering paragraph 13 of the Counterclaim, Righthaven asserts that it lacks  
16 sufficient information to form a belief as to the allegations asserted therein and on that basis  
17 denies same. Righthaven admits, however, that DiBiase has held himself out as having the  
18 professional credentials alleged in connection with his operation of the Internet domain and his  
19 control of the content appearing on same, which is the dissemination source for the unauthorized  
20 replication of the copyrighted work at-issue alleged in the Complaint.

21 14. Righthaven admits the allegations contained in paragraph 14 of the Counterclaim  
22 as it contains the Internet URL for the website with which DiBiase disseminated a 100%  
23 unauthorized replication of the copyrighted work at-issue in the Complaint. The allegations  
24 contained in this paragraph once again mirror those contained in Righthaven’s Complaint and  
25 further demonstrate the redundancy and unnecessary filing of the Counterclaim as argued in  
26 Righthaven’s Motion to Dismiss.

1           15.     In answering paragraph 15 of the Counterclaim, Righthaven asserts that it lacks  
2 sufficient information to form a belief as to the allegations asserted therein and on that basis  
3 denies same. Righthaven further responds that the contents of this paragraph are already at-issue  
4 and within the ambit of discoverable information pursuant to Federal Rule of Civil Procedure  
5 26(b)(1) based on the allegations of the Complaint (Doc. # 1) and DiBiase's answer and  
6 affirmative defenses (Doc. #19 at 1-5:13).

7           16.     In answering paragraph 16 of the Counterclaim, Righthaven asserts that it lacks  
8 sufficient information to form a belief as to the allegations asserted therein and on that basis  
9 denies same. Righthaven further responds that the contents of this paragraph are already at-issue  
10 and within the ambit of discoverable information pursuant to Federal Rule of Civil Procedure  
11 26(b)(1) based on the allegations of the Complaint (Doc. # 1) and DiBiase's answer and  
12 affirmative defenses (Doc. #19 at 1-5:13).

13           17.     In answering paragraph 17 of the Counterclaim, Righthaven asserts that it lacks  
14 sufficient information to form a belief as to the allegations asserted therein and on that basis  
15 denies same. Righthaven further responds that the contents of this paragraph are already at-issue  
16 and within the ambit of discoverable information pursuant to Federal Rule of Civil Procedure  
17 26(b)(1) based on the allegations of the Complaint (Doc. # 1) and DiBiase's answer and  
18 affirmative defenses (Doc. #19 at 1-5:13).

19           18.     Righthaven admits the allegations contained in paragraph 18. In fact, the Court  
20 has subject matter jurisdiction over this action because Righthaven has asserted a copyright  
21 infringement claim against DiBiase. (*See* Doc. # 1 at 1.) DiBiase has asserted non-infringement  
22 in his answer and through his affirmative defenses. (Doc. #19 at 1-5:13)

23           19.     In answering paragraph 19 of the Counterclaim, Righthaven states that the phrase  
24 “non-commercial” calls for a legal conclusion under the fair use exception codified under 107  
25 section 107(1) and on that basis denies same. Righthaven additionally maintains that DiBiase  
26 has asserted a fair use affirmative defense in this case (Doc. # 19 at 4:15, “Righthaven’s claims  
27 are barred in whole or in part by the doctrine of fair use.”), once again making the allegations  
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1 contained in this paragraph an example of his unnecessary and redundant Counterclaim. To the  
2 extent the allegations of this paragraph require a further response, Righthaven denies them.

3 20. In responding to paragraph 20 of the Counterclaim, Righthaven admits that  
4 DiBiase publishes the website in question, which serves as the dissemination point for his  
5 alleged infringing conduct as set forth in the Complaint. Righthaven is without information and  
6 belief as to the altruistic intents of DiBiase, which form the remaining allegations of this  
7 paragraph, and on that ground denies same.

8 21. In responding to paragraph 21 of the Counterclaim, Righthaven admits that  
9 “[a]ssisting prosecutors and homicide investigators in bringing justice to the friends and families  
10 of ‘no body’ murder victims . . .” is a commendable civic-minded goal. Righthaven denies,  
11 however, that this societal benefit should come at the expense of violating the exclusive rights  
12 granted to the holders of copyright protected works or that DiBiase’s alleged goal could not have  
13 been accomplished with the grant of consent for republication, which was never sought by him.  
14 To the extent the allegations of this paragraph require a further response, Righthaven denies  
15 them.

16 22. In responding to paragraph 22 of the Counterclaim, Righthaven admits that the  
17 work at-issue contains some degree of factual content together with original, creative authorship  
18 and related research endeavors by the writer. To the extent this paragraph requires an additional  
19 response, Righthaven denies them.

20 23. In responding to paragraph 23 of the Counterclaim, Righthaven is without  
21 sufficient information and belief as to what information DiBiase has based his belief in making  
22 the allegations contained therein. Righthaven’s inability to speculate as to DiBiase’s mental  
23 processes and intellectual vacillations aside, Righthaven asserts that paragraph 23 of the  
24 Counterclaim is directed, at best, to the subject of non-statutory damage matters, which, if at all  
25 relevant, is placed at-issue by Righthaven’s Complaint. Righthaven further responds that the  
26 contents of this paragraph, to the extent relevant in view of the relief requested in Righthaven’s  
27 Complaint, are within the ambit of discoverable information pursuant to Federal Rule of Civil  
28

1 Procedure 26(b)(1). To the extent it is determined that a formal response is required to this  
2 paragraph, Righthaven denies all allegations contained therein.

3 24. In responding to paragraph 24 of the Counterclaim, Righthaven is without  
4 information and belief as to what information DiBiase has based his belief in making the  
5 allegations contained therein. Righthaven's inability to speculate as to DiBiase's mental  
6 processes and intellectual vacillations aside, Righthaven asserts that paragraph 24 of the  
7 Counterclaim does not require a formal response as it is alleged purely for scandalous purposes  
8 and which have no bearing on the merits of the claims or defenses before the Court. To the  
9 extent it is determined that a formal response is required to this paragraph, Righthaven denies all  
10 allegations contained therein.

11 25. In responding to paragraph 25 of the Counterclaim, Righthaven is without  
12 information and belief as to what information DiBiase has based his belief in making the  
13 allegations contained therein. Righthaven's inability to speculate as to DiBiase's mental  
14 processes and intellectual vacillations aside, Righthaven asserts that paragraph 25 of the  
15 Counterclaim does not require a formal response as it is alleged purely for scandalous purposes  
16 and which have no bearing on the merits of the claims or defenses before the Court. To the  
17 extent it is determined that a formal response is required to this paragraph, Righthaven denies all  
18 allegations contained therein.

19 26. In answering responding to 26 of the Counterclaim, Righthaven is without  
20 information and belief as to what information DiBiase has based his belief in making the  
21 allegations contained therein. Righthaven's inability to speculate as to DiBiase's mental  
22 processes and intellectual vacillations aside, Righthaven asserts that paragraph 26 of the  
23 Counterclaim is, at best, directed to the subject of non-statutory damage matters, which, if at all  
24 relevant, is placed at-issue by Righthaven's Complaint. Righthaven further responds that the  
25 contents of this paragraph, to the extent relevant in view of the relief requested in Righthaven's  
26 Complaint, are within the ambit of discoverable information pursuant to Federal Rule of Civil  
27 Procedure 26(b)(1). To the extent it is determined that a formal response is required to this  
28 paragraph, Righthaven denies all allegations contained therein.



1           27.     In responding to paragraph 27 of the Counterclaim, Righthaven is without  
2 information and belief as to what information DiBiase has based his belief in making the  
3 allegations contained therein. Righthaven's inability to speculate as to DiBiase's mental  
4 processes and intellectual vacillations aside, Righthaven asserts that paragraph 27 of the  
5 Counterclaim is, at best, tangentially related to the subject of non-statutory damage matters,  
6 which, if at all relevant, is placed at-issue by Righthaven's Complaint. Righthaven further  
7 responds that the contents of this paragraph, to the extent relevant in view of the relief requested  
8 in Righthaven's Complaint, are within the ambit of discoverable information pursuant to Federal  
9 Rule of Civil Procedure 26(b)(1). To the extent it is determined that a formal response is  
10 required to this paragraph, Righthaven denies all allegations contained therein.

11           28.     In responding to paragraph 28 of the Counterclaim, Righthaven admits the work  
12 at-issue was available for viewing purposes on the source publication's website, which derives  
13 distinct economic and non-economic benefits from Internet traffic and online viewership.  
14 Righthaven additionally responds that viewing the work on the source publication website does  
15 not authorize someone, like DiBiase, to misappropriate 100% of the content found on the source  
16 publication's website for his own use and benefit without authorization from the copyright  
17 holder. Such conduct unquestionably amounts to copyright infringement, which DiBiase should  
18 have known given his legal education. Righthaven denies all remaining allegations in this  
19 paragraph to the extent they require a response.

20           29.     In responding to paragraph 29 of the Counterclaim, Righthaven asserts that the  
21 incorporation by reference averment does not require a formal response. To the extent a formal  
22 response to this paragraph is required, Righthaven incorporates its responses to all corresponding  
23 paragraphs in this reply to DiBiase's Counterclaim, which includes the overall objection that the  
24 Counterclaim is unnecessary and redundant in view of the other pleadings already before the  
25 Court.

1           30.     In responding to paragraph 30 of the Counterclaim, Righthaven admits that it has  
2 alleged willful infringement by DiBiase of the work at-issue in its Complaint. (Doc. # 1 at 4.)  
3 The allegations contained in paragraph 30 further demonstrate the duplicative and unnecessary  
4 contents of DiBiase’s Counterclaim.

5           31.     In responding to paragraph 31 of the Counterclaim, Righthaven denies the  
6 allegations contained therein as evidenced by its Complaint against DiBiase. (Doc. # 1.)  
7 Righthaven additionally maintains that DiBiase has answered the Complaint by denying he has  
8 committed copyright infringement (Doc. # 19 at 2 ¶ 10, “Mr. DiBiase denies that he has  
9 committed copyright infringement.”), once again making the allegations contained in this  
10 paragraph an example of that his Counterclaim is unnecessary and redundant.

11           32.     In responding to paragraph 32 of the Counterclaim, Righthaven denies the  
12 allegations contained therein. Righthaven additionally maintains that DiBiase has asserted a fair  
13 use affirmative defense in this case (Doc. # 19 at 4:15, “Righthaven’s claims are barred in whole  
14 or in part by the doctrine of fair use.”), once again making the allegations contained in this  
15 paragraph an example of his unnecessary and redundant Counterclaim.

16           33.     In responding to paragraph 33 of the Counterclaim, Righthaven denies the  
17 allegations contained therein as evidenced by its Complaint against DiBiase. (Doc. # 1.)  
18 Righthaven additionally maintains that DiBiase has answered the Complaint by denying he has  
19 committed copyright infringement (Doc. # 19 at 2 ¶ 10, “Mr. DiBiase denies that he has  
20 committed copyright infringement.”), once again making the allegations contained in this  
21 paragraph an example of his unnecessary and redundant Counterclaim.

22           34.     In responding to paragraph 34 of the Counterclaim, Righthaven denies the  
23 allegations contained therein as evidenced by its Complaint against DiBiase. (Doc. # 1.)  
24 Righthaven additionally maintains that DiBiase has answered the Complaint by denying he has  
25 committed copyright infringement (Doc. # 19 at 2 ¶ 10, “Mr. DiBiase denies that he has  
26 committed copyright infringement.”), once again making the allegations contained in this  
27 paragraph an example of his unnecessary and redundant Counterclaim.





**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 1<sup>st</sup> day of December, 2010, I caused the **COUNTER-DEFENDANT RIGHTHAVEN LLC'S REPLY TO COUNTERCLAIM** to be served by the Court's CM/ECF system.

SHAWN A. MANGANO, LTD.

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