

1 LAURENCE F. PULGRAM (CA State Bar No. 115163) (*pro hac vice*)  
2 [lpulgram@fenwick.com](mailto:lpulgram@fenwick.com)  
3 CLIFFORD C. WEBB (CA State Bar No. 260885) (*pro hac vice*)  
4 [cwebb@fenwick.com](mailto:cwebb@fenwick.com)  
5 FENWICK & WEST LLP  
6 555 California Street, 12th Floor  
7 San Francisco, California 94104  
8 Telephone: (415) 875-2300  
9 Facsimile: (415) 281-1350

6 KURT OPSAHL (CA State Bar No. 191303) (*pro hac vice*)  
7 [kurt@eff.org](mailto:kurt@eff.org)  
8 CORYNNE MCSHERRY (CA State Bar No. 221504) (*pro hac vice*)  
9 [corynne@eff.org](mailto:corynne@eff.org)  
10 ELECTRONIC FRONTIER FOUNDATION  
11 454 Shotwell Street  
12 San Francisco, California 94110  
13 Telephone: (415) 436-9333  
14 Facsimile: (415) 436-9993

11 CHAD BOWERS (NV State Bar No. 7283)  
12 [bowers@lawyer.com](mailto:bowers@lawyer.com)  
13 CHAD A. BOWERS, LTD  
14 3202 West Charleston Boulevard  
15 Las Vegas, Nevada 89102  
16 Telephone: (702) 457-1001  
17 Attorneys for Defendant and Counterclaimant  
18 DEMOCRATIC UNDERGROUND, LLC, and  
19 Defendant DAVID ALLEN

20 **UNITED STATES DISTRICT COURT**  
21 **FOR THE DISTRICT OF NEVADA**

22 RIGHTHAVEN LLC, a Nevada limited liability company,  
23 Plaintiff,  
24 v.  
25 DEMOCRATIC UNDERGROUND, LLC, a District of  
26 Columbia limited-liability company; and DAVID ALLEN,  
27 an individual,  
28 Defendants.

29 DEMOCRATIC UNDERGROUND, LLC, a District of  
30 Columbia limited-liability company,  
31 Counterclaimant,  
32 v.  
33 RIGHTHAVEN LLC, a Nevada limited liability company,  
34 and STEPHENS MEDIA LLC, a Nevada limited-liability  
35 company,  
36 Counterdefendants.

Case No. 10-01356-RLH (GWF)

**DEFENDANTS' REPLY**  
**MEMORANDUM IN**  
**SUPPORT OF CROSS-**  
**MOTION FOR SUMMARY**  
**JUDGMENT**

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<u>Page</u>
INTRODUCTION AND SUMMARY .....	1
ARGUMENT .....	3
I. SUMMARY JUDGMENT FOR DEMOCRATIC UNDERGROUND IS APPROPRIATE UNDER THE VOLITIONAL ACT DOCTRINE.....	3
II. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE THE EXCERPT’S APPEARANCE IN THE DEMOCRATIC UNDERGROUND DISCUSSION FORUM WAS FAIR USE.....	6
A. Plaintiff Raises No Genuine Issue of Material Fact As to the Purpose and Character of the Use.....	7
B. Plaintiff Raises No Genuine Issue of Material Fact As to the Nature of the Copyrighted Work.....	9
C. Plaintiff Raises No Genuine Issue of Material Fact As to the Amount and Substantiality of the Work Taken .....	10
D. Plaintiff Raises No Genuine Issue of Material Fact As to the Potential Effect of the Use On the Market For the Work.....	12
III. THERE IS NO BASIS IN THE LAW FOR RIGHTHAVEN’S DEMAND FOR TRANSFER OF THE DEMOCRATIC UNDERGROUND DOMAIN NAME.....	14
IV. RIGHTHAVEN IS NOT ENTITLED TO A CONTINUANCE TO TAKE DISCOVERY IT HAS NOT SHOWN NECESSARY OR LIKELY TO ALTER A RULING ON SUMMARY JUDGMENT.....	14
V. THE ISSUES RAISED IN THE MOTION FOR SUMMARY JUDGMENT WOULD NOT BE MOOTED BY A GRANT OF VOLUNTARY DISMISSAL .....	16
A. Regardless Of Voluntary Dismissal of the Complaint, the Counterclaim Requires A Determination That Reposting the Article Would Be Fair Use .....	16
B. Stephens Media’s Limited Consent to be Bound by This Court Does Not Resolve This Litigation as to Stephens Media.....	17
VI. PLAINTIFF’S CLAIMS THAT DEFENDANTS HAVE MULTIPLIED THIS PROCEEDING IS BOTH IRRELEVANT AND FALSE.....	18
CONCLUSION .....	20

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

**CASES**

*A&M Records, Inc. v. Napster, Inc.*,  
239 F.3d 1004 (9th Cir. 2001)..... 9, 10

*Anderson v. Liberty Lobby, Inc.*,  
477 U.S. 242 (1986)..... 5, 6

*Ashton-Tate Corp. v. Ross*,  
916 F.2d 516 (9th Cir. 1990)..... 15

*Blanch v. Koons*,  
467 F.3d 244 (2d Cir. 2006)..... 8

*Brae Transp., Inc. v. Coopers & Lybrand*,  
790 F.2d 1439 (9th Cir. 1986)..... 15

*Broadcast Music, Inc. v. Roger Miller Music, Inc.*,  
396 F.3d 762 (6th Cir. 2005)..... 11

*Campbell v. Acuff-Rose Music, Inc.*,  
510 U.S. 569 (1994)..... *passim*

*Cardinal Chem. Co. v. Morton Int’l, Inc.*,  
508 U.S. 83 (1993)..... 16

*Cartoon Network LP v. CSC Holdings, Inc.*,  
536 F.3d 121 (2d Cir. 2008)..... 4, 11

*CoStar Group, Inc. v. LoopNet, Inc.*,  
373 F.3d 544 (4th Cir. 2004)..... 3, 4, 6

*Degussa Admixtures, Inc. v. Burnett*,  
471 F. Supp. 2d 848 (W.D. Mich. 2007) ..... 3

*Dep’t of Water and Power of the City of Los Angeles v. ABB Power T & D Co.*,  
902 F. Supp. 1178 (C.D. Cal. 1995)..... 6

*Elvis Presley Enters., Inc. v. Passport Video*,  
349 F.3d 622 (9th Cir. 2003)..... 13

*Family Home and Finance Ctr., Inc. v. Federal Home Loan Mortg. Corp.*,  
525 F.3d 822 (9th Cir. 2008)..... 15

*Field v. Google Inc.*,  
412 F. Supp. 2d 1106 (D. Nev. 2006) ..... 6, 13

*Fisher v. Dees*,  
794 F.2d 432 (9th Cir. 1986)..... 7

**TABLE OF AUTHORITIES**  
**(Continued)**

		<b><u>Page(s)</u></b>
1		
2		
3		
4	<i>Frederick S. Wyle, Prof'l. Corp. v. Texaco, Inc.</i> ,	
5	764 F.2d 604 (9th Cir. 1985).....	5
6	<i>Johnson v. Mitsubishi Digital Elecs. America, Inc.</i> ,	
7	365 Fed. Appx. 830 (9th Cir. 2010).....	15
8	<i>Los Angeles News Serv. v. KCAL-TV Channel 9</i> ,	
9	108 F.3d 1119 (9th Cir. 1997).....	7, 10, 12
10	<i>Los Angeles News Serv. v. Reuters Television, Int'l.</i> ,	
11	149 F.3d 987 (9th Cir. 1998).....	10
12	<i>Los Angeles News Serv. v. Tullo</i> ,	
13	973 F.2d 791 (9th Cir. 1992).....	10
14	<i>Los Angeles Times v. Free Republic</i> ,	
15	54 U.S.P.Q.2d 1453 (C.D. Cal. 2000) (“ <i>Free Republic II</i> ”).....	10, 11
16	<i>Los Angeles Times v. Free Republic</i> ,	
17	1999 WL 33644483 (C.D. Cal. Nov. 8 1999) (“ <i>Free Republic I</i> ”).....	8, 9
18	<i>Mass. Sch. of Law at Andover v. American Bar Ass’n</i> ,	
19	142 F.3d 26 (1st Cir. 1998).....	15
20	<i>Mattel, Inc. v. Walking Mt. Prods.</i> ,	
21	353 F.3d 792 (9th Cir. 2003).....	7, 14
22	<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> ,	
23	475 U.S. 574 (1986).....	5, 6
24	<i>Mother &amp; Father v. Cassidy</i> ,	
25	338 F.3d 704 (7th Cir. 2003).....	3
26	<i>Nat’l Union Fire Ins. Co v. Argonaut Ins. Co.</i> ,	
27	701 F.2d 95 (9th Cir. 1983).....	2, 5, 15
28	<i>Nord v. Kelly</i> ,	
	474 F. Supp. 2d 1088 (D. Minn. 2007).....	2
	<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> ,	
	508 F.3d 1146 (9th Cir. 2007).....	7, 8
	<i>Playboy Enters., Inc. v. Webworld, Inc.</i> ,	
	991 F. Supp. 543 (N.D. Tex. 1997).....	3, 4
	<i>Qualls By and Through Qualls v. Blue Cross of California, Inc.</i> ,	
	22 F.3d 839 (9th Cir. 1994).....	6

**TABLE OF AUTHORITIES**  
**(Continued)**

		<b><u>Page(s)</u></b>
4	<i>Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs.</i> , 907 F. Supp. 1361 (N.D. Cal. 1995) .....	3, 4
6	<i>Righthaven LLC v. Realty One Group, Inc.</i> , 2010 U.S. Dist. LEXIS 111576 (D. Nev. Oct. 19, 2010).....	10, 11, 12, 13
7	<i>Riviera v. Distribs., Inc. v. Jones</i> , 517 F.3d 926 (7th Cir. 2008).....	3
9	<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	12
10	<i>State of Cal., on Behalf of the California Dept. of Toxic Substances Control v. Campbell</i> , 138 F.3d 772 (9th Cir. 1998).....	15
12	<i>Stewart v. Evans</i> , 351 F.3d 1239 (D.C. Cir. 2003) .....	2
14	<i>United States ex rel. Small Business Admin. v. Light</i> , 766 F.2d 394 (8th Cir. 1985).....	2
15	<i>Video-Cinema Films, Inc. v. CNN, Inc.</i> , 2001 U.S. Dist. LEXIS 25687 (S.D.N.Y. Nov. 28, 2001) .....	13
17	<i>VISA Int’l Serv. Ass’n v. Bankcard Holders of America</i> , 784 F.2d 1472 (9th Cir. 1986).....	15
18	<b>STATUTES</b>	
19	17 U.S.C. § 107 .....	7, 13
20	17 U.S.C. § 505 .....	20
21	<b>RULES</b>	
22	Fed.R.Civ.P. 26 .....	7
23	Fed.R.Civ.P. 56(d) .....	<i>passim</i>
24	Local Rule 56-1 .....	1
25	<b>OTHER AUTHORITIES</b>	
26	NIMMER ON COPYRIGHT, §13.05[A][2][a].....	10

27  
28

**INTRODUCTION AND SUMMARY**

That this case should never have been brought, and that Democratic Underground should never have been put to the requirement of responding to it, finds its greatest support to date in Righthaven's Opposition to Defendants' Cross-Motion for Summary Judgment.<sup>1</sup> Simply put, Righthaven fails to identify a single material fact that is subject to genuine dispute. In response to Defendants' "Concise Statement of Facts Not Genuinely in Dispute" (Motion at 3-7)—which cited the precise evidence demonstrating both lack of a volitional act and fair use—Righthaven stands mute. Righthaven has ignored its duty, under Local Rule 56-1, to provide:

a concise statement setting forth *each fact material to the disposition of the motion which the party claims is or is not genuinely in issue*, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies.

LR 56-1 (emphasis added). Remarkably, Righthaven provides no statement of facts at all—much less identification of what it admits to be undisputed or claims is in dispute. Accordingly, the facts set forth in Democratic Underground's Motion stand unrefuted.

The reason no genuine factual disputes have been identified is because none exist. On the volitional act element, it is undisputed that third party Pampango, not Democratic Underground, posted the Excerpt; that, as a result of automated processes and, without any action by the Defendants, it appears on democraticunderground.com; and that it was taken down within two days of Defendants' first knowledge of the allegations in this lawsuit. On the four fair use factors, it is undisputed that (i) the Excerpt was posted on a discussion forum with the purpose of fomenting public comment and criticism; (ii) the nature of the Article's content is self-evident, and factual; (iii) an amount of less than 10% of the Article was excerpted; and (iv) no harm to the value of the work has been shown. Indeed, any evidence of harm to the value of a *Las Vegas Review-Journal* news article would be in the possession of Righthaven and Stephens Media, yet

---

<sup>1</sup> The same abbreviations and defined terms will be used in this Reply as in Democratic Underground's initial Motion. In addition, Defendants' Cross-Motion for Summary Judgment (Dkt. 45) shall be referred to herein as "Motion," and Righthaven LLC's Opposition to Defendants' Cross-Motion for Summary Judgment (Dkt. 58) shall be referred to as "Opposition" or "Opp." The declaration of Shawn A. Mangano In Support Of Righthaven LLC's Request For Denial Or Continuance Of Defendants' Cross-Motion For Summary Judgment Pursuant To Fed. R. Civ. P. 56(d) (Dkt. 61) shall be referred to as "Rule 56(d) Decl."

1 they have presented none. This Motion therefore must be granted: even Righthaven  
2 acknowledges that, absent a material factual dispute, the Court determines as a matter of law  
3 whether there was fair use. Opp. at 12:19 (citing Ninth Circuit cases).

4       Instead of showing a factual dispute, Righthaven hides behind two other arguments, each  
5 insufficient to preclude summary judgment. *First*, it notes that it has not deposed the declarants  
6 attesting to the undisputed facts. Opp. at 7, 11, 15. However, this is not a barrier, as summary  
7 judgment may be granted without discovery where the facts of record reveal no basis for dispute.  
8 *See, e.g., Stewart v. Evans*, 351 F.3d 1239, 1245-46 (D.C. Cir. 2003); *United States ex rel. Small*  
9 *Business Admin. v. Light*, 766 F.2d 394, 397 (8th Cir. 1985); *Nord v. Kelly*, 474 F. Supp. 2d 1088,  
10 1093 (D. Minn. 2007). Simply doubting a declarant is insufficient: “neither a desire to cross-  
11 examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert  
12 summary judgment.” *Nat’l Union Fire Ins. Co v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir.  
13 1983). The Ninth Circuit has stringently required that any party opposing summary judgment on  
14 the basis of a need for discovery under Rule 56(d) specify exactly what discovery devices it  
15 intends to use, what facts it expects to elicit, and how those facts would preclude summary  
16 judgment. Righthaven’s untimely Rule 56(d) declaration fails to explain how any fact it expects  
17 to elicit could prevent summary judgment. See Dkt. 61. In fact, discovery will not change  
18 anything about the legal issues before this Court, as explained below. Simply put, Righthaven  
19 has identified no undiscovered fact that could have a material impact on this Motion.

20       *Second*, Righthaven attempts to mask the propriety of summary judgment by accusing  
21 Defendants and the EFF of “vexatious” litigation tactics. None of the accusations relate to the  
22 legal or factual issues necessary to decide summary judgment. Without rising to Righthaven’s  
23 bait, suffice it to say that the facts reflect that Defendants’ efforts to defeat this meritless lawsuit  
24 have been entirely appropriate, as explained in Part VI below.

25       Righthaven is no doubt vexed by the filing of a meritorious summary judgment motion.  
26 But that hardly makes the Motion “vexatious,” much less provides grounds to deny it. The Court  
27  
28

1 should grant summary judgment on the Complaint in favor of Defendants.<sup>2</sup>

2 **ARGUMENT**

3 **I. SUMMARY JUDGMENT FOR DEMOCRATIC UNDERGROUND IS**  
 4 **APPROPRIATE UNDER THE VOLITIONAL ACT DOCTRINE**

5 There is no dispute as to all the facts necessary to determine that Defendants are not liable  
 6 for copyright infringement pursuant to the volitional act doctrine of the *Religious Tech. Ctr. v.*  
 7 *Netcom On-Line Commc'n Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995), series of cases. Instead,  
 8 Righthaven's Opposition is based on its misunderstanding of the applicable law and purported  
 9 disputes of facts that, at best, are immaterial.

10 Righthaven relies primarily upon *Playboy Enters., Inc. v. Webworld, Inc.*, 991 F. Supp.  
 11 543 (N.D. Tex. 1997). It interprets that decision to hold that the volitional act doctrine does not  
 12 apply outside of Internet Service Providers (ISPs) that enable access to the Internet. Opp. at 9.  
 13 To the contrary, *Webworld* did not address this question, and Righthaven's theory has been  
 14 flatly rejected by *Netcom* and the two Circuit Court cases that *have* considered the issue.

15 In *Netcom*, the court ruled on the liability of both Netcom, an access provider, and  
 16 Mr. Klemesrud, the operator of a Bulletin Board System (BBS). A BBS is an early style of  
 17 Internet forum, the technological predecessor to Democratic Underground's Website. The  
 18 *Netcom* court denied direct liability, holding that the "allegations against Klemesrud fail for the  
 19 same reason the court found that Netcom was entitled to judgment as a matter of law on the direct  
 20 infringement claim." *Netcom*, 907 F. Supp. at 1381.

21 *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), concerned defendant

22  
 23  
 24 <sup>2</sup> As stated in the Motion, Righthaven has no right to condition its voluntarily dismissal of the Complaint on  
 25 preclusion of Democratic Underground's assertion of its right to apply for statutorily provided attorneys' fees. In  
 26 response, Righthaven falsely asserts that Democratic Underground cited only one case for this proposition. Dkt. 57  
 27 at 7. But the Opposition ignores both *Mother & Father v. Cassidy*, 338 F.3d 704 (7th Cir. 2003) and Judge  
 28 Easterbrook's persuasive explanation in *Riviera v. Distribs., Inc. v. Jones*, 517 F.3d 926 (7th Cir. 2008). Moreover,  
 Righthaven's effort to distinguish *Degussa Admixtures, Inc. v. Burnett*, 471 F. Supp. 2d 848 (W.D. Mich. 2007), is  
 unavailing, as Righthaven merely points out factual differences of no consequence to the legal rule that a voluntary  
 dismissal cannot avoid a statutory entitlement to attorneys' fees. Should this Court agree with Defendants'  
 authorities, and expressly enter dismissal of the Complaint subject to a right to apply for attorneys' fees (and without  
 the right to withdraw such dismissal), then, but only then, would this summary judgment motion be unnecessary.



1 LoopNet’s online real estate website.<sup>3</sup> Like Democratic Underground, LoopNet’s website hosted  
 2 content uploaded by the customers of the service, but did not provide Internet access. LoopNet  
 3 owned the website and owned the servers. Thus, like here, *CoStar* found no infringement by a  
 4 defendant who “own[s] the website on which the Work was displayed without authorization and  
 5 [who owns] the server upon which the unauthorized copy of the Work is stored.” Opp. at 9:15-17  
 6 (describing Democratic Underground); *see also* Opp. at 10:9-19; Rule 56(d) Decl. ¶ 8  
 7 (summarizing other facts showing Democratic Underground did not engage in a volitional act).<sup>4</sup>

8 Likewise, in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), the  
 9 Second Circuit rejected the argument that the *Netcom* decision should be pigeonholed to Internet  
 10 access providers, agreeing with *CoStar* that the volitional act rule was derived from the Copyright  
 11 Act, not the unique circumstances of the Internet. *Id.* at 131. Accordingly, the Second Circuit  
 12 applied the *Netcom* rule to a remote digital video recording system.

13 Moreover, *Webbworld* is distinguishable on its facts. First, unlike this case, the court  
 14 found that *Webbworld* “took ‘affirmative steps to cause the copies to be made.’ . . . Such steps  
 15 included using the ScanNews software to troll the Usenet for *Webbworld*’s product.”  
 16 *Webbworld*, 991 F. Supp at 552 (quoting *Netcom*, 907 F. Supp. at 1381). By contrast, the  
 17 undisputed facts show that posts on the Democratic Underground forum are supplied by users, not  
 18 gathered by Democratic Underground. Dkt. 48, Declaration of David Allen (“Allen Decl.”) ¶¶ 7-  
 19 8.<sup>5</sup> Moreover, *Webbworld*’s software was specifically designed by *Webbworld* to cull images  
 20 from Usenet newsgroups devoted to *Playboy* content, newsgroups with names like  
 21 “alt.sex.playboy” or “alt.mag.playboy.” *Webbworld*, 991 F. Supp at 552-53. Democratic  
 22 Underground’s Website is not designed to cull any content, much less content from the *LVRJ*.

23 \_\_\_\_\_  
 24 <sup>3</sup> Righthaven is correct that Defendants’ counsel Kurt Opsahl argued *CoStar v. LoopNet* before the Fourth Circuit.  
 25 *See* Opp. at 9:10-17. However, it is mistaken about the side—Mr. Opsahl represented LoopNet, who prevailed.  
 26 *CoStar* was ably represented by Walter Dellinger III and Jonathan Hacker of O’Melveny & Myers LLP.

27 <sup>4</sup> Righthaven cites these facts under the mistaken impression that these facts distinguish *CoStar*. While they do not  
 28 help Righthaven’s legal argument, they do show that Righthaven does not dispute the facts necessary to rule on the  
 volition issue. *See* Opp. at 10:27 (noting that the “evidence before the Court unquestionably establishes” facts that  
 support a finding of no volitional act.)

<sup>5</sup> Contrary to Righthaven’s assertion (Opp. 8:18-25; Rule 56(d) Decl. ¶ 10) this Court does not need declarations  
 from every employee at Democratic Underground to rule on this Motion. Mr. Allen has personal knowledge of how  
 his website operates technically, and his declaration is sufficient to show that no volitional act occurred. Allen Decl.  
 ¶¶ 1, 5.

1 Allen Decl. ¶¶ 5, 7. Thus, even if Webworld had satisfied the volitional act requirement by  
2 collecting the infringing works and posting them, Democratic Underground did no such thing.

3 Finally, Righthaven attempts to manufacture a genuine issue of material fact by posing a  
4 series of questions about Democratic Underground’s operation. Opp. at 11-12; Rule 56(d) Decl.  
5 ¶ 9. But Righthaven makes no attempt to show why the answers to these questions are material to  
6 this litigation. They are not.

7 A fact is material if it might affect the outcome of the suit under the applicable substantive  
8 law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The key relevant fact here is  
9 that Pampango posted the Excerpt—an undisputed fact, and one as to which no discovery is  
10 sought. Instead, Righthaven’s first few questions center around Democratic Underground’s  
11 server and software, who made them, and how they operate. But there is no explanation as to  
12 why this could make any difference, or what possible configuration Righthaven somehow  
13 believes could rise to the level of a volitional act. Righthaven apparently hopes that the answers  
14 will undermine the credibility of Mr. Allen’s declaration, but its desire to cross-examine is  
15 insufficient as a matter of law. *Nat’l Union Fire Ins. Co.*, 701 F.2d at 97. As the Ninth Circuit  
16 has explained, Righthaven “may not simply rest on the hope of discrediting movant’s evidence at  
17 trial.” *Frederick S. Wyle, Prof’l. Corp. v. Texaco, Inc.*, 764 F.2d 604, 608 (9th Cir. 1985).  
18 Righthaven “must do more than simply show that there is some metaphysical doubt as to the  
19 material facts.” *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It is  
20 undisputed that the Excerpt here was uploaded by Pampango, and details about website software  
21 not shown to be relevant cannot raise a factual issue.

22 Righthaven’s second set of questions focus on knowledge of Democratic Underground  
23 employees. However, Righthaven offers no facts suggesting that it, or anyone else, gave notice to  
24 Democratic Underground of its objection to Pampango’s post. It thus offers no basis to question  
25 that no one at Democratic Underground knew of the claimed infringement until the time the post  
26 was removed, and no basis to believe any contrary information could be adduced by discovery.  
27 Moreover, Righthaven fails to explain how the answers to these questions could be material in  
28 light of Democratic Underground’s explanation that knowledge would *not* be sufficient to

1 constitute a volitional act, and that the case most directly on point—*CoStar*—found no volitional  
2 act even where employees reviewed each post before it went live. *See* Motion at 9-10; *see also*  
3 *Qualls By and Through Qualls v. Blue Cross of California, Inc.*, 22 F.3d 839, 844 (9th Cir. 1994)  
4 (affirming summary judgment because “the information sought by [litigant’s] attorney would not  
5 have shed light on any of the issues upon which the summary judgment decision was based”).  
6 Indeed, Righthaven’s Opposition does not respond at all to the authorities demonstrating that  
7 knowledge is not sufficient to constitute a volitional act.

8 As Righthaven acknowledges, “[i]n ruling on a motion for summary judgment, the judge  
9 must view the evidence presented through the prism of the substantive evidentiary burden.” Opp.  
10 at 12:16-17 (quoting *Anderson*, 477 U.S. at 254). Volition is an element of Righthaven’s cause of  
11 action. *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (holding that “[a]  
12 plaintiff must also show volitional conduct on the part of the defendant in order to support a  
13 finding of direct copyright infringement”). Since Democratic Underground has put forth facts  
14 showing a lack of volition, Righthaven “must come forward with ‘specific facts showing that  
15 there is a genuine issue for trial.’” *Matsushita* at 587 (citation omitted). Questions, especially  
16 immaterial ones, are not a substitute for specific material facts. *See Dep’t of Water and Power of*  
17 *the City of Los Angeles v. ABB Power T & D Co.*, 902 F. Supp. 1178 (C.D. Cal. 1995) (granting  
18 summary judgment where “plaintiffs have not shown that the questions they wish to ask would  
19 shed light on their arguments.”).

20 Since Righthaven has not raised any genuine issues of material fact that would preclude  
21 summary judgment, has conceded facts that support summary judgment, and has failed to  
22 distinguish the long line of precedent establishing the volitional act doctrine, this Court should  
23 grant summary judgment in favor of Defendants.

24 **II. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE THE EXCERPT’S**  
25 **APPEARANCE IN THE DEMOCRATIC UNDERGROUND DISCUSSION**  
26 **FORUM WAS FAIR USE**

27 Though Righthaven suggests that application of the fair use doctrine requires a “case-by-  
28 case analysis” (Opp. at 13), it also concedes that, where the relevant facts are undisputed, the  
Court may determine on summary judgment whether the challenged use qualifies as fair use.

1 Opp. at 12; *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1120 (9th Cir. 1997);  
 2 *see also Mattel, Inc. v. Walking Mt. Prods.*, 353 F.3d 792, 800 (9th Cir. 2003) (fair use is a mixed  
 3 question of fact and law, and where material facts are not in dispute, summary judgment is  
 4 appropriate).<sup>6</sup> Righthaven’s mere assertion that there are factual questions cannot overcome its  
 5 failure to identify any single factual dispute that could make a difference.

6 **A. Plaintiff Raises No Genuine Issue of Material Fact As to the Purpose and**  
 7 **Character of the Use.**

8 Righthaven entitles its discussion regarding factor 1—the purpose and character of the  
 9 use—as a discussion about “genuine issues of material facts” (Opp. at 13:12); however, a closer  
 10 look reveals that Righthaven does not dispute any of the facts set forth by Defendants. *See* Opp.  
 11 at 13:11-15:20. Nor does Righthaven articulate any new facts that would be revealed in  
 12 discovery that could create a genuine issue.<sup>7</sup> *See id.* at 15:12-20. Rather, Righthaven simply  
 13 disagrees about which side this factor favors—a disagreement that, while unfounded, presents  
 14 merely an issue of law for the Court.

15 It is undisputed that the Excerpt was posted on a discussion forum with the purpose (and  
 16 effect) of encouraging public comment and criticism among a politically interested group. Opp.  
 17 at 13:27-14:2; Complaint, Ex. 3. Such use for the purpose of criticism, comment and education,  
 18 is highly transformative and provides a significant benefit to the public. *See Campbell v. Acuff-*  
 19 *Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (criticism and comment are recognized as canonical  
 20 examples of transformative use); 17 U.S.C. § 107 (expressly recognizing protection for uses  
 21 “such as criticism, [and] comment”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163  
 22 (9th Cir. 2007) (recognizing the need to assess the benefit to the public from the use at issue);

23 <sup>6</sup> Plaintiff misinterprets *Fisher* to say that “[c]onducting such an analysis [of weighing the fair use factors] as a  
 24 matter of law requires that controlling facts be presumed or admitted.” Opp. at 13:7-10 (citing *Fisher v. Dees*, 794  
 F.2d 432, 435-36 (9th Cir. 1986). This case sets forth no such requirement. But even if it did, Righthaven has tacitly  
 conceded Defendants’ Concise Statement of Facts by failing to dispute any of them.

25 <sup>7</sup> Plaintiff’s argument as to the “requirement” of conducting discovery prior to deciding summary judgment is  
 26 contrary to the law, as discussed in Part IV, *infra*. Further, Plaintiff’s claim that Federal Rule of Civil Procedure 26  
 27 requires Defendants to identify all employees at Democratic Underground (Opp. at 15:12-16) is incorrect. Rule 26  
 28 requires identification of persons having “discoverable information . . . that the disclosing party may use to support  
 its claims or defenses.” That the third employee has no such knowledge and was therefore not identified in  
 Defendants’ disclosures hardly requires his deposition. Righthaven’s claim that Defendants were required to identify  
 all employees is especially ironic since Righthaven failed to identify a single witness by name in its initial  
 disclosures. *See* Part VI, *infra*.

1 *Blanch v. Koons*, 467 F.3d 244, 253-54 (2d Cir. 2006) (same). Use of the short Excerpt on a left-  
2 wing political website, alongside a separate link to the full original, was thus substantially  
3 transformative of the original news publication of the whole Article, and provided a unique  
4 opportunity and context for commentary that benefits the public.

5 Righthaven also has no response to the proposition that the minimally commercial nature  
6 of the use at issue is not determinative, and is of limited importance, given both the highly  
7 transformative use and its public benefit. *Campbell*, 510 U.S. at 579 (holding purely commercial  
8 use of excerpt in highly remunerative but transformative sound recording was still fair use);  
9 *Perfect 10*, 508 F.3d at 1164, 166 (Google’s use of thumbnail images was fair despite a  
10 commercial purpose because it was outweighed by the benefit to the public and transformative  
11 nature of the use); *Blanch*, 467 F.3d at 253-54 (affirming grant of summary judgment on fair use  
12 grounds despite “substantial” commercial use because of the broader public benefits of the use  
13 and its transformative nature). Righthaven simply ignores the rule.

14 In any event, Righthaven raises no question of fact with respect to the purpose of the use.  
15 Righthaven mentions the declaration of Mr. Allen, stating that the DU Website is supported, in  
16 part, by advertising revenue. Opp. at 14:8-11. Indeed, Defendants have admitted that the DU  
17 Website generated less than \$2.00 of revenue, total, from the page displaying the Excerpt. Allen  
18 Decl. ¶ 19. Righthaven does not dispute this fact—it merely uses it to support its point that the  
19 use was commercial. *See id.* At most, Righthaven states that it would like to question Mr. Allen  
20 about the “exact commercial nature” of the use that he already explained. Rule 56(d) Decl. ¶ 11.  
21 As noted above, the desire to cross-examine to test credibility, without any explanation of what  
22 facts could change the outcome, cannot defeat summary judgment. Whatever the “exact” amount  
23 of dollars at issue here, its magnitude cannot overcome the transformative nature of the use to  
24 promote criticism and commentary.

25 Righthaven’s reliance on the unpublished decision in *Los Angeles Times v. Free Republic*  
26 (“*Free Republic I*”) is misplaced because the facts here are distinguishable. 1999 WL 33644483  
27 (C.D. Cal. Nov. 8, 1999); Opp. at 14-15. In *Free Republic I*, the court was faced not with a single  
28 short excerpt of one article. Instead, it was looking at wholesale copying of “thousands of [Los

1 Angeles] Times and [Washington] Post news articles,” which were alleged to be copied in their  
2 entirety. *Free Republic I*, 1999 WL 33644483 at \*9. In considering the “nature of the use,” the  
3 *Free Republic I* court noted that the display of works for purpose of facilitating commentary or  
4 criticism *was* transformative, but that copying thousands of articles verbatim was not. *Id.* at \*9-  
5 \*10. It also explicitly considered the numbers of articles copied, and the fact that these full copies  
6 supplanted the demand to purchase archived copies from the newspapers. Weighing all these  
7 factors, it concluded that the nature of the use on balance favored the plaintiffs. *Id.* Here, by  
8 contrast, the use was far more transformative, with only 10% of one Article posted on the DU  
9 Website; with only a single Excerpt, not thousands of articles, in issue; and with a link connecting  
10 to the original Article. The use of the Excerpt did not to displace sales of archives—it is  
11 undisputed that the Article remains available on the *LVRJ* for free. Dkt. 47, Declaration of Kurt  
12 Opsahl (“Opsahl Decl.”) at ¶ 3.

13 **B. Plaintiff Raises No Genuine Issue of Material Fact As to the Nature of the**  
14 **Copyrighted Work.**

15 Similarly, Righthaven raises no genuine issue of material fact as to factor two—the nature  
16 of the copyrighted content. Nor can it, as the content is self-evident, undisputed, and has been  
17 submitted as part of the record. Complaint, Ex. 2; *see also* Opp. at 16:1 (“the Work is admittedly  
18 based on fact”). Again, it is the legal significance of the undisputed facts that Righthaven  
19 attempts to dispute. And again, Righthaven has no answer to established law, to wit, that the  
20 second factor analysis “calls for recognition that some works are closer to the core of intended  
21 copyright protection than others.” *Campbell*, 510 U.S. at 586. Factual works fall further from this  
22 core of intended protection than purely creative works. *See A&M Records, Inc. v. Napster, Inc.*,  
23 239 F.3d 1004, 1016 (9th Cir. 2001) (citing *Campbell*, 510 U.S. at 586).

24 As another smokescreen, Righthaven asserts that the second factor analysis “raises a  
25 genuine issue of material fact, because [1] Defendants copied the Work [2] without authorization  
26 and [3] the subject matter was clearly subject to copyright protection.” Opp. at 15:26-28. So  
27 where is the factual dispute? The parties agree that the posted Excerpt is a copy of part of the  
28 news Article. The fact that copying occurred holds no weight, as fair use is a defense to copying,

1 and as such, it presupposes that some copying has occurred. *See Campbell*, 510 U.S. at 590. For  
 2 the same reason, “the mere fact that the copied portions are themselves copyrightable cannot  
 3 incline the second factor against fair use.” NIMMER ON COPYRIGHT, §13.05[A][2][a]. Nor does  
 4 authorization or lack thereof have any bearing upon the *nature* of the original work. The work at  
 5 issue is a published, freely available, fact-based, online news article, and it would remain so  
 6 regardless of authorization.

7 Righthaven warns fervently that, were the Court to adopt the reasoning of Defendants  
 8 (and Judge Hicks in *Realty One*) on the second factor analysis, then “any literary work based  
 9 entirely or in part on the factual recitation of an author would fail to meet the requirements of the  
 10 second fair use analysis prong.” Opp. at 16:22-23. Righthaven misses the point. The very  
 11 purpose of this factor in the fair use balancing test is to attribute less protection to works that are  
 12 primarily factual in nature. *See Campbell*, 510 U.S. at 586; *A&M Records*, 239 F.3d at 1016;  
 13 *Righthaven LLC v. Realty One Group, Inc.*, 2010 U.S. Dist. LEXIS 111576, at \*5 (D. Nev.  
 14 Oct. 19, 2010).

15 Finally, in another misplaced legal argument, Righthaven cites *Los Angeles Times v. Free*  
 16 *Republic*, 54 U.S.P.Q.2d 1453, 1467 (C.D. Cal. 2000) (“*Free Republic I*”) for the proposition  
 17 that “a news reporter must determine which facts are significant and recount them in an  
 18 interesting and appealing manner.” *See* Opp. at 16, 17. Yet, Righthaven overlooks that *Free*  
 19 *Republic II* found that the second factor *avored* fair use, precisely because the work was a piece  
 20 of news reporting: “[T]he more informational or functional the plaintiff’s work, the broader  
 21 should be the scope of the fair use defense.” *Free Republic II*, 54 U.S.P.Q.2d at 1467 (quoting  
 22 Nimmer §13.05[A][2][a]).<sup>8</sup> Here, as in *Free Republic II*, the “second factor weighs in favor of a  
 23 finding of fair use of the news articles.” 54 U.S.P.Q.2d at 1467.

24 **C. Plaintiff Raises No Genuine Issue of Material Fact As to the Amount and**  
 25 **Substantiality of the Work Taken.**

26 The amount and substantiality of the work taken is a fact easily determined by comparing

27 <sup>8</sup> The Ninth Circuit has regularly found that the second factor favors fair use when the original work is news  
 28 reporting. *See Los Angeles News Serv. v. Reuters Television, Int’l.*, 149 F.3d 987, 994 (9th Cir. 1998); *Los Angeles*  
*News Serv.*, 108 F.3d at 1122; *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992).

1 the Article to the Excerpt: 5 sentences were used out of a 50 sentence article, or 10%. *Compare*  
2 Complaint, Ex. 3 to Ex. 2. Righthaven does not dispute the amount copied. *Id.* Righthaven  
3 similarly does not dispute that, rather than copying the entire Article, the post on the DU Website  
4 provided a link to the full Article at the *LVRJ* website. *Id.* Ex. 3.

5 Righthaven seeks to argue the legal significance of the undisputed facts, yet it cannot cite  
6 a single case where an excerpt this small has been found to infringe, let alone one in a discussion  
7 forum. *See Opp.* at 17:3-18:22. The best it can muster is a citation to United States Copyright  
8 Office Circular 21, entitled “Reproduction of Copyrighted Works by Educators and Librarians,” a  
9 publication that actually *supports* Defendants’ position.<sup>9</sup> Righthaven quotes a portion of the  
10 Circular’s standards, noting that, for education, “unauthorized replication of 10% of a literary  
11 work may be deemed unacceptable” and that “[t]he same 10% threshold is set forth with regard to  
12 unauthorized replication of non-performance related copyrighted works used for educational  
13 purposes.” *Opp.* at 17:27-18:5. Yet, in the portion Righthaven omits to discuss, Circular 21  
14 provides that copies may be made of: “Either ***a complete article, story or essay of less than***  
15 ***2,500 words*** or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the  
16 work, whichever is less, but ***in any event a minimum of 500 words.***” Circular 21 at 6 (Dkt. 60,  
17 Mangano Decl. Ex. 2) (emphasis added). Under this standard, Democratic Underground could  
18 have copied the Article in its entirety, as the Article is 1409 words long (*i.e.*, less than 2,500). In  
19 addition, the Excerpt at issue is less than 500 words, and therefore it is fair use under each of the  
20 two separate standards of the Circular.

21 Righthaven continues to urge the Court to ignore a key decision in this District that found  
22 a larger excerpt of copyrighted works to constitute fair use. *See Opp.* at 17; *Realty One*, 2010  
23 U.S. Dist. LEXIS 111576, at \*5 (finding by Judge Hicks that for a blog, copying only the first  
24 eight sentences of a thirty sentence *LVRJ* article, or 26%, was sufficiently small to warrant  
25 dismissal on fair use grounds). Meanwhile, Righthaven has no answer to the fact that it

26  
27 <sup>9</sup> Copyright Office interpretations are not binding but are “entitled to respect insofar as they are persuasive.”  
28 *Broadcast Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 778 (6th Cir. 2005); *see also Cartoon Network.*,  
536 F. 3d at 129 (The “Copyright Office’s pronouncement deserves only . . . deference based on its ‘power to  
persuade.’”) (citation omitted). Circular 21 persuasively shows that the Excerpt is an acceptable amount of copying.



1 acknowledged to Judge Hicks in *Realty One* that use of excerpts *greater* in proportion than here  
 2 would be fair use. *See* Motion at 14.<sup>10</sup> As no disputed facts exist with regard to the amount or  
 3 substantiality of the Article taken, this factor favors fair use as a matter of law. *See Los Angeles*  
 4 *News Serv.*, 108 F.3d at 1120.

5 **D. Plaintiff Raises No Genuine Issue of Material Fact As to the Potential Effect**  
 6 **of the Use On the Market For the Work.**

7 Righthaven fails to identify a single factual dispute as to any harm to the value of the  
 8 Article resulting from the Excerpt appearing on the DU Website. *See* Opp. at 18:23-19:20. It  
 9 attempts no showing, for example, that it received a dime less from advertisers, or that revenues  
 10 from future archived copies will decline, due to a short portion (excluding the actual poll  
 11 numbers) having appeared elsewhere. Any evidence of harm to the value of a *LVRJ* news article  
 12 would be exclusively in the possession of Righthaven and Stephens Media, yet they have  
 13 presented no evidence to support harm, nor claimed to need discovery to prove harm to the  
 14 work's value. *See* Rule 56(d) Decl.

15 Instead, Righthaven relies entirely on a flawed assertion that because Democratic  
 16 Underground allegedly benefited (to the tune of less than \$2 in advertising revenue) from the  
 17 Excerpt's posting, this equates to harm to the copyright holder. That argument is a non-sequitor.  
 18 The fact that Democratic Underground used the Excerpt in a transformative way does not mean  
 19 that the value of the Article was reduced. Righthaven wrongly asserts that there is a presumption  
 20 of market harm in any case of commercial use, citing *dicta* in *Sony Corp. of Am. v. Universal City*  
 21 *Studios, Inc.*, 464 U.S. 417 (1984), but ignoring later, dispositive Supreme Court jurisprudence.  
 22 Specifically, in its 1994 *Campbell* decision, the Supreme Court clarified that no presumption  
 23 applies absent "verbatim copying of the original *in its entirety* for commercial purposes," since  
 24 absent such "mere duplication" there was no basis to presume that the copy "serves as a market  
 25 replacement" for the original. *Campbell*, 510 U.S. at 591 (emphasis added). When, "on the  
 26

27 <sup>10</sup> In opposition to the motion to dismiss in *Realty One*, Righthaven asserted that had the copying been limited to the  
 28 first two paragraphs of the article it would likely have constituted a fair use. *See Righthaven LLC v. Realty One*  
*Group, Inc.*, Case No. 2:10-cv-01036-LRH-PAL, Dkt. 12 at 10-11. In that case, the first two paragraphs contained  
 three sentences of the 28 sentence article, more than the 10% copied here. *See id.* Dkt. 1, Exs. 2, 3.

1 contrary, the second use is transformative, market substitution is at least less certain, and market  
2 harm may not be so readily inferred.” *Id.* Accordingly, the *Campbell* Court reversed the Court of  
3 Appeals’ application of a presumption of market harm in that case, in a decision that decisively  
4 rejects Righthaven’s assertion of a presumption here. *See also Elvis Presley Enters., Inc. v.*  
5 *Passport Video*, 349 F.3d 622, 631 (9th Cir. 2003) (“The more transformative the new work, the  
6 less likely the new work’s use of copyrighted materials will affect the market for the materials.”).  
7 As the Supreme Court stated, “[i]f, indeed, commerciality carried presumptive force against a  
8 finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the  
9 preamble paragraph of § 107, including news reporting, comment, criticism, teaching,  
10 scholarship, and research, since these activities ‘are generally conducted for profit in this  
11 country.’” *Campbell*, 510 U.S. at 584.

12 Here, the Excerpt was not “mere duplication” for commercial purposes: the copying at  
13 issue was 10%, not the entirety; the use was transformative—creating a forum for comment and  
14 criticism; and the Excerpt was posted with a link to the Article on the lvrj.com website,  
15 generating traffic to instead of keeping it away from the original Article. Such circumstances  
16 favor a finding of fair use. *Id.*; *Realty One*, 2010 U.S. Dist. LEXIS 111576, at \*6 (Judge Hicks  
17 found fair the use of a significantly larger portion of a *LVRJ* article on a similar blog published  
18 with a link to the original article at it could not “satisfy a reader’s desire to view and read the  
19 article in its entirety”).

20 Finally, Righthaven can show no harm to the value of the work it claims to now own  
21 because it has admitted that *its* business is based entirely on lawsuits seeking to capitalize on  
22 infringement, not on any exploitation of the work. Opsahl Decl. Ex. B (Righthaven is a  
23 “technology company whose only job is to protect copyrighted content.”); *see Video-Cinema*  
24 *Films, Inc. v. CNN, Inc.*, 2001 U.S. Dist. LEXIS 25687, at \*32 (S.D.N.Y. Nov. 28, 2001) (finding  
25 no market harm when only payments were settlements to avoid litigation); *Field*, 412 F. Supp. 2d  
26 at 1118 (fourth factor supported fair use where there was no evidence of any market for plaintiff’s  
27 made-for-litigation writings). Righthaven has raised no facts to suggest that it stands to lose any  
28 licensing, display, or other revenues. It has acknowledged it has no such revenues. Indeed, it is

1 undisputed that the Article remains available for free on the *LVRJ* website, and that Righthaven  
 2 receives *no compensation* for the *LVRJ*'s use. Opsahl Decl. ¶ 3; Reply Declaration of Kurt  
 3 Opsahl In Support Of Defendants' Motion for Summary Judgment ("Opsahl Reply Decl."), Ex. C  
 4 (Response 44).

5 \* \* \* \*

6 As Righthaven has not raised any issues of material fact, and all four factors weigh in  
 7 favor of finding fair use, the Court should grant summary judgment of non-infringement to the  
 8 Defendants. Moreover, even if the Court were to conclude that some factor did not weigh  
 9 entirely in favor of fair use, this would still not preclude summary judgment, as the balancing of  
 10 factors still presents a question of law for the Court. *See Mattel*, 353 F.3d at 800 (fair use is a  
 11 mixed question of fact and law and where material facts are not in dispute, summary judgment is  
 12 appropriate). The overwhelming and undisputed facts support summary judgment here.

13 **III. THERE IS NO BASIS IN THE LAW FOR RIGHTHAVEN'S DEMAND FOR**  
 14 **TRANSFER OF THE DEMOCRATIC UNDERGROUND DOMAIN NAME**

15 Righthaven does not present any argument in support of its demand for transfer of a  
 16 domain name, nor oppose any argument made by Democratic Underground in support of  
 17 summary judgment. *See* Motion at 16. Accordingly, this Court should grant summary judgment  
 18 against Righthaven's demand to control the democraticunderground.com domain name.

19 **IV. RIGHTHAVEN IS NOT ENTITLED TO A CONTINUANCE TO TAKE**  
 20 **DISCOVERY IT HAS NOT SHOWN NECESSARY OR LIKELY TO ALTER A**  
 21 **RULING ON SUMMARY JUDGMENT**

22 Righthaven insists throughout its Opposition that the Court cannot rule on Defendants'  
 23 Motion for Summary Judgment until Righthaven has conducted depositions. *Opp.* at 4:3, 4:9,  
 24 6:6, 7:17, 11:14, 15:13. Righthaven maintains, without authority, that it is "axiomatic" that it  
 25 should be "entitled to examine the veracity" of statements made by Defendants' declarants,  
 26 despite Righthaven's failure to raise a single disputed fact that is material to the resolution of this  
 27 Motion. *Opp.* at 4:13-15. Under these circumstances, continuing summary judgment and  
 28 prolonging litigation of the Complaint for discovery to occur is not appropriate.

The party opposing a motion for summary judgment and seeking a continuance for

1 discovery must show “(1) that they have set forth in affidavit form the *specific facts that they*  
2 *hope to elicit* from further discovery, (2) *that the facts sought exist*, and (3) that these sought-  
3 after facts *are ‘essential’ to resist* the summary judgment motion.” *State of Cal., on Behalf of the*  
4 *California Dept. of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998)  
5 (“*Dept. of Toxic Substances*”) (emphasis added); *see also, VISA Int’l Serv. Ass’n v. Bankcard*  
6 *Holder of America*, 784 F.2d 1472, 1475 (9th Cir. 1986).

7 Although Righthaven has now belatedly filed a Rule 56(d) declaration,<sup>11</sup> it complies with  
8 none of these three obligations. “Rule 56(f) requires affidavits setting forth the particular facts  
9 expected from the movant’s discovery. Failure to comply with the requirements of Rule 56(f) is a  
10 proper ground for denying discovery and proceeding to summary judgment.” *Brae Transp., Inc.*  
11 *v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986) (addressing Rule 56(d) at its former  
12 location). An abstract plan to conduct depositions, alone, fails to identify any specific facts that  
13 such discovery might reveal. *Nat’l Union Fire Ins. Co.*, 701 F.2d at 97; *see also Johnson v.*  
14 *Mitsubishi Digital Elecs. America, Inc.*, 365 Fed. Appx. 830, 833 (9th Cir. 2010) (“vague  
15 references to ‘discovery disputes’ and the need to ‘accumulate evidence’ were insufficient to  
16 satisfy Rule 56(f)’s specificity requirement”).

17 Moreover, as discussed above, the few subjects Righthaven identifies as subject for  
18 discovery, for example, Defendants’ software, servers and internal procedures, are all immaterial.  
19 *See Opp.* at 11. Even if they were material, Righthaven has failed to identify any answers it  
20 would expect to find in response to its questions that, if discovered, would contradict any material  
21 fact. Righthaven posits questions that appear generically relevant at best, not specific facts that  
22 exist and that would preclude summary judgment. *See Family Home and Finance Ctr., Inc. v.*  
23 *Federal Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

24 Righthaven’s position that summary judgment is “proper only after there is an adequate

25 <sup>11</sup> Righthaven filed no Rule 56(d) request until January 24, two weeks after its opposition to summary judgment.  
26 Dkt. 61. Rule 56(d) contemplates the filing of a request when “opposing the motion,” not later. The only Court of  
27 Appeals that has considered the time for a request held that a request “normally should precede or accompany the  
28 response to the summary judgment motion or follow as soon as practicable thereafter.” *Mass. Sch. of Law at*  
*Andover v. American Bar Ass’n*, 142 F.3d 26 (1st Cir. 1998). In the present case, there was nothing justifying  
Righthaven’s delay. While Righthaven cites *Ashton-Tate Corp. v. Ross*, 916 F.2d 516 (9th Cir. 1990), that case  
simply held that a filing *after* the hearing was too late, not that a Rule 56(d) request could be withheld until after  
filing an opposition to the motion where there is no reason to do so.

1 opportunity for discovery” (Opp. at 5:22-23) begs the question of what is adequate given the  
 2 particular issues in play. Righthaven’s accusations, vague references, and questions concerning  
 3 immaterial facts fail to provide any basis for a continuance. Therefore, the Court can and should  
 4 grant Defendants’ Motion.

5 **V. THE ISSUES RAISED IN THE MOTION FOR SUMMARY JUDGMENT WOULD**  
 6 **NOT BE MOOTED BY A GRANT OF VOLUNTARY DISMISSAL**

7 **A. Regardless Of Voluntary Dismissal of the Complaint, the Counterclaim**  
 8 **Requires A Determination That Reposting the Article Would Be Fair Use.**

9 As an alternative basis for the Court to deny the Motion for Summary Judgment,  
 10 Righthaven argues that the issues the Motion presents will be moot if the Court grants  
 11 Righthaven’s motion to dismiss the Complaint, and that the Counterclaim is merely “redundant”  
 12 (Opp. at 2:17) and therefore would also be disposed of by such a voluntary dismissal. Opp. at  
 13 7:3-7. Neither argument can withstand scrutiny. Voluntary dismissal of the Complaint would not  
 14 avoid this Court’s need to address the merits this Motion raises.

15 First, Righthaven’s argument that dismissal of the Complaint moots the Counterclaim  
 16 continues to ignore settled law that a counterclaim for declaratory relief will stand even after the  
 17 complaint’s dismissal when, as here, the counterclaim seeks relief not necessarily decided by  
 18 dismissal—in particular, a declaration of the invalidity of the right allegedly infringed. *See*  
 19 Motion at 26-29; Dkt. 46 (“Opp. to SM MTD”) at 12-16. Righthaven and Stephens Media filed  
 20 37 pages of combined reply briefing on their Motions to Dismiss. Dkts. 56, 57. Yet they offer no  
 21 response to *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83 (1993), or the numerous other  
 22 authorities cited in the Motion that a voluntary dismissal cannot warrant the Counterclaim’s  
 23 dismissal when it would not necessarily provide certainty as to issues presented by Counterclaim.

24 Moreover, Righthaven (and Stephens Media) ignore the fact that the Complaint’s  
 25 dismissal will not provide Democratic Underground a determination of its right to *repost* the  
 26 Excerpt, consistent with its practice of maintaining a complete record of all postings at the DU  
 27 Website. *See* Motion at 27; Allen Decl. ¶ 25; Opp. to SM MTD at 17. Although a dismissal  
 28 would be *res judicata* precluding another claim for Pampango’s posting, the reposting at the  
 instigation of Democratic Underground will present different factual circumstances that, unlike

1 the original posting by Pampango, could be a volitional act. Thus, to ensure that its rights to  
2 repost are protected (Allen Decl. ¶ 25), Democratic Underground needs at least a determination  
3 that a posting of the Excerpt constitutes fair use.

4 Righthaven has never stipulated that Democratic Underground is permitted to repost the  
5 Excerpt. Nor has Stephens Media, which indisputably holds “rights of reversion” in the Article  
6 (Dkt. 38, SM MTD Williams Decl. Exh. 1) and continues to display the Article on the *LVRJ*  
7 website claiming a copyright in its Stephens Media’s name. Opsahl Decl. ¶ 3. In fact,  
8 Righthaven maintains that it could still pursue another claim for a “separate and distinct act of  
9 infringement by the Defendants.” Dkt. 57 (“Righthaven Reply ISO MTD”) at 20:1. This Court  
10 therefore will need to decide the merits of the fair use issue regardless of a dismissal of the  
11 Complaint in order to resolve the continuing issues presented by the Counterclaim regarding the  
12 right to repost the Excerpt.

13 Finally, it should be recalled that the merits were first raised by Righthaven, when it  
14 argued that the Court should find its claims “objectively reasonable” and “non-frivolous” as one  
15 factor justifying dismissal combined with denial of Defendants’ attorneys’ fees. Dkt. 36  
16 (“Motion to Voluntarily Dismiss”) at 14. The Court will have to consider the merits in that  
17 context, so there is little more to determine summary judgment. For all these reasons,  
18 Righthaven’s motion to voluntarily dismiss cannot warrant avoidance of consideration of the  
19 merits, and, if anything, has already put the Court to that task.

20 **B. Stephens Media’s Limited Consent to be Bound by This Court Does Not**  
21 **Resolve This Litigation as to Stephens Media.**

22 Stephens Media’s has submitted a carefully phrased offer to be “bound by the final  
23 outcome of this litigation” but only “**insofar as it relates to Stephens Media’s ability to sue for**  
24 **infringement on any reversionary interest it may possess in the literary work at issue.**” SM  
25 Reply at 2-3 (emphasis added). That offer is cold comfort for Democratic Underground,  
26 however, since a mere dismissal of the Complaint would not determine *anyone’s* ability to sue  
27 over Democratic Undergrounds reposting, and thus, by definition, would not bind Stephens  
28 Media as to such reposting.

1           Moreover, although Stephens Media tacitly admits it has a reversionary interest in the  
2 copyright, it and Righthaven have still failed to provide the Court with the terms of that  
3 reversionary interest. SM MTD Ex. 1. The sole purpose of the assignments to Righthaven is to  
4 allow Stephens Media's surrogate to prosecute lawsuits. It therefore seems likely that the  
5 reversion to Stephens Media will be triggered by the lawsuit's completion—a fact that, if revealed  
6 by discovery, will further support the sham nature of the assignment. However, should the  
7 assignment be found to be sham, and Righthaven's claims rejected on that basis, Stephens  
8 Media's limited consent to be bound by the final outcome here would be ineffective. A finding  
9 that the *assignment* was sham would not then preclude Stephens Media from suing in its own  
10 name, or from granting an assignment to another party. Thus, Stephens Media's limited  
11 "consent" would not protect Democratic Underground.

12           Similarly, Stephens Media's limited consent to be bound only as to its "ability to sue on  
13 any reversionary interest" would exclude it from being bound by numerous other results in this  
14 action that may resolve any other subject. For example, Stephens Media would escape being  
15 bound by any determination that Righthaven is merely acting as its agent, that Righthaven is its  
16 alter ego, that the conduct of this action constitutes barratry, champerty and maintenance, or that  
17 *both* Counter-Defendants must pay Defendants' attorneys' fees.

18           The fact that Stephens Media does not want to be a party does not allow it to exit the case,  
19 avoid discovery, and avoid being bound by all that occurs. The only means to obtain a final  
20 determination binding Stephens Media and its reversionary interest is by having Stephens Media  
21 as a party.

22 **VI. PLAINTIFF'S CLAIMS THAT DEFENDANTS HAVE MULTIPLIED THIS**  
23 **PROCEEDING IS BOTH IRRELEVANT AND FALSE**

24           Righthaven expends numerous pages both in its Opposition and its Reply on its Motion to  
25 Dismiss hurling invective at Defendants for purportedly "multiplying the proceedings." *See* Opp.  
26 at 2-5; Righthaven Reply ISO MTD at 2-5; Rule 56(d) Decl. ¶ 6. As an initial matter,  
27 Righthaven's complaints have no bearing on the merits of Defendant's motion. Even if  
28 Righthaven's characterizations were accurate (they are not), none of the issues raised explain why

1 summary judgment is not appropriate or point toward any genuine dispute of material facts.

2 That said, Righthaven's complaints are preposterous. First, Righthaven has only itself to  
3 blame that this Motion is now pending. Righthaven could have easily ended this dispute (and  
4 ongoing fees), by dismissing without condition or by withdrawing its conditions after Defendants  
5 filed for summary judgment. Instead, Righthaven gambled that it would be allowed to walk away  
6 without consequence. Since Righthaven's dismissal is contingent on an unacceptable condition,  
7 however, Defendants have no choice but to prepare a defense, and they are doing so.

8 Second, Defendants are hardly "over-litigating" in an effort to accrue fees. Whatever fee  
9 claim Defendants ultimately present will be reviewed by this Court for its reasonableness.  
10 Righthaven's objection that any fee claim, or any Court award, will be excessive is premature at  
11 best. If there is a time to argue that excessive fees are being sought, it will be in response to an  
12 actual motion to recover them. More importantly, however, Defendants' counsel has done  
13 precisely what was needed to move toward a prompt conclusion of the case – no more, no less.

14 For example, Democratic Underground has indeed initiated discovery, whether or not  
15 Righthaven desires it. *See Opp.* at 3. Democratic Underground believes the complaint can be  
16 resolved without discovery—which is why it moved for summary judgment. Nonetheless, the  
17 parties are bound by a Court-ordered discovery schedule that imposes real deadlines, with expert  
18 disclosure due by March 30. *See Dkt. 54* ("Joint Discovery Plan and Scheduling Order").  
19 Righthaven stipulated to this discovery plan *after* it moved for voluntary dismissal. *See Dkt. 42.*  
20 Although it could have sought a stay, it did not, and the clock is therefore running.

21 In order to protect their ability to mount a defense, Defendants had to start the discovery  
22 process to ensure adequate time to gather information. Defendants were wise to do so, as  
23 Righthaven's responses have been both untimely, woefully inadequate, and peppered with  
24 nonsensical objections. Righthaven has thus far admitted or denied only 5% of the Requests for  
25 Admissions, answered none of the Interrogatories, and produced exactly zero documents. Opsahl  
26 Reply Decl. ¶ 16.<sup>12</sup> The rest: all objections. These will take time to resolve, and Defendants

27 <sup>12</sup> Righthaven faults Defendants for not returning a proposed protective order over the Christmas holiday, yet  
28 Defendants offered proposed language over two weeks ago, to which Righthaven has not responded. In the  
meantime, Righthaven has refused to produce *any* documents. Opsahl Reply Decl. ¶¶ 16-17.



1 must proceed on the schedule the Court ordered, unless and until the case is dismissed, settled, or  
2 resolved on summary judgment.

3 As for Righthaven’s complaint that Defendants pressed to obtain adequate initial  
4 disclosures, that is a “hamster wheel” Righthaven itself chose to traverse. *See Opp.* at 3.  
5 Righthaven’s initial disclosures failed to name *even one individual* with potential knowledge  
6 upon whom it intended to rely at trial, choosing instead to ‘disclose’ that there were unspecified  
7 “person[s] most knowledgeable” of certain topics—which is, of course, no disclosure of  
8 witnesses at all. Opsahl Reply Decl. ¶ 3, Ex. A. When Defendants protested, Righthaven’s  
9 supplement identified an EFF attorney as a witness (on pejorative topics unrelated to any claim or  
10 defense), but *again* failed to name a single Righthaven witness having discoverable information.  
11 Opsahl Reply Decl. ¶¶ 4-5, Ex. B. Before finally agreeing to identify individuals, Righthaven  
12 avoided Defendants’ efforts to confer for weeks, and then insisted that Defendants’ local counsel  
13 be present for the call, over Defendants’ objection that his presence was not required. Opsahl  
14 Reply Decl. ¶¶ 6-14. Incredibly, Righthaven now complains of the number of attorneys *it insisted*  
15 *attend the call*, as purported evidence of a “shocking litigation tactic” and effort to run up fees.  
16 *Opp.* at 2.

17 Righthaven’s overblown rhetoric about “inflated” fees and “vexatious” litigation is  
18 baseless. Democratic Underground, the target of an overreaching lawsuit, is simply defending  
19 itself and protecting its right to move for fees under Section 505 of the Copyright Act.

### 20 CONCLUSION

21 For the foregoing reasons, the Court should enter summary judgment on the Complaint in  
22 this action, based both on lack of a volitional act of copyright infringement, and fair use.

23 Dated: January 28, 2011

FENWICK & WEST LLP

24 By:           /s/ Laurence F. Pulgram            
25 LAURENCE F. PULGRAM, ESQ

26 Attorneys for Defendant and Counterclaimant  
27 DEMOCRATIC UNDERGROUND, LLC, and  
28 Defendant DAVID ALLEN