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12  
13 **UNITED STATES DISTRICT COURT**  
14 **DISTRICT OF NEVADA**  
15

16 RIGHTHAVEN LLC, a Nevada limited-  
liability company,  
17  
Plaintiff,  
18 v.  
19 DEMOCRATIC UNDERGROUND, LLC, a  
District of Columbia limited-liability  
20 company; and DAVID ALLEN, an individual,  
21  
Defendants.

Case No.: 2:10-cv-01356-RLH-RHH

**REPLY IN SUPPORT OF  
PLAINTIFF/COUNTERDEFENDANT'S  
MOTION FOR VOLUNTARY  
DISMISSAL WITH PREJUDICE AND  
ADJUDICATION OR DISMISSAL OF  
COUNTERCLAIM**

22  
23 DEMOCRATIC UNDERGROUND, LLC, a  
District of Columbia limited-liability  
24 company,  
25  
Counterclaimant,  
v.  
26 RIGHTHAVEN LLC, a Nevada limited-  
liability company; and STEPHENS MEDIA  
27 LLC, a Nevada limited-liability company,  
28  
Counterdefendants.

1 Righthaven LLC (“Righthaven”) hereby submits the instant Reply in support of its  
2 Motion for Voluntary Dismissal with Prejudice and Adjudication or Dismissal of the  
3 Counterclaim (the “Motion”; Docket No. 36-0), seeking the voluntary dismissal of Righthaven’s  
4 Complaint (Docket No. 1-0), with prejudice, pursuant to Rule 41(a)(2) of the Federal Rules of  
5 Civil Procedure, as asserted against Democratic Underground, LLC (“Democratic  
6 Underground”) and David Allen (collectively with Democratic Underground known herein as  
7 the “Defendants”). Righthaven’s Motion also sought the adjudication or dismissal of the  
8 pending Counterclaim (Docket No. 13-0), as filed by Democratic Underground. This Reply is  
9 accompanied by the Declaration of Shawn A. Mangano (“Mangano Decl.”) (a true and correct  
10 copy of the Mangano Decl. is attached hereto and incorporated herein as Exhibit 1), and is based  
11 upon the pleadings and papers on file in this action, any oral argument this Court may allow, and  
12 any other matter of which this Court takes notice.

13  
14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15  
16 **I. ARGUMENT**

17 **A. *The Defendants’ Refusal to Accept Righthaven’s Concession on the Merits***  
18 ***Exemplifies EFF’s Vexatious Anti-Righthaven Agenda and Wasteful Approach to***  
19 ***this Litigation***

20 The Defendants’ response to Righthaven’s voluntary dismissal efforts defies logic. In  
21 moving to voluntarily dismiss this matter *with prejudice*, Righthaven is telling the Defendants:  
22 “You win on the merits!” In other words, despite the arguably actionable nature of the  
23 Defendants’ infringing conduct, Righthaven, in an attempt to avoid filing duplicative appeals  
24 with the Ninth Circuit and unnecessarily consuming the Court’s valuable resources, is offering to  
25 concede this matter to the Defendants and forever abandon the right to file suit for this  
26 infringement in the future. Amazingly, this is still not good enough for the Defendants or their  
27 counsel.

1 The Defendants' refusal to agree to the dismissal terms sought by Righthaven, wherein  
2 the Defendants would be granted a full and final judgment on the merits, is demonstrative of the  
3 vexatious, vituperative approach taken against Righthaven by the Defendants' attorneys in this  
4 matter. The Defendants' counsel, the Electronic Frontier Foundation ("EFF"), has taken it upon  
5 itself to attack Righthaven's copyright enforcement efforts. EFF, representing defendants in  
6 multiple Righthaven cases, even advertises (a true and correct copy of said advertisement is  
7 attached hereto and incorporated herein as Exhibit 2) on its website that EFF's attorneys "are  
8 presently working at capacity" litigating Righthaven cases. (Ex. 2.) EFF's approach in these  
9 cases is uncomplicated: falsely characterize and attack Righthaven's business model; level  
10 unsupported, malicious statements concerning Righthaven both in the media and in court filings;  
11 and vehemently oppose all legal action taken by Righthaven regardless of the merits of the  
12 individual case or of Righthaven's underlying cause. This is unfortunate. It is Righthaven's  
13 belief that its mission should be lauded by the public: Righthaven seeks to protect the works of  
14 authors, to promote the progress of arts and sciences, and to ensure that, in this digital age of  
15 copying-and-pasting and rampant Internet-based copyright infringements, the creative efforts of  
16 individuals and publications alike do not go unrecognized.

17 However, whether Righthaven's copyright enforcement efforts are laudable is not the  
18 debate presently before the Court. The question before the Court is ***whether the Defendants are***  
19 ***simply willing to take "yes" for an answer.*** It goes without saying that the judiciary expects  
20 litigants to conduct themselves in a reasonable manner, a manner which maximizes judicial  
21 economy. Copyright litigants are no exception to this rule. In fact, when weighing a request for  
22 attorneys' fees in copyright cases, the Ninth Circuit takes careful consideration of whether either  
23 party has engaged in "vexatious, oppressive, obdurate and bad faith conduct" throughout the  
24 course of the litigation. *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 491  
25 (9th Cir. 1984) (*citing Kelly v. Guinn*, 456 F.2d 100 (9th Cir. 1972)). This principle is seemingly  
26 lost on the Defendants. ***By waging an unrelenting, overly-litigious battle in the face of***  
27 ***Righthaven's conciliatory offer via Rule 41(a)(2), and by continuing to accumulate***  
28 ***unnecessary, potentially exorbitant legal fees as a direct result of that battle, the Defendants***

1 *(and EFF) are engaging in precisely the type of obdurate behavior that the Copyright Act*  
2 *seeks to avoid.* This vexatious, wasteful approach should not be rewarded by the Court.

3 Never has EFF's motive been clearer than the current lawsuit. Righthaven, motivated  
4 largely by judicial economy, believes that it is acting in the noblest of senses by offering to  
5 dismiss this action with prejudice. By refusing Righthaven's offer, the Defendants are  
6 frustrating the fundamental purpose of the Copyright Act, which is to assure an author's "right to  
7 their original expression" and to encourage "others to build freely upon the ideas and information  
8 conveyed" by that author. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). In this case, the  
9 Defendants were not advancing the Copyright Act; by publicly displaying a partial, yet verbatim  
10 copy of a substantial portion of a protected literary work, the Defendants were not encouraging  
11 others to build upon the creative ideas and content found in the original work. Nevertheless,  
12 Righthaven is offering to concede this matter despite the fact that the Defendants' act of  
13 reproduction did not constitute a promotion of the Copyright Act.

14 There is no reasonable explanation – neither legal nor practical – for the Defendants'  
15 ongoing refusal to acquiesce to Righthaven's sensible (and, in Righthaven's view, honorable)  
16 offer to voluntarily dismiss this matter with prejudice. Unfortunately, as long as the Defendants  
17 are able to prolong this litigation, EFF will continue to conduct itself in a wasteful and  
18 unreasonable manner, all the while continuing to pile on (and waste) entirely preventable legal  
19 expenses. To illustrate this premise, consider the following timeline:

- 20 • November 15, 2010: Righthaven files its 41(a)(2) Motion;
- 21 • December 7, 2010: EFF files a 39-page brief (Docket No. 45-0): (1) moving for  
22 summary judgment on the merits and (2) opposing Righthaven's request for voluntary  
23 dismissal;
- 24 • December 15, 2010: EFF submits the Defendants' initial disclosures, clearly  
25 reflecting EFF's intent to depose a number of individuals bearing little to no  
26 connection with the instant lawsuit (Mangano Decl. ¶ 3.);
- 27 • December 17, 2010: EFF propounds (13) interrogatories on Righthaven (Mangano  
28 Decl. ¶ 4.);

- 1 • December 17, 2010: EFF submits (82) requests for admission to Righthaven  
2 (Mangano Decl. ¶ 5.);
- 3 • December 17, 2010: EFF submits (62) requests for production of documents to  
4 Righthaven (Mangano Decl. ¶ 6.).

5 This litigious course of action (particularly, this extremely burdensome and voluminous  
6 discovery) was **wholly unnecessary**: the entirety of the legal work listed above – each summary  
7 judgment argument made, each discovery document requested, each interrogatory propounded –  
8 was inexplicably completed by EFF ***a month after Righthaven had started the process of***  
9 ***ending (and conceding) this case***. Ultimately, the extent and timing of EFF’s misguided efforts  
10 reflect nothing more than EFF’s futile attempt to needlessly prolong this litigation and  
11 accumulate a windfall of attorneys’ fees. Such conduct should be neither permitted nor  
12 rewarded. **Simply stated, this case needs to end today.**

13  
14 **B. The Defendants Fail to Establish that a Dismissal Without Fees and Costs Will**  
15 **Result in Legal Prejudice**

16 The Defendants’ insistence that Righthaven’s request for voluntary dismissal is only  
17 appropriate if the Defendants are awarded attorneys’ fees ignores a consideration fundamental to  
18 the Rule 41(a)(2) analysis. If this matter is dismissed with prejudice and the Court aptly decides  
19 that all parties are responsible for their own fees and costs, the Defendants will not suffer any  
20 legal prejudice as a direct consequence of said dismissal. Accordingly, the Court would be well  
21 within its discretion to dismiss this matter, with prejudice, pursuant to the terms set forth in  
22 Righthaven’s Motion and proposed Order of Dismissal.

23 The Defendants will not be legally prejudiced, in any capacity, by this Court’s  
24 prospective entry of Righthaven’s Proposed Order of Dismissal. (*See* Mot. Ex. 1.) The law is  
25 clear that, in the 41(a)(2) construct, a plaintiff’s request for dismissal should be “liberally  
26 granted” so long as the defendant will not be legally prejudiced. *Watson v. Clark*, 716 F. Supp.  
27 1354, 1355 (D. Nev. 1989) *aff’d*, 909 F.2d 1490 (9th Cir. 1990); *see also Westlands Water*  
28 *District v. United States*, 100 F.3d 94, 96 (9th Cir. 1996) (“*Westlands*”). Legal prejudice does

1 not arise merely because a dispute is left unresolved, from the threat of future lawsuits, or from a  
2 “missed opportunity for a legal ruling on the merits.” *Watson*, 716 F. Supp. at 1355; *Smith v.*  
3 *Lenches*, 263 F.3d 972, 976 (9th Cir. 2001). Most importantly, the Ninth Circuit has firmly  
4 established that “the expense incurred in defending against a lawsuit does not amount to legal  
5 prejudice.” *Westlands*, 100 F.3d at 97. It speaks volumes that the Defendants, in their  
6 Opposition, fail to even suggest that they will be legally prejudiced should this Court enter a  
7 dismissal order without granting a corresponding award of attorneys’ fees. Ultimately, no such  
8 argument could reasonably have been made.

9 Righthaven’s discussion of the Ninth Circuit’s holding in *Smith* bears repeating, as it  
10 provides direct guidance to this issue. In *Smith*, the court found that the defendant would not be  
11 prejudiced by a grant of voluntary dismissal based on litigation costs because: (1) discovery had  
12 not commenced, (2) trial preparations had not commenced, and (3) no motions challenging the  
13 merits had been filed. *Smith*, 263 F.3d at 976. As of the filing date of Righthaven’s 41(a)(2)  
14 Motion (November 15, 2010), neither party had propounded any form of discovery, trial  
15 preparations had not yet begun, and no motions challenging the merits of Righthaven’s  
16 underlying infringement claim had been filed with the Court. Though EFF, a full month after the  
17 filing of Righthaven’s Motion (and in an act demonstrative of EFF’s ill-conceived, wastefully  
18 persistent attempt to drive up litigation costs despite Righthaven’s concession efforts): (1)  
19 propounded exorbitant discovery requests on Righthaven (*see* discovery timeline on pages 4-5,  
20 *supra*), (2) submitted the Defendants’ Rule 26 initial disclosures reflecting EFF’s clearly  
21 apparent intent to depose multiple persons even tenuously involved with this litigation, and (3)  
22 filed a Motion for Summary Judgment (*see* Docket No. 45-0, pgs. 1-17) challenging the merits of  
23 Righthaven’s underlying claim, none of these actions (and the substantial, unnecessary legal  
24 expenses associated therewith) had been taken at the time Righthaven originally moved to  
25 voluntarily dismiss. Accordingly, in light of the Ninth Circuit precedent in *Westlands* and *Smith*,  
26 the Defendants cannot legitimately claim that they will be legally prejudiced as a result of  
27 bearing their own attorneys’ fees upon a dismissal of this action with prejudice. Thus, as the  
28 imposition of legal prejudice is a consideration integral to the Court’s 41(a)(2) analysis, the fact

1 that the Defendants will not be legally prejudiced, in any capacity, by a dismissal of this action  
2 pursuant to the terms sought by Righthaven wholly justifies the Court's entry of Righthaven's  
3 Proposed Order.

4  
5 **C. Righthaven's Right of Withdrawal Under Rule 41(a)(2) is Unaffected by the**  
6 **Defendants' Unsupported Argument to the Contrary**

7 As the plaintiff in this lawsuit, and as the party moving for voluntary dismissal pursuant  
8 to Rule 41(a)(2), Righthaven has the right to withdraw its request for dismissal if attorneys' fees  
9 are imposed regardless of any statutory basis for said fees. On this issue, the most applicable  
10 Ninth Circuit law clearly favors Righthaven, and the Defendants' largely unsupported argument  
11 to the contrary completely fails to prove otherwise.

12 The Defendants' efforts to strip Righthaven of its right to withdraw are not well taken.  
13 On one hand, the Defendants acknowledge that the Ninth Circuit recognizes a plaintiff's right to  
14 withdraw a dismissal request if the conditions of dismissal are considered too burdensome or  
15 onerous. (Defs.' Opp'n 19:7-8) On the other hand, the Defendants simultaneously claim that the  
16 plaintiff's right of withdrawal is suddenly diminished if these burdensome conditions arise from  
17 an award of costs and fees imposed on an independent statutory basis. (Defs.' Opp'n 19:8-9)  
18 However, revealingly, the Defendants cite a single case – an unpublished Sixth Circuit decision –  
19 to support this theory. The Defendants do not cite any other authority, including Ninth Circuit  
20 authority, to substantiate this notion. Furthermore, the lone case cited by the Defendants,  
21 *Degussa Admixtures, Inc. v. Burnett*, 277 Fed. Appx. 530 (6th Cir. 2008) ("*Degussa II*"),  
22 contains significant factual distinctions from the instant matter, the likes of which exemplify the  
23 impropriety of the Defendants' argument in the present context. *Degussa II* represents the Sixth  
24 Circuit's affirmation of the Western District of Michigan's decision to award attorneys' fees to  
25 the defendant following the plaintiff's request for voluntary dismissal. *Degussa Admixtures, Inc.*  
26 *v. Burnett*, 471 F. Supp. 2d 848, 857 (W.D. Mich. 2007) ("*Degussa I*"). Unlike the instant  
27 action, the court in *Degussa I* was faced with a record in which: (1) the "parties [had] conducted  
28 discovery, including the taking of key depositions," (2) the court had heard oral argument, and

1 (3) the plaintiff was found to have been litigating in bad faith. *Degussa I*, 471 F. Supp. 2d at 851,  
2 854, 857. In this case, discovery had not yet commenced as of the filing of Righthaven's Motion  
3 (though, as previously noted, the Defendants unnecessarily propounded their first round of  
4 discovery more than a month after the filing of Righthaven's Motion), no oral arguments have  
5 even been *docketed* by the Court, and Righthaven has in no way been deemed to have been  
6 litigating this matter in bad faith. In other words, the Defendants fail to cite any Ninth Circuit  
7 authority to support their theory that Righthaven's right of withdrawal is somehow diminished if  
8 the basis of said withdrawal arises from statutorily awarded attorneys' fees, and the lone Sixth  
9 Circuit case relied upon by the Defendants is factually distinguishable to the point of being  
10 utterly inapplicable to the present analysis. An argument simply cannot stand under these  
11 circumstances.

12 Additionally, the Defendants err in challenging Righthaven's reliance on the Ninth  
13 Circuit's decision in *Lau v. Glendora Unified School District*, 792 F.2d 929, 930-31 (9th Cir.  
14 1986). (Defs.' Opp'n 19:12-18) The Defendants contend that *Lau* is distinguishable because, in  
15 that case, the award of attorneys' fees was based upon the court's discretion rather than upon  
16 independent statute. *Id.* While the attorneys' fees in *Lau* were in fact imposed at the court's  
17 discretion, the Ninth Circuit did not suggest that those were the **only** circumstances in which the  
18 plaintiff would be entitled to withdraw his motion for voluntary dismissal. The *Lau* court merely  
19 stated that "a plaintiff has the choice between accepting the conditions and obtaining dismissal  
20 and, if he feels that the conditions are too burdensome, withdrawing his dismissal motion and  
21 proceeding with the case on the merits." *Id.* at 930-31 (*quoting GAF Corporation v.*  
22 *Transamerica Insurance Co.*, 665 F.2d 364, 367-68 (D.C. Cir. 1981)). The Ninth Circuit did not  
23 set any specific limitations on the plaintiff's right to withdraw in the 41(a)(2) construct, nor was  
24 any indication given that in certain cases (such as cases in which attorneys' fees are awarded  
25 pursuant to independent statute) the plaintiff's right to withdraw was to be revoked altogether.  
26 *See Lau*, 792 F.2d at 930-31. The Court should not be misled by the Defendants' unsupported,  
27 self-serving representation to the contrary.<sup>1</sup>

28 <sup>1</sup> In the event that this Court chooses to impose an award of attorneys' fees against Righthaven, Righthaven may have no choice but to exercise its jurisprudentially-established right to withdraw and litigate this matter on the

1  
2 **D. The Present Circumstances do not Remotely Warrant the Imposition of Attorneys'**  
3 **Fees, thus the Court Need Not Authorize the Defendants' Request**

4 Given the nature of this lawsuit, the behavior of the parties, and the manner in which this  
5 litigation has unfolded, there is simply no basis upon which attorneys' fees should be fairly  
6 awarded to any party. In that vein, the Defendants drastically miss the mark when they contend  
7 that Righthaven is "holding the Court hostage" by advocating that a dismissal with prejudice  
8 should reasonably be conditioned upon the parties bearing responsibility for their own costs and  
9 attorneys' fees. (*See* Defs.' Opp'n 20:1) Under the present circumstances, this accusation is  
10 nothing short of astonishing. By baselessly opposing Righthaven's judicious efforts to forever  
11 dismiss this lawsuit, and by refusing to let this case end despite Righthaven's willingness to  
12 afford the Defendants a conclusive, conciliatory resolution, ***it is the Defendants – and not***  
13 ***Righthaven – who are holding the Court hostage by needlessly perpetuating this litigation.***  
14 Furthermore, this backwards contention made by the Defendants glosses over a subtle, yet very  
15 important distinction: Righthaven understands the Court's power to authorize an award of  
16 attorneys' fees, but, as discussed in the preceding section, Righthaven ultimately reserves the  
17 well-established right to withdraw its voluntary dismissal if such a condition is imposed.  
18 Righthaven's position is buoyed by the notion that, in this case, it would be highly inappropriate  
19 for the Court to award attorneys' fees because: (1) no exceptional circumstances exist that would  
20 justify such an award, (2) Righthaven's infringement action against the Defendants is neither  
21 frivolous nor was it filed in bad faith, and (3) the statutory attorneys' fees analysis, as set forth in  
22 the Copyright Act, weighs heavily in Righthaven's favor under the current facts. *See* 17 U.S.C. §  
23 505.

24  
25 **1. No Exceptional Circumstances Exist**

26  
27 merits. The attorneys' fees accumulated by the Defendants, including those accumulated as a direct result of the  
28 Defendants' ongoing flood of unnecessary briefing and discovery requests, will likely prove far too onerous and  
burdensome. Though Righthaven is clearly willing to concede this matter on the merits pursuant to the terms  
outlined in the 41(a)(2) Motion, the Defendants continue to inexplicably drive up their litigation costs despite the  
absence of a need to do so.

1 The Defendants' claim that an award of attorneys' fees is justified in light of this matter's  
2 "exceptional circumstances" is highly erroneous. (Defs.' Opp'n 20:8-10) The record currently  
3 before the Court cannot remotely be classified as one bearing the exceptional circumstances that  
4 many courts find necessary in order to impose a fee award when ruling upon a motion to  
5 voluntarily dismiss with prejudice. *See, e.g., Mobile Power Enterprises, Inc. v. Power Vac, Inc.*,  
6 496 F.2d 1311, 1312 (10th Cir. 1974). In fact, the argument made by the Defendants on this  
7 topic, and the case law cited in support thereof, plainly demonstrates the complete **absence** of  
8 such circumstances in this lawsuit.

9 First, Righthaven reiterates that this matter remains in the infancy stages of litigation. At  
10 the time Righthaven filed its Motion for Voluntary Dismissal, discovery had not commenced,  
11 and the only significant documents filed with the Court were Righthaven's original Complaint  
12 (Docket No. 1-0) and the Defendants' Answer and Counterclaim (Docket No. 13-0). Though, as  
13 noted above, the Defendants have since piled on costly, unnecessary filings and propounded a  
14 proverbial mountain of discovery requests, not a single hearing has been docketed with the  
15 Court, not a single item of evidence has been produced, and the parties are nowhere near  
16 beginning preparations for trial. And notwithstanding the Defendants' seemingly vexatious  
17 efforts to increase their attorneys' fees despite Righthaven's offer to voluntarily dismiss this  
18 action with prejudice, the legal work thus far performed by the parties remains rather minimal  
19 when compared to matters subjected to extensive discovery or fully litigated through trial.  
20 Summarily, it is hard to imagine how the Defendants, at this stage of the case, can viably  
21 demonstrate the existence of any exceptional circumstances.

22 Second, the authority cited by the Defendants ironically validates the impropriety of their  
23 argument. The Defendants' refer almost exclusively to the Tenth Circuit's decision in *AeroTech,*  
24 *Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997) ("*AeroTech*"), supposedly as a means of  
25 substantiating their claim concerning the existence of exceptional circumstances. (Defs.' Opp'n  
26 20:6-8) Of great moment, and as the Defendants correctly point out, the court in *AeroTech*  
27 explained that exceptional circumstances can arise "when a litigant makes a **repeated practice** of  
28 bringing claims and then dismissing them with prejudice after inflicting substantial litigation

1 costs on the opposing party and the judicial system.” *AeroTech*, 110 F.3d at 1528 (emphasis  
2 added). Apparently in an effort to connect the logical dots and draw (or manufacture) a parallel  
3 between the Tenth Circuit’s discussion in *AeroTech* and Righthaven’s business practice, the  
4 Defendants follow up this citation by concluding that the present circumstances are “certainly”  
5 exceptional because Righthaven has filed “almost 179 lawsuits in six months.” (Defs.’ Opp’n  
6 20:8-10) However, the Defendants do not demonstrate, or even attempt to demonstrate, that  
7 Righthaven has made a “repeated practice” of filing and voluntarily dismissing lawsuits with  
8 prejudice only after inflicting substantial defense fees on each defendant. *AeroTech*, 110 F.3d at  
9 1528. In fact, the Defendants fail to identify *a single, additional lawsuit* filed by Righthaven in  
10 which the matter was voluntarily dismissed with prejudice in a manner similar to the scenario  
11 described by the Tenth Circuit in *AeroTech*. While Righthaven has prudently used Rule 41(a)(2)  
12 as a mechanism for concluding many of its copyright actions, these filings have been the result  
13 of agreeable resolutions reached between the parties (contrary to the extensive, excessively  
14 litigious briefing presently before the Court). *See, e.g., Righthaven LLC v. Hyde Park*  
15 *Communications, Inc.*, (D. Nev.) 2:10-cv-01064-HDM-RJJ (Docket No. 7-0) (“Righthaven and  
16 Hyde Park have agreed to settle the matter by a written agreement.”). Specifically, as of the date  
17 of this filing, Righthaven has reached mutually agreeable resolutions with approximately 107  
18 copyright defendants by way of written settlement agreement. (Mangano Decl. ¶ 7.)  
19 Significantly, this entire volume of Rule 41(a)(2) case resolution filings is entirely incomparable  
20 to the chain of briefing in the instant matter. Thus, it is not surprising that the Defendants’  
21 Opposition fails to highlight even a single instance (let alone multiple instances) in which  
22 Righthaven has improperly invoked 41(a)(2) as a procedural mechanism. Thus, the “repeated  
23 practice” standard established in *AeroTech* – and the legal consequences associated therewith –  
24 simply do not apply.<sup>2</sup>

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25  
26  
27 <sup>2</sup> Nowhere in the *AeroTech* opinion is there any indication that the plaintiff had made “a repeated practice of  
28 bringing claims and then dismissing them with prejudice after inflicting substantial litigation costs on the opposing  
party and the judicial system.” *AeroTech*, 110 F.3d at 1528. As such, it is not surprising that the Tenth Circuit  
ultimately affirmed the lower court’s decision to deny the award of attorneys’ fees sought by the defendant. *Id.* at  
1529.

1 Perhaps realizing the complete absence of legal authority to support their position, the  
2 Defendants conclude their exceptional circumstances argument with a self-serving, vituperative  
3 rant against Righthaven's business model. (Defs.' Opp'n 20: 11-19) This attack, laden with  
4 unsubstantiated, inaccurate factual assertions, has virtually no bearing on the applicable  
5 "exceptional circumstances" analysis and is noticeably detached (from a conceptual argument  
6 standpoint) from the Defendants' *AeroTech* discussion in the Opposition's preceding paragraph.  
7 Moreover, the attacking statements leveled by the Defendants are as vexatious as they are  
8 illogical. For instance, the Defendants condemn Righthaven for filing suit without first  
9 "providing notice and opportunity to take down alleged infringements." (Defs.' Opp'n 20:11-12)  
10 However, this argument demonstrates the analytically shallow nature of the Defendants'  
11 position, as the Defendants have failed to consider the following factors: (1) an infringer who  
12 will knowingly receive a take-down notice prior to facing legal repercussions has no incentive to  
13 refrain from infringing until such time as notice is received; (2) copyright owners incur  
14 substantial costs and expend substantial time and resources locating and monitoring Internet-  
15 based infringements, and said owners should not be prohibited from attempting to recoup said  
16 losses (while simultaneously protecting their copyright) from those engaging in infringement;  
17 and (3) the provisions of the Digital Millennium Copyright Act ("DMCA") offer protection to  
18 DMCA-compliant website operators, including the right to receive take-down notices prior to  
19 facing suit, but non-compliant websites are not afforded said right. *See* 17 U.S.C. § 512(c) *et seq.*  
20 It is revealing that the Defendants fail to discredit – or even briefly address – any of these  
21 squarely relevant (and seemingly obvious) considerations.

22 The Defendants' claim that Righthaven uses "scare tactics," such as including an  
23 allegation for statutory damages in the pleadings, is similarly unfounded. (Defs.' Opp'n 20:13-  
24 15) This conclusory characterization of Righthaven's intent ignores the fact that the Copyright  
25 Act expressly provides for statutory damages in the amount of \$150,000.00 per infringement  
26 whenever the court finds that the infringement was committed willfully. 17 U.S.C. § 504(c)(2).  
27 In this regard, Righthaven's basis for alleging willful infringement in its copyright actions is both  
28 uncomplicated and jurisprudentially supported: willfulness is established because the infringer

1 intentionally (and personally) posted the infringement, *or* willfulness is established because the  
 2 infringer operates a forum-based website and the infringer is “willfully blind to facts that would  
 3 have caused a reasonable person to know . . . that they were infringing valid copyrights.” *Lanard*  
 4 *Toys Ltd. v. Novelty, Inc.*, 375 Fed. Appx. 705, 711 (9th Cir. 2010); *see also N.A.S. Import, Corp.*  
 5 *v. Chenson Enterprises, Inc.*, 968 F.2d 250, 252-53 (2d Cir. 1992) (willful infringement “may be  
 6 inferred from the defendant’s conduct.”). As such, Righthaven has a good-faith, legally well-  
 7 founded basis for alleging willful infringement in its copyright actions, thereby validating  
 8 Righthaven’s inclusion of a statutory damages allegation under Section 504(c)(2). This  
 9 proposition is by no means diminished simply due to the Defendants’ legally unfounded,  
 10 conclusory attacks on Righthaven’s underlying intent.

11  
 12 **2. This Lawsuit is Neither Frivolous on its Merits Nor the Product of Bad**  
 13 **Faith Litigation**

14 No reasonable argument can be made that the instant lawsuit, or the sum of Righthaven’s  
 15 lawsuits, are legally frivolous.<sup>3</sup> Similarly, there is no evidence whatsoever – notwithstanding the  
 16 Defendants’ bald-faced, unsupported assertions – that Righthaven is, or has ever been, motivated  
 17 by bad faith with respect to any of its legal filings. Consequently, neither of these accusations,  
 18 both of which have been contrived by the Defendants for the apparent purpose of garnering  
 19 public ill-will towards Righthaven, provides a legitimate basis for imposing attorneys’ fees as a  
 20 condition of dismissal.

21 While the extreme brevity of the Defendants’ discussion concerning frivolity and bad  
 22 faith is – standing alone – admittedly an insufficient reason to summarily dismiss the  
 23 Defendants’ argument, the complete absence of legal authority cited in support of the  
 24 Defendants’ position is far more revealing. (*See* Defs.’ Opp’n 20-21) The Defendants open their  
 25 argument by accurately referring to a 1963 decision rendered by the District of Maryland,

26  
 27 <sup>3</sup> In this regard, it is noteworthy that the Defendants fail to address the string of recent opinions rendered by this  
 28 Court, summarized on pages 20-22 of Righthaven’s 41(a)(2) Motion. These opinions clearly reflect that this Court  
 has confirmed the legitimacy and legal sufficiency of numerous Righthaven copyright suits substantially similar to  
 the present action. In doing so, this Court has arguably established, *ipso facto*, that said lawsuits are, at least at the  
 pleading level, neither frivolous nor objectively unreasonable. (*See* Mot., pgs. 20-22)

1 wherein the court found that attorneys' fees can be awarded upon a showing of frivolity or the  
2 plaintiff's bad faith. *Lawrence v. Fuld*, 32 F.R.D. 329,331-32 (D. Md. 1963). (Defs.' Opp'n  
3 20:23-24) Thereafter, the Defendants thereafter fail to cite even a single piece of additional  
4 authority to substantiate the notion that the merits of this case, or Righthaven's intentions at the  
5 time of filing, rise to such an objectionable level.

6 The Defendants similarly fail to cite any pertinent facts demonstrating either the frivolity  
7 of Righthaven's suit or Righthaven's bad-faith approach to this litigation. Instead, the  
8 Defendants futilely note that Righthaven's allegation concerning the seizure of the Democratic  
9 Underground domain name as part of its prayer for relief (*see* Compl. – "Prayer for Relief") is  
10 both "contrary to the Copyright Act" and an "obvious effort to instill fear of consequences  
11 completely disproportionate to the issues in the case." (Defs.' Opp'n 20-21) However, this self-  
12 serving, false characterization of law and fact is entirely unsupported and falls well short of the  
13 legal standards for frivolity and bad faith. A claim is frivolous only if it is "legally and factually  
14 baseless from an objective perspective." *United States Philips Corp. v. Synergy Dynamics*  
15 *International, LLC*, 2006 WL 3453225, at \*6 (D. Nev. Nov. 28, 2006); *see also Molski v.*  
16 *Rapazzini Winery*, 400 F. Supp. 2d 1208, 1210 (N.D. Cal. 2005) (a claim is frivolous if it is  
17 lacking a legal basis or legal merit). Moreover, attorneys' fees are rarely awarded on the basis of  
18 bad faith litigation; awarding such fees on grounds of bad faith "is punitive and should be  
19 imposed only in exceptional cases." *Rodriguez v. United States*, 542 F.3d 704, 711 (9th Cir.  
20 2008) (internal quotation marks omitted). At present, the exactitude of the Defendants' partial  
21 copying and unauthorized republication of the same (*see* Compl. Ex. 1-2.) directly undermines  
22 any contention that Righthaven's instant copyright claim is frivolous or that Righthaven's filing  
23 was motivated by bad faith. Consequently, an award of attorneys' fees would be utterly  
24 inappropriate on this basis.

25  
26 **3. Application of the Present Facts to the § 505 Analysis Clearly Demonstrates**  
27 **the Impropriety of a Potential Fee Award**  
28

1                   **a. The Defendants' Degree of Success Must Be Viewed in its Proper**  
2                   **Context**

3                   The Defendants' argument concerning the first fair use factor, the degree of success  
4                   obtained, fails to venture beyond the analytical surface. The Defendants brashly conclude that,  
5                   because they will be the recipient of a judgment on the merits as a result of Righthaven's  
6                   dismissal efforts, that "[t]his factor strongly supports an award of attorneys' fees." (Defs.' Opp'n  
7                   22:6-7) In this regard, the Defendants act as if this matter has been fully litigated and that  
8                   Righthaven is only choosing to concede this suit after having exhaustively explored each and  
9                   every possible theory of liability. This is not the case. Righthaven's dismissal efforts are not the  
10                  result of extensive briefing, voluminous discovery, oral argument before the Court, or the  
11                  presentment of evidence. Contrarily, the Defendants' success in this matter is largely technical –  
12                  the product of Righthaven's decision to avoid bringing duplicative, simultaneous appeals before  
13                  the Ninth Circuit out of respect for judicial economy. In that vein, the Defendants are unable to  
14                  explain the clear distinction between the instant case and cases such as *Pythagoras Intellectual*  
15                  *Holdings, LLC v. Stegall*, 2009 WL 3245000 (C.D. Cal. Oct. 5, 2009), wherein the court found  
16                  that "the degree of success obtained by Defendants was high" because the plaintiffs' claims had  
17                  been dismissed after nearly two years of expensive, ongoing litigation. *Id.* at 1-2. By  
18                  comparison, the instant matter was initiated less than six months ago, with Righthaven's original  
19                  dismissal Motion being filed just three months after the filing of the Complaint (filed August 10,  
20                  2010). Accordingly, the degree of the Defendants' success is undoubtedly offset – at least in  
21                  significant part – by these unique circumstances, precluding an award of attorneys' fees on these  
22                  grounds.

23                   **b. The Instant Infringement Claim, Like All Righthaven Infringement**  
24                   **Claims, is Both Meritorious and Objectively Reasonable**

25                  The Defendants assert a variety of arguments in an attempt to attack the reasonableness  
26                  of Righthaven's underlying infringement claim, none of which effectively advance the  
27                  Defendants' position. Ironically, the Defendants' discussion on this topic highlights a number of  
28                  issues which actually strengthen Righthaven's legal footing. Additionally, the Defendants

1 conspicuously fail to address significant portions of Righthaven’s argument concerning objective  
2 reasonableness. Such omissions should not go unnoticed.

3 The Defendants’ arguably backward approach to the § 505 analysis is exemplified by the  
4 Defendants’ statements about fair use. While the merits of the fair use issue have been  
5 substantially briefed by both parties in separate filings, Righthaven did briefly touch upon fair  
6 use in the original 41(a)(2) Motion. (Mot. 2:24-26) discussing this reference, the Defendants  
7 shortsightedly assert that “[o]n fair use, Righthaven asserts only that ‘reasonable minds may  
8 differ,’ while failing to present any analysis of fair use that might ‘reasonably’ support its claim .  
9 . . .” (Defs.’ Opp’n 22:15-17) This statement is baffling. Apparently, absent any substantiating  
10 authority, the Defendants are of the belief that Righthaven was required to provide the Court  
11 with a full-fledged fair use analysis as part of its 41(a)(2) dismissal Motion, and that  
12 Righthaven’s failure to do so thereby evidences the objective unreasonableness of the underlying  
13 infringement lawsuit. Moreover, the Defendants’ contention completely ignores the venerably  
14 established rule that the burden for demonstrating fair use rests with the defendant, not the  
15 plaintiff. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994). This burden did not  
16 somehow shift to Righthaven simply because Righthaven moved for voluntary dismissal, thus  
17 the Defendants’ argument in this regard is entirely without merit.

18 The Defendants’ reference to Righthaven’s obligations under Rule 11 further aids  
19 Righthaven’s cause. The Defendants mention that Righthaven, as a party to “179 cases,” is  
20 repeatedly “subject to Rule 11’s pre-filing inquiry.” (Defs.’ Opp’n 22:12-13) The Defendants  
21 are apparently reminding Righthaven that the instant filing, along with all other Righthaven other  
22 copyright suits, are subject to Rule 11 standards of diligence. *See* Fed. R. Civ. P. 11(b).  
23 However, such a reminder is entirely unnecessary: in the approximately 202 copyright suits filed  
24 by Righthaven over the past year, ***not a single Rule 11 motion has been served upon***  
25 ***Righthaven by any copyright defendant***, nor has any such motion been filed with the Court.  
26 (Mangano Decl. ¶¶ 8-9.) In fact, it is Righthaven, and not Righthaven’s defendants, who has had  
27 a proper basis for moving for Rule 11 sanctions. *See, e.g., Righthaven LLC v. Dr. Shezad Malik*  
28 *Law Firm, P.C.*, (D. Nev.) 2:10-cv-0636-RLH-RJJ (Docket No. 13-0). In sum, the Defendants’

1 reference to Rule 11 in the Opposition has the ultimate effect of further strengthening  
2 Righthaven's legal standing with the Court.

3 Finally, the Defendants fail to rebut, in any capacity, the presumption of reasonableness  
4 afforded to Righthaven arising from Righthaven's copyright ownership. Specifically, the  
5 Defendants summarily ignore the line of cases cited in Righthaven's Motion establishing that a  
6 copyright action supported by the plaintiff's presentment of copyright ownership (via copyright  
7 registration or application) is generally construed by the court as an objectively reasonable,  
8 colorable claim for infringement. *See Twentieth Century Fox Film Corp. v. Streeter*, 438 F.  
9 Supp. 2d 1065, 1075 (D. Ariz. 2006); *National Nonwovens, Inc. v. Consumer Products*  
10 *Enterprises, Inc.*, 397 F. Supp. 2d 245, 260 (D. Mass. 2005). As Righthaven has specifically  
11 alleged, and attached proof of: (1) Righthaven's copyright ownership in and to the infringed  
12 literary work, (Compl. ¶¶ 10,28.) (Compl. Ex. 4.) and (2) the Defendants' infringement of  
13 Righthaven's copyrighted work, (Compl. ¶ 13.) (Compl. Ex. 3.) Righthaven has unequivocally  
14 established at least a *colorable*, objectively reasonable claim for infringement. The Defendants'  
15 failure to address this principle speaks for itself.

16  
17 **c. The Defendants' Arguments on Motivation and Deterrence are**  
18 **Unsubstantiated, Speculative, and Vexatious**

19 Much like the preceding argument on reasonableness, the Defendants' arguments  
20 concerning Righthaven's allegedly improper motive and the need for deterrence are entirely  
21 predicated on wholly unsupported, self-serving factual assertions. This demeaning, offensive  
22 (and arguably malicious) approach has no place in the current lawsuit and should be left out of  
23 the Court's final analysis.

24 The Defendants' strategy here is not surprising given the unduly hostile nature of the  
25 preceding arguments. However, as has been the case with the Defendants' entire Opposition, the  
26 absence of factual support and applicable legal authority ultimately manifests, leaving nothing  
27 more than an unpersuasive bed of insults. For instance, the Defendants almost immediately  
28 begin by stating that Righthaven's "motive is purely mercenary," and that Righthaven "has built

1 a business model with Stephens Media around bringing hundreds of strike suits for use of  
2 excerpts or copies of *LVRJ* articles, month after month.” (Def’s. Opp’n 23:17-19) Revealingly,  
3 the Defendants do not expound upon, or explain in any capacity, the manner in which  
4 Righthaven’s motive is “mercenary.” Nor do the Defendants legitimately explain, beyond  
5 asserting false characterizations, the manner in which any of Righthaven’s lawsuits have been  
6 improper. Similarly, the Defendants do not justify the legitimacy of their attacks in the face of  
7 the numerous favorable rulings Righthaven has received from this Court concerning a variety of  
8 legal issues raised in other, substantially similar Righthaven-initiated infringement cases. (*See*  
9 Mot. 20-22)

10 EFF’s erroneous attacks continue throughout this argument. The Defendants go on to  
11 state that Righthaven is “armed with statutory remedies,” and that said remedies “overwhelm the  
12 actual value of the uses challenged.” (Def’s. Opp’n 23:19-20) This accusation exemplifies the  
13 absurdity of the Defendants’ position. First, the “statutory remedies” references by the  
14 Defendants are those which have been *specifically afforded by Congress via the Copyright Act*.  
15 *See* 17 U.S.C. § 504 *et seq.* Furthermore, the Defendants are apparently acting as expert  
16 witnesses by offering definitive conclusions regarding the present and future value of the  
17 infringed work’s reproduction. Realistically, the Defendants have no idea as to the past, present,  
18 or future value of infringed work, including its potential for licensing. However, the Defendants  
19 instead choose to make vexatious, conclusory assertions despite having no factual or legal basis  
20 for doing so. The Court should ignore such thoughtless arguments.

21  
22 **4. Independent Adjudication of the Counterclaim is Wholly Unnecessary and**  
23 **Would Needlessly Perpetuate this Litigation**

24 There is simply no need to perpetuate this litigation, regardless of the Defendants’  
25 entirely superfluous counterclaim. The Defendants’ counterclaim is predicated a single claim for  
26 relief: declaration of no copyright infringement. (*See* Def’s. Answer and Counterclaim ¶¶ 184-  
27 196.) In other words, the relief sought by the Defendants is the exact inverse of the relief sought  
28 by Righthaven in the original Complaint. (*See* Compl. ¶¶ 34-46.) However, Righthaven’s

1 41(a)(2) Motion clearly, and *unequivocally*, establishes that the infringement alleged by  
2 Righthaven did not occur for the purposes of this lawsuit. (*See* Mot. 3:9-11) (awarding the  
3 Defendants “a full and final judgment on the merits in the Defendants’ favor, just as if the  
4 Defendants were to prevail at trial.”). As such, the relief sought by the Defendants in the  
5 counterclaim has been fully achieved by way of Righthaven’s voluntary dismissal. In that vein,  
6 the legal theory upon which that conclusion was reached is rendered entirely irrelevant.  
7 Accordingly, the Defendants’ unfounded contention that they are nevertheless entitled to a full  
8 adjudication of each defense theory proffered in the pleadings would be nothing more than an  
9 exercise in redundancy and a substantial waste of judicial resources (and legal expenses).

10 ***Righthaven is conceding the exact judgment sought by the Defendants. It is remarkable that***  
11 ***the Defendants find this to be insufficient.***

12 Furthermore, the Defendants’ assertion that absent further adjudication, Righthaven will  
13 be free to re-initiate this lawsuit is undermined by the doctrine of *res judicata*. This doctrine,  
14 one founded upon claim preclusion, prohibits litigation in a subsequent suit of any claim that was  
15 raised (or could have been raised) in a preceding suit. *Western Radio Servs. Co. v. Glickman*, 123  
16 F.3d 1189, 1192 (9th Cir.1997). *Res judicata* is applicable “whenever there is: (1) an identity of  
17 claims, (2) a final judgment on the merits, and (3) identity or privity between parties.” *Owens v.*  
18 *Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). This principle is directly  
19 applicable at present. First, an identity of claims is clearly established as any action for  
20 infringement of the subject work would clearly rise from the same, or a substantially similar,  
21 nucleus of operative facts.<sup>4</sup> Second, assuming this matter is voluntarily dismissed with  
22 prejudice, a final judgment on the merits in the Defendants’ favor will have been reached. *See,*  
23 *e.g., Smoot v. Fox*, 340 F.2d 301, 303 (6th Cir. 1964). Finally, as Righthaven is the copyright  
24 owner of the infringed work, (*see* Compl. ¶ 28.) any future lawsuit for infringement against the  
25 Defendants would, once again, be a Righthaven-initiated suit, thereby reestablishing identity  
26 (and/or privity) between Righthaven and the Defendants.

27 \_\_\_\_\_  
28 <sup>4</sup> “The central criterion in determining whether there is an identity of claims between the first and second  
adjudications is whether the two suits arise out of the same transactional nucleus of facts.” *Frank v. United Airlines,*  
*Inc.*, 216 F.3d 845, 851 (9th Cir.2000).

1 Barring a separate and distinct act of infringement by the Defendants, Righthaven will  
2 have no basis upon which it can re-assert the instant lawsuit in the future, as doing so would be  
3 precluded by the doctrine of *res judicata*. As such, the Defendants' theory regarding  
4 Righthaven's ability to re-file is both factually and legally erroneous. Ultimately, there is no  
5 basis upon which the Defendants' can reasonably argue that they are entitled to the Court's  
6 independent adjudication of the pending counterclaim. Both Righthaven's infringement claim,  
7 and the mirroring counterclaim needlessly filed by the Defendants, will be fully resolved upon  
8 the Court's dismissal of this matter with prejudice.

9  
10 **II. CONCLUSION**

11 For the reasons set forth above, Righthaven respectfully requests that this Court grant  
12 Righthaven's Motion for Voluntary Dismissal with Prejudice pursuant to the terms outlined in  
13 Righthaven's Proposed Order of Dismissal, (Mot. Ex. 1.) including the full adjudication or  
14 dismissal of the pending Counterclaim (Docket No. 13-0).

15 Dated this 7<sup>th</sup> day of January, 2011.

16 RIGHTHAVEN LLC

17  
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**CERTIFICATE OF SERVICE**

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I am an employee of Righthaven LLC and that on this 7<sup>TH</sup> day of January, 2011, I caused the **REPLY IN SUPPORT OF PLAINTIFF/COUNTERDEFENDANT’S MOTION FOR VOLUNTARY DISMISSAL WITH PREJUDICE AND ADJUDICATION OR DISMISSAL OF COUNTERCLAIM** to be served by the Court’s CM/ECF system to the following:

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