

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1 LAURENCE F. PULGRAM (CA State Bar No. 115163) (*pro hac vice*)
lpulgram@fenwick.com
 2 JENNIFER J. JOHNSON (CA State Bar No. 252897) (*pro hac vice*)
jjjohnson@fenwick.com
 3 CLIFFORD C. WEBB (CA State Bar No. 260885) (*pro hac vice*)
cwebb@fenwick.com
 4 FENWICK & WEST LLP
 555 California Street, 12th Floor
 5 San Francisco, California 94104
 Telephone: (415) 875-2300
 6 Facsimile: (415) 281-1350

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

12 CHAD BOWERS (NV State Bar No. 7283)
bowers@lawyer.com
 13 CHAD A. BOWERS, LTD
 3202 West Charleston Boulevard
 14 Las Vegas, Nevada 89102
 Telephone: (702) 457-1001

15 Attorneys for Defendant and Counterclaimant
 16 DEMOCRATIC UNDERGROUND, LLC, and
 Defendant DAVID ALLEN

17 **UNITED STATES DISTRICT COURT**
 18 **FOR THE DISTRICT OF NEVADA**

<p>19 RIGHTHAVEN LLC, a Nevada limited liability company, Plaintiff, v. 21 DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company; and DAVID ALLEN, 22 an individual, Defendants.</p>	<p>Case No. 2:10-cv-01356-RLH (GWF)</p> <p>DEMOCRATIC UNDERGROUND’S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIM</p>
--	--

<p>24 DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company, Counterclaimant, v. 26 RIGHTHAVEN LLC, a Nevada limited liability company, 27 and STEPHENS MEDIA LLC, a Nevada limited-liability company, 28 Counterdefendants.</p>	
---	--

REPLY ISO MOTION FOR SUMMARY
 JUDGMENT ON COUNTERCLAIM

CASE NO. 2:10-CV-01356-RLH (GWF)

1 On October 24, 2011, Defendant and Counterclaimant Democratic Underground filed a
2 Motion for Summary Judgment on the Counterclaim (Dkt. No. 168) against Counterdefendant
3 Stephens Media LLC (“Stephens Media”), seeking a declaration of non-infringement based on
4 both fair use and lack of any volitional act. On November 17, 2011, Stephens Media submitted a
5 limited response to the Motion in which Stephens Media “does not contest the substantive
6 arguments presented by [Democratic Underground] on the issues of volitional act and fair use as
7 applied to the material facts of this case.” Docket No. 174 at 2. Accordingly, the Court should
8 grant this uncontested Motion for Summary Judgment on the Counterclaim in accordance with
9 the Proposed Declaratory Judgment attached hereto, which declares the finding that Stephens has
10 not opposed.

11 The only issue raised by Stephens Media in its Response (Dkt. No. 174) to the Motion for
12 Summary Judgment, is to request that the Court maintain the confidentiality and sealed status of
13 various non-party contracts that were produced by Stephens Media in this action, as well as the
14 portions of the moving papers that reference to these materials. *See* Dkt No. 174 at 3-8.
15 Democratic Underground takes no position on the propriety of maintaining the sealed status of
16 the *non-party contracts*, Exhibits 9 and 12-17 of the Supporting Declaration of Kurt Opsahl (Dkt.
17 No. 168-1, Ex. 9, 12-17). However, with respect to the content of the motion itself (Dkt. No.
18 168), only minimal parts of the sealed contracts have been excerpted.

19 The strict standard limiting filing under seal applies to materials included in dispositive
20 motions. While the Court may ultimately reach its own conclusions based on the record,
21 Democratic Underground respectfully suggests that Stephens Media has not provided compelling
22 reasons that would justify maintaining the sealed status of the small amount of information that is
23 excerpted in the motion, and certainly not “compelling reasons supported by specific factual
24 findings that outweigh the general history of access and public policies favoring disclosure.”
25 *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (internal
26 citation omitted). Pursuant to *Kamakana*, a solid basis exists for this Court to conclude that the
27 unredacted version of the motion itself could be unsealed.
28

1 Finally, the entry of summary judgment as to the Counterclaim in this action also impacts
2 the order needed to finalize judgment as to the Complaint filed by Plaintiff Righthaven LLC. In
3 light of this Court's dismissal of Righthaven's complaint based on its lack of ownership of the
4 copyrighted work at issue, and the resulting lack of standing to assert any claim, prior to moving
5 for summary judgment against Stephens Media, Defendants on October 21, 2011 moved for entry
6 of a partial final judgment dismissing with prejudice Righthaven's claims, pursuant to Fed. R.
7 Civ. P. Rule 54(b). *See* Dkt. No. 166. A response was due on November 7, 2011. However,
8 Righthaven filed no opposition to that motion, nor did it dispute the propriety of entry of a
9 dismissal with prejudice. *See* Local Rule of Civil Practice 7-2(d) ("The failure of an opposing
10 party to file points and authorities in response to any motion shall constitute a consent to the
11 granting of the motion."). As the entry of summary judgment will now dispose of all claims in
12 this action, no further certification of a partial judgment as to "fewer than all claims or parties" is
13 required under Rule 54(b). Rather, a single final judgment should be entered both declaring non-
14 infringement and dismissing Righthaven's claims with prejudice.

15 The [Proposed] Final Declaratory Judgment submitted herewith has been prepared to
16 accomplish this result.

17 Dated: December 5, 2011

FENWICK & WEST LLP

18
19
20
21
22
23
24
25
26
27
28

By: /s/ Laurence Pulgram
LAURENCE PULGRAM
Fenwick & West LLP
555 California Street, Suite 1200
San Francisco, CA 94104
Telephone: (415) 875-2300
Facsimile: (415) 281-1350
lpulgram@fenwick.com

Attorneys for Defendant and Counterclaimant
DEMOCRATIC UNDERGROUND, LLC, and
Defendant DAVID ALLEN