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11
 12 **UNITED STATES DISTRICT COURT**
 13 **DISTRICT OF NEVADA**
 14

15 RIGHTHAVEN LLC, a Nevada limited-
 16 liability company,
 17
 18 Plaintiff,
 19 v.
 20 DEMOCRATIC UNDERGROUND, LLC, a
 District of Columbia limited-liability
 21 company; and DAVID ALLEN, an individual,
 22
 23 Defendants.

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

24 DEMOCRATIC UNDERGROUND, LLC, a
 District of Columbia limited-liability
 25 company,
 26
 27 Counterclaimant,
 28 v.

1 RIGHTHAVEN LLC, a Nevada limited-
2 liability company; and STEPHENS MEDIA
3 LLC, a Nevada limited-liability company,

4 Counterdefendants.

5
6 I, Shawn A. Mangano, declare, under penalty of perjury, that the following is true and
7 correct:

8 1. I am an attorney-at-law admitted to practice before all courts of the State of
9 Nevada. I have personal knowledge of the facts set forth below, except for those factual
10 statements expressly made upon information and belief, and as to those facts, I believe them to
11 be true. I am over eighteen years old and I am competent to testify to the matters set forth
12 herein.

13 2. I represent Plaintiff/Counterdefendant Righthaven LLC (“Righthaven”) in the
14 above-referenced matter.

15 3. This declaration is made in support of Righthaven, LLC’s Request for Denial or
16 Continuance of Defendants’ Cross-Motion for Summary Judgment Pursuant to Federal Rule of
17 Civil Procedure 56(d) (“Rule 56(d)”). This request is referenced in Righthaven’s response to
18 Defendants’ cross-motion for summary judgment at footnote 1 on page 7, as well as discussed in,
19 at least, the introduction of same.

20 4. As the Court is aware, Righthaven has moved this Court for permission to
21 voluntarily dismiss its Complaint in this action with prejudice. Defendants have opposed this
22 request. They have further moved for summary judgment, via a “cross-motion for summary
23 judgment,” in their favor on the issues of direct infringement and fair use. As argued in
24 Righthaven’s opposition to Defendants’ cross-motion for summary judgment, genuine issues of
25 material fact exist that prevent the Court from granting the cross-motion. Moreover, Righthaven
26 maintains that Defendants’ cross-motion for summary judgment should be denied or,
27 alternatively continued, pursuant to Rule 56(d). Righthaven’s Rule 56(d) request is contingent
28 upon the following: (1) denial of Righthaven’s pending motion to voluntarily withdraw its

1 Complaint with prejudice or imposition of conditions unacceptable for such dismissal by the
2 Court; (2) denial of Righthaven's motion to dismiss and/or strike Democratic Underground,
3 LLC's ("DU") counterclaim; and (3) denial of Stephens Media, LLC's ("Stephens") motion to
4 dismiss DU's counterclaim/third-party complaint. If the foregoing events were to occur, only
5 then would Righthaven's related request for denial or continuance of Defendants' cross-motion
6 pursuant to Rule 56(d) be ripe for decision by the Court.

7 5. As set forth in Righthaven's response to the cross-motion, it does not wish to
8 engage in exhaustive and expensive discovery efforts given the pending motions before this
9 Court, which include its own request to voluntarily dismiss its Complaint with prejudice. If the
10 Court were to grant this request, Defendants' counterclaim will likewise be dismissed (although
11 Righthaven and Stephens maintain that it should be dismissed or stricken independent of the
12 relief granted with regard to the motion for voluntary dismissal), and the need for discovery will
13 be obviated.

14 6. Righthaven's rather practical approach further spares the Court the need to
15 potentially adjudicate a host of discovery disputes that will undoubtedly arise given the
16 Defendants' litigation tactics. In this regard, DU has already served Righthaven with 82 requests
17 for admission, 62 requests for production of documents, and 13 highly compound interrogatories.
18 Likewise, DU has served Stephens with 75 requests for admission, 69 requests for production of
19 documents, and 13 interrogatories. DU served the foregoing discovery requests despite having
20 full knowledge of Righthaven's motion to voluntarily dismiss its Complaint with prejudice.
21 These discovery requests are highly objectionable as Righthaven has detailed in its responses.
22 The nature of the materials sought, which is at least one basis for Righthaven's objections, serve
23 to underscore the contentious and fee-driven litigation tactics employed by Defendants in this
24 case. Righthaven has not propounded any written discovery on Defendants as of this filing under
25 the rather sensible approach that doing so will only require it, and the Court in ruling on the
26 objections certain to be lodged in response, to expend additional unnecessary time and resources
27 given the current procedural posture of this case.

1 7. As set forth above, Righthaven has not propounded any written discovery given
2 the procedural posture of this case. Righthaven has also not conducted any depositions in this
3 case for the same reasons. Should the above described conditions exist which would make the
4 cross-motion for summary judgment ripe for adjudication, Righthaven maintains that numerous
5 issues of material fact exist upon which Righthaven would need to conduct discovery. For
6 instance, Defendants allege in their Cross-Motion that they “operate the DU Website, upon
7 which a third party posted allegedly infringing material . . .” and such conduct does not state a
8 claim for direct copyright infringement.” (Doc. # 45 at 18:10-11.) Defendants further argue that
9 “neither Democratic Underground nor David Allen engaged in any volitional act to display the
10 Excerpt.” (*Id.* at 18:12-14.) As support for these propositions, Defendants rely on the
11 declaration of Mr. Allen. (*Id.*)

12 8. With regard to the issue of direct infringement, Mr. Allen’s declaration further
13 acknowledges that user contributions are stored on “a database on the server that hosts the DU
14 Website.” (*Id.* at 2 ¶ 7.) Mr. Allen also admits that “Democratic Underground hosts the posted
15 material . . . in order to make that material available to other users upon those users’ request.”
16 (*Id.* at 2 ¶ 3.) Moreover, Mr. Allen concedes that reader requests for material, such as the
17 unauthorized copy of the Work, is “sent to the server.” (*Id.* at 2 ¶ 8.) Moreover, Mr. Allen
18 concedes that reader requests for material, such as the unauthorized copy of the Work, is “sent to
19 the server.” (*Id.* at 2 ¶ 8.) The request is then sent by software which retrieves “the contents of
20 that post from the database” (Doc. 48 at 3 ¶ 8.) Mr. Allen also avers that he had never read
21 the unauthorized copy of the Work prior to the lawsuit. (*Id.* at 4 ¶ 21.)

22 9. For instance, as argued in Righthaven’s response to the cross-motion, what is the
23 “software” and the corresponding functionality employed by Defendants’ operation of the DU
24 Website which is referred to in Mr. Allen’s declaration? (Doc. # 48 at 3 ¶ 8.) Was this software
25 purchased by Defendants? Was this software designed by or for Defendants or otherwise
26 modified for use in connection with the DU Website? Similar genuine issues of material fact
27 exist with regard to the “server” used by Defendants. (*Id.* at 2-3 ¶¶ 7-8.) What acts do take to
28 Defendants their maintain their server and the content stored thereon? Do Defendants have any

1 internal procedures or reporting mechanisms which track content accessed by users from their
2 server? Furthermore, while Mr. Allen states he had never viewed the infringing post until after
3 service of the Complaint, Defendants' cross-motion is silent as to whether the other two DU
4 employees knew of or about the infringing post at an earlier date than that asserted by Mr. Allen.
5 Additionally, Righthaven would seek to explore through written discovery and through
6 deposition testimony whether Defendants had received any user notices that it may infringe the
7 copyright holder's rights, or, if so, whether they failed to take corrective action. Righthaven
8 wishes to engage in written discovery requests (through, at a minimum, requests for production
9 of documents and potentially a third-party subpoena for the production of materials), along with
10 the depositions of Mr. Allen and the persons most knowledgeable on such topics as the purchase
11 of the software and its related attributes, website's maintenance, server interaction via the
12 software, data storage, internal data access reporting of user content pursuant to Federal Rule of
13 Civil Procedure 30(b)(6). As argued in Righthaven's response to the cross-motion, this
14 information is exclusively within the knowledge and control of Defendants. To date, only the
15 Declaration of Mr. Allen has been disclosed on these highly material issues and said disclosure
16 occurred only in support of the cross-motion.

17 10. Discovery would also be required as to the identity of all individuals who work
18 for or who are associated with DU and its website. For instance, Mr. Allen's own declaration
19 states that "[i]n addition to myself, two other individuals work for Democratic Underground."
20 (Doc. # 48 at 2 ¶ 4.) DU has only disclosed the identity of Mr. Allen and one other individual
21 employed by DU. Righthaven obviously would seek documents and other discovery from DU as
22 to the identity of this third individual. Righthaven would also like to depose this individual on,
23 at least, the issues asserted by Defendants as to the lack evidence and/or the inability for a
24 finding of direct infringement liability.

25 11. Discovery would also be required on issues related to Defendants' asserted fair
26 use defense. With regard to the first and fourth fair use elements, Defendants' own evidence
27 clearly reveals the unauthorized copy of the work was used for a commercial purpose and that
28 the market for the work was subjected to significant harm based on its exposure on the website.

1 Mr. Allen readily admits that “[t]he DU Website is supported, in part, by advertising revenue
2 generated by display of advertising on the site.” (Doc. # 48 at 2 ¶ 6.) He also acknowledges that
3 “[t]he DU Website currently has more than 165,000 registered users . . .” all of which are
4 undoubtedly exposed to advertising contained on the site and which Defendants undoubtedly tout
5 to advertisers when setting rates for placing an advertisement on the site. (*Id.* at 2 ¶ 5.) Mr.
6 Allen further admits that “approximately 565 views . . .” of the unauthorized Work occurred
7 during the “92 days it was posted and available at the DU Website.” (*Id.* at 4 ¶ 16.) While
8 Defendants attempt to minimize the commercial use related to the unauthorized posting of the
9 Work, it nevertheless was commercial use. That said, information concerning the exact
10 commercial nature of Defendants’ unauthorized use of the work is unquestionably within their
11 exclusive knowledge and control. Righthaven asks that the cross-motion be denied or continued
12 until it has an opportunity to conduct discovery on these issues, which additionally include
13 revenue generated from the website, the form of said revenue and specifically the revenue
14 attributed to page views of the unauthorized copy of the work. While Mr. Allen has attempted to
15 quantify this inquiry via his Declaration, Mr. Allen has not been subject to cross-examination on
16 these issues via deposition and Defendants have not been required to respond to written
17 discovery requests related to these issues.

18 12. Righthaven maintains that its request for denial of the cross-motion or,
19 alternatively, a continuance of its disposition is compelled pursuant to Rule 56(d) in view of the
20 foregoing. It is my understanding that Defendants would not object to this request as being
21 untimely under Rule 56(d) in the event I caused it to be filed on January 24th. While Righthaven
22 maintains that it could file this request at a later date, I have caused same to be filed today in
23 view of the agreement between counsel under which Defendants would not challenge the
24 timeliness of this filing.

25 Signed and affirmed this 24th day of January, 2011 under the penalty of the United
26 States of America.

27
28 /s/ Shawn A. Mangano

SHAWN A. MANGANO, ESQ.

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I filed the foregoing document on January 24, 2011 via the Court's CM/ECF system.

By: /s/ Shawn A. Mangano
Shawn A. Mangano, Esq.
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