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19 Defendant DAVID ALLEN

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

17 RIGHTHAVEN LLC, a Nevada limited liability company,)
18 Plaintiff,)

19 v.)

20 DEMOCRATIC UNDERGROUND, LLC, a District of)
21 Columbia limited-liability company; and DAVID ALLEN,)
22 an individual,)
23 Defendants.)

22 _____)
23 DEMOCRATIC UNDERGROUND, LLC, a District of)
24 Columbia limited-liability company,)
25 Counterclaimant,)

26 v.)

25 RIGHTHAVEN LLC, a Nevada limited liability company,)
26 and STEPHENS MEDIA LLC, a Nevada limited-liability)
27 company,)
28 Counterdefendants.)

Case No. 2:10-cv-01356-RLH
(RJJ)

**MEMORANDUM IN
OPPOSITION TO
STEPHENS MEDIA LLC'S
MOTION TO DISMISS AND
JOINDER**

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INTRODUCTION

1
2 Most companies, when considering a possible copyright infringement claim, would hire
3 an attorney to provide counsel and, if warranted, to file a lawsuit. Instead, Stephens Media LLC
4 (“Stephens Media”), working with attorney Steven Gibson, created Righthaven LLC
5 (“Righthaven”), a copyright litigation factory. The newspaper company invested in Righthaven,
6 in return for a share of the profit, and controls Righthaven’s activity through agreements.
7 Stephens Media solicits business for Righthaven (with Stephens Media’s general counsel as the
8 point of contact) and threatens the public with litigation by Righthaven, claiming it is pursuing a
9 “hard nosed” tactic to “aggressively” protect its content. While it purports to assign rights to
10 Righthaven for purposes of litigation, the publisher retains rights of “reversion” over what it
11 consistently calls its own content, even after the purported assignments. To this day, the News
12 Article at issue in this action remains on Stephens Media’s *Las Vegas Review-Journal* (“LVRJ”)
13 website, with its original copyright notice showing ownership by Stephens Media, and with its
14 invitation to the public to make copies and share the News Article with others.

15 Nevertheless, now that Righthaven has gone too far and filed its baseless Complaint
16 against Democratic Underground in this action, Stephens Media hopes to flee the scene, piously
17 claiming that it is just an innocent bystander, having done nothing but assign a copyright. To the
18 contrary, the Counterclaim alleges sufficient facts, supported by the public record, to plead both
19 subject matter jurisdiction and a claim for declaratory relief against Stephens Media.

20 As an alternative means to exit this action, Stephens Media argues that the Court should
21 exercise its “discretion” to dismiss the Counterclaim in its entirety as “superfluous” because it
22 purportedly duplicates the issues in the Complaint. This suggestion is also dead wrong, in two
23 respects. First, Stephens Media is not a party to the Complaint, and thus will not be bound by any
24 adjudication absent the Counterclaim. Stephens Media’s argument that the Counterclaim is
25 “unnecessary” thus hinges on the false assumption that Stephens Media is not a proper party to be
26 bound in this action, contrary to the facts alleged. Democratic Underground is entitled to an
27 adjudication binding Stephens Media, and the Counterclaim is the necessary means to achieve it.

28 Second, the declaratory judgment Counterclaim here is necessary because it raises issues

1 different from, and that may not necessarily be resolved by, a decision on the Complaint. The
 2 Court may properly reject the Complaint based on failure of proof on any single element in
 3 Plaintiff's claim, or based on any one of the affirmative defenses, leaving unresolved the other
 4 issues on which Democratic Underground has requested a declaration of its rights to guide its
 5 ongoing conduct. This includes issues such as fair use, lack of a volitional act, *de minimis*
 6 copying, and invalidity of the sham assignment of copyright. As the Supreme Court has
 7 recognized in similar circumstances, a declaratory judgment claim must survive, even if an
 8 affirmative defense raises the same issues, since "[a]n unnecessary ruling on an affirmative
 9 defense is not the same as the necessary resolution of a counterclaim for declaratory judgment."
 10 *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83 (1993).

11 Accordingly, Stephens Media's motion to dismiss must be denied.

12 **STATEMENT OF FACTS**¹

13 Defendant and Counter-Claimant, Democratic Underground has properly alleged that
 14 Stephens Media created and now acts in concert with Righthaven LLC ("Righthaven") to bring
 15 copyright cases, including this one, against anyone impertinent enough to host even short excerpts
 16 of materials from Stephens Media's *LVRJ* newspaper. Dkt 13 ("Counterclaim" or "C.Claim"), ¶¶
 17 8-43.²

18 Representatives of Stephens Media have touted its relationship with Righthaven, stating
 19 that Stephens Media "grubstaked and contracted with a company called Righthaven. It's a local
 20 technology company whose only job is to protect copyrighted content." C.Claim ¶ 23;
 21 Declaration of Kurt Opsahl ("Opsahl Decl."), ¶ 7, Ex. B. Sherman Frederick, then-President and
 22 CEO of Stephens Media, wrote and published those words in the *LVRJ* on May 28, 2010, less
 23 than three months before Righthaven filed this suit. *Id.* Mr. Frederick has been explicit in
 24 characterizing Righthaven as a tool employed by Stephens Media to prosecute its purported
 25 rights, stating unequivocally: "don't steal our content. Or, I promise you, you will meet my little
 26 _____"

27 ¹ Democratic Underground will not repeat all, but incorporates by reference, the additional statement of facts already
 provided to the Court in its Consolidated Brief in Opposition to Plaintiff's Motion for Voluntary Dismissal to the
 Extent it Seeks to Foreclose Award of Attorneys' Fees and in Support of Cross-Motion for Summary Judgment.

28 ² Stephens Media confirms by its Motion that it is the owner of the *LVRJ*. Dkt. 38 at 3.

1 friend called Righthaven.” C.Claim ¶ 33; Opsahl Decl., ¶ 8, Ex. C.

2 Additionally, Stephens Media’s general counsel Mark Hinueber has made numerous
3 public statements discussing Stephens Media’s ownership interest in Righthaven, its control over
4 who Righthaven sues, and Righthaven’s business practices that are based on agreements with
5 Stephens Media: representing, for instance, that “I can tell Righthaven not to sue somebody.”
6 Opsahl Decl., ¶¶ 7, 13-15, Exs. B, H-J.³

7 Further substantiating these representations of control, Righthaven is a limited liability
8 company owned by two more limited liability companies, each with a 50 percent stake. One of
9 those companies is composed of members of the Arkansas investment banking billionaire Warren
10 Stephens’ family. C.Claim ¶¶ 27-29; Opsahl Decl., ¶¶ 9-11, Ex. F. The Stephens’ family
11 investments include Stephens Media and the *LVRJ*. *Id.* The other 50 percent stake in Righthaven
12 is owned by an LLC managed by Las Vegas attorney Steve Gibson, who filed this action as lead
13 counsel for Righthaven. Dkt. 1 (“Compl.”); C.Claim ¶ 32; Opsahl Decl., ¶¶ 9-11, Exs. D - F.
14 Nor is Stephens Media a disinterested partner in its alliance with Righthaven: “Stephens Media
15 receives from Righthaven a share of any settlement or recovery related to preparing and filing
16 copyright lawsuits.” C.Claim ¶ 25; *see also* Dkt. 38, Ex. 1 (Copyright Assignment between
17 Stephens Media and Righthaven, referring to Righthaven’s ongoing “monetary commitments and
18 commitment to services provided”).

19 In pursuit of its alliance with Stephens Media, Righthaven has filed at least 179 suits
20 similar to this action in this District since March 2010. Opsahl Decl., ¶ 17, Ex. L. Righthaven
21 employs a “proprietary” technology to search the Internet to find news stories and excerpts from
22 the *LVRJ* posted on third-party websites. C.Claim ¶ 15; Opsahl Decl., ¶¶ 5, 13, Ex. H. Once
23 Righthaven finds an excerpt, it registers the copyright, obtains a purported partial assignment
24 from Stephens Media, and then sues its victim—who usually resides outside the state—without
25 providing prior notice or opportunity to take down the work. C.Claim ¶¶ 13-16.

26 ³ All of the facts or public reports described in this Statement of Facts as to the relationship between Stephens Media
27 and Righthaven are alleged or referenced in the Counterclaim, with the exception of the Hinueber comments. As
28 discussed below, Democratic Underground contends that the allegations in the Counterclaim alone are sufficient to
demonstrate subject matter jurisdiction and defeat Stephens Media’s Motion. However, it includes the additional
materials to demonstrate additional facts that it could expect to establish through discovery if the Counterclaim as is
were deemed insufficient.

1 In line with this *modus operandi*, neither Stephens Media nor the *LVRJ* first registered the
2 copyright in the Article at issue here; Righthaven did that on July 9, 2010, claiming rights through
3 assignment by “written agreement.” Complaint ¶ 30 and Ex. 4. However, contrary to
4 Righthaven’s representation in obtaining this copyright registration, no such assignment had
5 occurred by that date. Stephens Media’s declaration in support of its motion attaches an
6 assignment dated July 19, 2010, ten days *after* the registration date. Dkt. 38, Ex. 1 (“Copyright
7 Assignment”).

8 Though purportedly assigned to Righthaven, the entire News Article remains publicly
9 available on Stephens Media’s *LVRJ* website at no cost, with copyright notice credited to the
10 *LVRJ*, not Righthaven. C.Claim ¶ 132; Opsahl Decl., ¶¶ 3-4, Ex. A. Further, the purported
11 assignment reflects that Stephens Media continues to own a “right of reversion” in the Article and
12 is receiving unspecified “monetary commitments” from Righthaven. C.Claim ¶ 5; Dkt. 38, Ex. 1
13 (Copyright Assignment).

14 Accordingly, the Counterclaim in this action alleges that the assignment of the copyright
15 in this action is a sham (C.Claim ¶ 38); that Stevens Media retains an interest in the copyrighted
16 Article being sued upon (*Id.* ¶ 40); that Righthaven is acting as agent for Stephens Media (*Id.* ¶
17 41); and that Righthaven is controlled by Stephens Media to the extent that it functions as an alter
18 ego for this case (*Id.* ¶ 42). The Counterclaim asks for a declaration that, based on these
19 circumstances, Defendants have not infringed. *Id.* ¶ 196. It also seeks a declaration that
20 Defendants did not engage in any volitional act of copyright infringement, that the five sentence
21 posting from the Article amounts to *de minimis* use, and that the posting amounted to fair use. *Id.*
22 ¶¶ 186, 189, 190. And it asks for a declaration that Righthaven failed to mitigate any damages in
23 acquiring the copyright after it knew of the alleged infringement, and then failed to give notice
24 and an opportunity to take the down the post. *Id.* ¶ 191.

DISCUSSION

I. THE COUNTERCLAIM STATES A CASE OR CONTROVERSY BETWEEN DEMOCRATIC UNDERGROUND AND STEPHENS MEDIA

A. THE FACTS ALLEGED IN THE COUNTERCLAIM AMPLY DEMONSTRATE STEPHENS’ MEDIA’S INTERESTS IN THE COPYRIGHTED WORK AND THIS CONTROVERSY

To maintain its Declaratory Judgment counterclaim, Democratic Underground need only file an “appropriate pleading” (such as the Counterclaim filed here) that establishes (1) jurisdiction; and (2) the existence of an actual case or controversy between parties having adverse legal interests. *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 359 (1961). Stephens Media challenges the existence of a case or controversy. Counterdefendant’s Motion to Dismiss or Strike (“SM MTD”) Dkt. 38 at 4:23-28.

There is no universal rule for compliance with the case or controversy requirement; rather, “the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); quoted and reaffirmed in *MedImmune, Inc. v. Genentech, Inc.* 549 U.S. 118, 127 S. Ct. 764, 771-72 (2007).

The gist of Stephens Media’s case or controversy argument is that it has nothing to do with Righthaven other than the purported assignment. SM MTD at 7:11-12. In contesting the existence of subject matter jurisdiction, Stephens Media’s motion expresses surprise that it would be brought into a Righthaven case, despite its acknowledged role in creating and directing Righthaven’s business, its litigation machine. Remarkably, the Motion does not directly address any specific allegations in the Counterclaim.

Indeed, its argument is entirely unmoored in the pleadings, and relies on only one factual anchor – the document purporting to assign rights in the News Article to Righthaven. SM MTD, Ex. 1 (Dkt. 38 at 16). That single document cannot immunize Stephens Media. First, it is incomplete on its face. It references a separate set of “monetary commitments and commitment to services provided” for the Article which will, when produced in discovery, reveal the actual

1 flow of obligations, control, and funding between Righthaven and Stephens Media. Moreover,
 2 that assignment document does not evidence the purported disconnection between Stephens
 3 Media and the copyright interests sued upon here. It explicitly references Stephens Media’s right
 4 of reversion, without disclosing what those rights are. *Id.* (reciting assignment by Stephens
 5 Media “to Righthaven, subject to Assignor’s rights of reversion”). Moreover, it purports to assign
 6 only the “copyrights *requisite*” for certain purposes—a conclusory, self-serving definition of how
 7 rights have been split that begs, rather than answers, the question of who really owns and controls
 8 what interests. *Id.* (emphasis added).

9 Stephens Media’s argument is further contradicted by the Counterclaim’s well-founded
 10 allegations. Most directly, Democratic Underground has alleged that “Stephens Media retains
 11 some legal or equitable interest in some copyright rights in the News Article” (Counterclaim
 12 C.Claim ¶ 40)—an allegation entirely consistent with the assignment document and the continued
 13 display of, and authorizations to copy, the Article that still appears on Stephens Media’s website.
 14 Opsahl Decl. ¶¶ 3-4, Ex. A.

15 While Stephens Media may yet deny that it owns or controls interests in the copyright— it
 16 has not yet even answered—this Court need not resolve this disputed fact at this stage because it
 17 goes to the merits of the declaratory relief claim against Stephens Media, not subject matter
 18 jurisdiction. As the Supreme Court explained in *Bell v. Hood*, 327 U.S. 678, 682 (1946), subject
 19 matter “[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a
 20 cause of action on which petitioners could actually recover.”⁴ On a motion to dismiss,
 21 Democratic Underground need only show that the facts alleged, if proved, would confer standing.
 22 *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 104 (1998).

23 As the Supreme Court explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992),
 24 standing “must be supported in the same way as any other matter on which the plaintiff bears the
 25 burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of
 26

27 ⁴ Indeed, if merely disputing the truth of an allegation were sufficient to support a motion to dismiss for lack of
 28 subject matter jurisdiction, then any defendant of a Righthaven lawsuit (for example, individuals named in its
 complaints) could simply submit a declaration denying that they had responsibility for the copying alleged and
 thereby negate federal question jurisdiction over such a claim before any discovery ever occurred.

1 the litigation.” 504 U.S. at 561. This case is at the pleading stage of litigation. “At the pleading
2 stage ... we ‘presume that general allegations embrace those specific facts that are necessary to
3 support the claim.’” *Id.* (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889 (1990)
4 (reversing decision denying summary judgment for lack of standing and subject matter
5 jurisdiction)).

6 The well-pleaded allegations in the Counterclaim are more than sufficient to show subject
7 matter jurisdiction. Indeed, those allegations would easily meet the standards articulated for Rule
8 12(b)(6) motions—and not previously applied to motions under Rule 12(b)(1)—that require only
9 factual allegations establishing a plausible basis for the claim. *See generally Ashcroft v. Iqbal*,
10 556 U.S. ___, 129 S.Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The facts
11 alleged go much farther than mere plausibility.

12 First and foremost, the allegations of a retained right in the Article discussed above, if
13 proved, are sufficient to show standing to seek a declaration establishing Democratic
14 Underground’s rights in hosting the post at issue. That Stephens Media has itself submitted an
15 assignment specifically confirming its retained reversionary interests only reinforces the
16 plausibility of the pleadings. The post at issue was removed from the DU Website as a
17 precautionary measure when this suit was filed. Allen Decl. ¶ 24. But upon a finding of fair use,
18 it desires and intends to restore the post and the comments of users responding to it. *Id.* ¶ 25.
19 Having already been sued once at the control and direction of Stephens Media, it rightly seeks a
20 declaration that it cannot be sued again.

21 Second, the Counterclaim’s allegations show that Stephens Media is deeply tied to control
22 of Righthaven. As an initial matter, Stephens Media does not deny the alleged agency
23 relationship with Righthaven (C.Claim ¶ 41), merely asserting the legal conclusion that the
24 relationship does not rise to a level such that “Righthaven’s suit against Democratic Underground
25 could reasonably be tied to Stephens Media.” SM MTD at 7:3-4. Stephens Media fails to address
26 the allegation that the assignment was a sham (C.Claim ¶ 38), or that the separation between
27 Righthaven and Stephens Media for purposes of this lawsuit is a sham. C.Claim ¶ 42. Indeed,
28 Stephens Media does not even offer an explanation of its actual relationship with Righthaven

1 beyond its submission of the carefully worded, but incomplete, purported assignment.

2 In addition, Democratic Underground alleged that “[a]s of the filing of this Answer and
3 Counterclaim, the *LVRJ* displayed a copy of the Article on its website⁵ with a copyright notice as
4 follows: ‘Copyright © Las Vegas Review-Journal.’”⁶ C.Claim ¶ 132. Stephens Media, while
5 contending it has assigned all the “requisite” rights in the Article to Righthaven and denying any
6 other involvement with the company, offers no explanation for its ongoing display of the
7 copyright and content in light of the purported assignment of the copyright to Righthaven.

8 The relationship goes much further than the purported assignment and reversion—as
9 explained in specific facts alleged in the Counterclaim with citation to the public record.
10 Stephens Media “provided the initial funding for Righthaven.” C.Claim ¶ 24. More specifically,
11 Stephens Media “grubstaked Righthaven by supplying Righthaven with funds in return for a
12 promised share of profits.” C.Claim ¶ 23. Grubstake refers to the “provisions, gear, etc.,
13 furnished to a prospector on condition of participating in the profits of any discoveries.”

14 Dictionary.com Unabridged, Random House, Inc.

15 <http://dictionary.reference.com/browse/grubstake>. This interesting word choice comes from
16 Stephens Media’s then-CEO, Sherman Frederick.⁷ See Opsahl Decl., ¶ 7, Ex. B. (Sherman
17 Frederick, *Copyright theft: We're not taking it anymore*, *Las Vegas Review-Journal*, May. 28,
18 2010).⁸

19 Moreover, Democratic Underground has alleged that Stephens Media “is acting in concert
20 with Righthaven in order to propagate these lawsuits.” C.Claim ¶ 20; see also Opsahl Decl., ¶ 7,
21 Ex. B (Sherman Frederick, *Copyright theft, supra*, (“If you'd like [to] find out more about
22 working with Righthaven to protect your copyrighted material ... you may do so by contacting our
23 general counsel, Mark Hinueber...”). Nor is Stephens Media a disinterested partner: as the

24
25 ⁵ See Las Vegas Review Journal website, at <http://www.lvrj.com/news/tea-party-power-fuels-angle-93662969.html>.

26 ⁶ This is hardly a “speculative” allegation. See SM MTD at 7. The copyright notice was still in public view on
Stephens Media’s *LVRJ* website as of December 6, 2010. Opsahl Decl. ¶¶ 3-4. Ex. A.

27 ⁷ At the time, Sherman Frederick was the CEO of Stephens Media. C.Claim ¶ 21. He was replaced as CEO on or
around November 12, 2010. Las Vegas Review-Journal, *Review-Journal names Bob Brown as new publisher*,
Nov. 12, 2010, <http://www.lvrj.com/news/review-journal-names-new-publisher-107539263.html>.

28 ⁸ This Court may consider the article quoted because it is a statement of a party opponent, Stephens Media’s CEO on
that opponent’s own website.

1 entity that grubstaked Righthaven, “Stephens Media receives from Righthaven a share of any
2 settlement or recovery related to preparing and filing copyright lawsuits.” C.Claim ¶ 25; *see also*
3 Assignment, SM MTD Ex. 1, referring to ongoing “monetary commitments and commitment to
4 services provided.”

5 Democratic Underground has every reason to fear that Stephens Media would continue to
6 assert a baseless copyright claim. Mr. Frederick’s published threat was unequivocal: “don’t steal
7 our content. Or, I promise you, you will meet my little friend called Righthaven.”⁹ C.Claim ¶ 33;
8 Opsahl Decl., ¶ 8, Ex. C. This can only be construed as a threat by Stephens Media to use its
9 partner/agent Righthaven as a weapon in suing over what he calls “our content” – notably, not
10 “Righthaven’s content.”

11 In the newspaper column quoted in this paragraph of the Counterclaim, Mr. Frederick
12 explains that Stephens Media has “gotten tough with content stealers by using a company called
13 Righthaven.” *Id.*

14 That point is this: If newspapers want to control their own destiny they must
15 protect their content from theft. It can't be hit and miss. It must be effective and
16 hard-nosed, using the Constitutional power of copyright law. . . .

17 As for me *and my newspaper company*, we choose sustainability by aggressively
18 protecting *our content*.

19 Opsahl Decl., ¶ 8, Ex. C. (Sherman Frederick, *Protecting newspaper content -- You either do it,*
20 *or you don't*, *Las Vegas Review-Journal*, Sept. 1, 2010 (emphasis added)).

21 Finally, it is Stephens Media’s and Righthaven’s policy not to send any notice before
22 filing a lawsuit. C. Claim ¶¶ 161-63. They sent no pre-filing notice here, consistent with their
23 hundreds of other lawsuits. Hence Democratic Underground cannot afford to wait for any further
24 threats. It needs to resolve the issues now. Stephens Media, through its CEO Sherman Frederick
25 and others, has not been shy about its intent to sue anyone who dares excerpt a *LVRJ* article.
26 Stephens Media consistently refers to these articles as Stephen Media’s content, regardless of
27 whether it is ostensibly assigned to Righthaven, because Stephens Media controls the lawsuits

28 ⁹ The quote references the 1983 film *Scarface*, in which the main character Tony Montana famously said, “Say hello to my little friend!” as he wields an assault rifle against a rival drug lord in the climactic shootout scene. *See* [http://en.wikipedia.org/wiki/Scarface_\(1983_film\)](http://en.wikipedia.org/wiki/Scarface_(1983_film)).

1 filed. Stephens Media's unrecanted threats, coupled with its retained rights in the Article, show
2 that there is a current, live and substantial controversy between the parties.

3 **B. AT A MINIMUM, DEMOCRATIC UNDERGROUND SHOULD BE**
4 **PERMITTED JURISDICTIONAL DISCOVERY**

5 As explained above, the allegations in the Counterclaim are sufficient. Nevertheless,
6 should this Court decide that it needs additional facts demonstrating jurisdiction to resolve this
7 motion, Democratic Underground respectfully requests leave to conduct jurisdictional discovery.
8 *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir.1986) (“[d]iscovery
9 should ordinarily be granted where ‘pertinent facts bearing on the question of jurisdiction are
10 controverted or where a more satisfactory showing of the facts is necessary’”); *Laub v. U.S. Dep’t*
11 *of the Interior*, 342 F.3d 1080 (9th Cir. 2003) (finding abuse of discretion to dismiss for lack of
12 subject matter jurisdiction without a reasonable opportunity to conduct discovery). With
13 discovery, Democratic Underground can obtain any additional evidence necessary to prove the
14 extensive and intimate relationship between Righthaven and Stephens Media, and to refute
15 Stephens Media’s unsupported and conclusory assertion that there is no case or controversy
16 between it and Democratic Underground.

17 For example, Stephens Media’s general counsel Mark Hinueber has made numerous
18 public statements discussing Stephens Media’s ownership interest in Righthaven,¹⁰ its control
19 over who Righthaven sues,¹¹ and Righthaven’s business practices that are based on agreements
20 with Stephens Media.¹² While, as explained above, this Court need not resolve any disputed facts
21 at this stage, Democratic Underground has demonstrably strong reasons to be confident that
22 discovery will confirm the facts necessary to prevail in demonstrating Stephens Media’s role.

23
24 ¹⁰ See e.g., Opsahl Decl., ¶ 13, Ex. H (Joe Mullin, *Is This the Birth of the Copyright Troll?*, Corporate Counsel (Aug.
25 16, 2010) (“Mark Hinueber, general counsel of *Review-Journal* parent company Stephens Media, acknowledges that
Stephens owns a small stake in Righthaven.” (emphasis added))).

26 ¹¹ See e.g., Opsahl Decl., ¶ 14, Ex. I (Toby Manthey, *Firm holds websites to the law*, Arkansas Democrat-Gazette
27 (Aug. 26, 2010) (“‘We’re starting to look at the individual sites a little more closely than when we first started,’
Hinueber said. ‘*I can tell Righthaven not to sue somebody.*’ So far, he said, he hasn’t done that much ...” (emphasis
added))).

28 ¹² See e.g., Opsahl Decl., ¶ 15, Ex. J. (Ron Breeding, Arkansas newspapers get serious about copyright enforcement,
KUAR FM 89.1 (Sep. 29, 2010) (“‘Righthaven’s made the decision that based on their agreement with us, they’re not
going to send [cease and desist] notices.’” (emphasis added))).

1 **II. THE COUNTERCLAIM IS NOT SUBJECT TO DISMISSAL AS REDUNDANT**

2 **A. THE COUNTERCLAIM IS NECESSARY TO OBTAIN AN**
3 **ADJUDICATION BINDING ON STEVENS MEDIA AS A PARTY.**

4 Stephens Media's assertion that the Counterclaim is "unnecessary" and the "mirror
5 image" of the Complaint, and therefore needs not be adjudicated (ST MTD at 8-11), blinks one
6 critical, and obvious fact at the outset: Stephens Media is not a party to the Complaint. As a
7 result, any victory for Democratic Underground on the Complaint will not be binding on Stephens
8 Media. A complaint and counterclaim cannot possibly be "mirror images" of each other when
9 they do not even include the same parties. Adjudication of the Counterclaim is thus absolutely
10 necessary, as it is the only way to obtain a binding judgment or other resolution against Stephens
11 Media.

12 Stephens Media's argument that the Counterclaim is unnecessary hinges on the argument
13 that it is not a party that Democratic Underground is entitled to bind in this action—that is, that
14 there is no case and controversy upon which Democratic Underground may sue. But this is
15 simply the same argument just refuted in Part I. Since the Counterclaim pleads a live controversy
16 with Stephens Media, it must proceed.

17 Not surprisingly, not a single authority cited by Stephens Media supports its proposition
18 that a declaratory judgment counterclaim may be dismissed as duplicative despite its addition of a
19 proper party that would otherwise not be bound by the action. Whatever discretion this Court has
20 in entertaining a counterclaim against a plaintiff alone, Democratic Underground respectfully
21 suggests that it does not extend to ejecting a party properly joined in the action, merely because
22 that party does not wish to be bound.

23 Dismissal of the Counterclaim would leave Stephens Media free, even after Democratic
24 Underground prevails against Righthaven, to make good on its threats of aggressive litigation
25 against all who display *LVRJ* work by suing, or directing others to sue, over its own reversionary
26 interest in this copyright, as well as over other minimal excerpts of *LVRJ* works. It could sue
27 again for the use that already occurred before the Pampango post was taken down as a
28 precautionary measure. Or it could sue if Democratic Underground restores that post, which it

1 desires to do after obtaining a ruling on fair use. *See* Allen Decl. ¶ 25. The only way to bind
 2 Stephens Media, to remove the chill of its threats to litigate and direction of litigation to date, and
 3 to ensure that it does not pursue further litigation, is by adjudication of the Counterclaim.

4 **B. THE DECLARATORY JUDGMENT COUNTERCLAIM IS NOT**
 5 **REDUNDANT OF THE ORIGINAL COMPLAINT AND PLEADINGS**

6 Stephens Media further errs in contending that the Counterclaim should be stricken or
 7 dismissed because it merely “seeks the opposite effect of [Righthaven’s] Complaint.” SM MTD
 8 at 8. In fact, the Counterclaim goes far beyond the Complaint both in the issues that it raises and
 9 the relief that it seeks. In an effort to obtain a definitive ruling on the legality of Democratic
 10 Underground’s conduct going forward, the Counterclaim specifically seeks a declaration that
 11 there was no volitional act (C.Claim ¶186), only *de minimis* copying (*id.* ¶189), fair use (*id.*
 12 ¶190), and failure to mitigate by Righthaven’s failure to provide any notice and opportunity to
 13 take down the post before suing. *Id.* ¶ 191. The Counterclaim also introduces additional issues,
 14 including the invalidity of the assignment (*id.* ¶¶ 38-40), the existence of a license resulting from
 15 the *LVRJ*’s invitation to share its works, and estoppel (*id.* ¶¶ 83-101), and it incorporates those
 16 allegations into its request for a declaration that no infringement has occurred “based on the
 17 circumstances described above.” *Id.* ¶¶ 184, 196. These are all issues distinct from the subject of
 18 the Complaint. Only by deciding these issues can the rights of Democratic Underground be made
 19 certain, both as to Pampango post, and as to ongoing posts of other excerpts by other DU Website
 20 users. *See* Allen Decl. ¶¶ 25, 28-30; *Broadview Chem. Corp. v. Loctite Corp.*, 474 F.2d 1391,
 21 1393 (2d Cir. 1973) (“It is undisputed that the principal purpose of a declaratory judgment is to
 22 clarify and settle disputed legal relationships and to relieve uncertainty, insecurity and
 23 controversy.”).

24 Stephens Media argues that, regardless of the serious new challenges the Counterclaim
 25 makes to its business model, at the end of the day a judgment in this action will result in either a
 26 finding of infringement or no infringement, so no Counterclaim is needed. SM MTD at 10. This
 27 argument is demonstrably incorrect, in the first instance, because it ignores the Counterclaim’s
 28 assertions that *the rights sued upon are invalid*, in addition to not being infringed. Democratic

1 Underground believes and has alleged that the assignment to Righthaven was a sham, and that
 2 Stephens Media is the true holder of any copyright in question. C.Claim ¶¶ 38-40. Democratic
 3 Underground also believes that the copyright registration is invalid due to fraud on the copyright
 4 office—as evidenced by a registration filed by Righthaven on July 9 claiming rights under a
 5 written assignment (Complaint Ex. D), when even the sham assignment produced with Stephens
 6 Media’s Motion was dated no earlier than July 19. SM MTD Ex. 1. Further, Democratic
 7 Underground has asked for a declaration that Righthaven and Stevens Media have no valid right
 8 to sue due to their pattern and practice of failing to give notice before bringing suit, a deliberate
 9 failure to mitigate any damages they may have suffered. C.Claim ¶ 191.

10 All these claims to invalidity of the rights claimed will not be resolved if the Court merely
 11 determines that no infringement occurred. It is well settled in this context that where a
 12 counterclaim seeks a declaration of invalidity of intellectual property interests, it stands
 13 independent of, and survives resolution of, infringement claims. *See Cardinal*, 508 U.S. at 83
 14 (holding that “case or controversy” in patent suit survives the resolution of the infringement claim
 15 when a counterclaim for declaration of invalidity remains unresolved, as a “declaratory judgment
 16 of invalidity presents a claim independent of the patentee’s charge of infringement”); *see also*
 17 *Diamonds.net LLC v. IDEX Online, Ltd.*, 590 F. Supp. 2d 593, 603 (S.D.N.Y. 2008)(noting
 18 “importance to the public at large of resolving questions of . . . validity”); *AIR-vend, Inc. v.*
 19 *Thorne Indus., Inc.*, 625 F. Supp. 1123, 1126-27 (D. Minn. 1985).

20 The Supreme Court’s reasoning in *Cardinal* applies equally in the copyright context.¹³
 21 Democratic Underground’s Counterclaim presents “a claim independent of [Righthaven’s] charge
 22 of infringement,” in that it seeks declaration of the underlying validity of the rights asserted
 23 now—and that may be asserted in the future—against the DU Website and users. *See also*
 24 *Faulkner Press, LLC v. Class Notes, LLC*, 94 U.S.P.Q. 2d (BNA) 1318 (N.D. Fla. Mar. 17, 2010)
 25 (refusing to dismiss counterclaim where it raised the possibility of the copyright’s invalidity).
 26 Accordingly, the Counterclaim must continue on the issues of validity of the assertions of

27 _____
 28 ¹³ The same rule applies in the trademark context. *See, e.g., Stickerath v. Globalstar, Inc.*, 2008 U.S. Dist Lexis 95127
 (N.D. Cal. May 13, 2008) (applying rule from *Cardinal* to trademark case; declining to dismiss counterclaim); *see*
 also, *Dominion Elec. Mfg. Co. v. Edwin L. Weigand Co.*, 126 F.2d 172 (6th Cir. 1942).

1 infringement at issue.

2 Moreover, Stephens Media is just wrong in arguing that “every legal and factual issue
3 raised in the Counterclaim will be fully resolved by the adjudication of Righthaven’s original
4 Complaint.” SM MTD at 10. A finding of non-infringement will not necessarily adjudicate the
5 issues presented in the Counterclaim—such as fair use, volitional act, *de minimis* use—any one of
6 which may be dispositive of the Complaint, leaving the other issues unresolved absent the
7 Counterclaim. Failure to resolve these issues leaves Democratic Underground exposed, both with
8 respect to its rights to restore the Pampango post, and as to additional posts of *LVRJ* excerpts that
9 its users have made and will continue to make. Allen Decl. ¶¶ 25, 28-30.

10 A request for declaratory relief is appropriate in exactly this context, where a party needs
11 determination of particular rights that might otherwise go unresolved. While “[o]ne defendant
12 exonerated from infringement may be content with such adjudication -- another may not... [since
13 the] mere exoneration from infringement does not always meet the necessities of a wrongfully
14 accused defendant.” *Dominion Elec.*, 126 F.2d at 174 (“mere dismissal of a plaintiff’s bill does
15 not always adjudicate every aspect of the controversy or give the defendant all the relief to which
16 he may be entitled”); *see also MRSI Int’l, Inc. v. Bluespan, Inc.*, 2006 U.S. Dist. LEXIS 68891,
17 at **3-7 (D. Utah Sep. 21, 2006) (refusing to dismiss counterclaims as duplicative of underlying
18 claims or affirmative defenses because the court could potentially adjudicate the underlying
19 claims without reaching issues in declaratory relief claim); *United Wats, Inc. v. Cincinnati Ins.*
20 *Co.*, 971 F. Supp. 1375, 1381 (D. Kan. 1997) (rejecting as “without merit” motion to dismiss
21 counterclaims as redundant to underlying claim). As the Court noted in *Blackmer v. Shadow*
22 *Creek Ranch Dev. Co.*, 2007 U.S. Dist. Lexis 99224, at **4-5 (S.D. Tex. June 26, 2007), even
23 where there was substantial overlap between claims and defenses, there is a “qualitative
24 difference between merely prevailing in Plaintiff’s lawsuit, and receiving an affirmative
25 declaration of rights.”

26 Stevens Media’s assertion that the Counterclaim overlaps with affirmative defenses also
27 cannot warrant dismissal of the former, since there is no assurance that the latter will ever be
28 reached. “An affirmative defense is simply asserted to defend a plaintiff’s claims; a counterclaim

1 seeks specific relief.” *Motionless Keyboard Co. v. Microsoft Corp.* 2004 WL 1274401, at *1
2 (D. Or. June 9, 2004) (refusing to strike counterclaim). As the Supreme Court has put it, “[a]n
3 unnecessary ruling on an affirmative defense is not the same as the necessary resolution of a
4 counterclaim for declaratory judgment.” *Cardinal*, 508 U.S. at 93-94.

5 Finally, none of the scattering of cases cited by Stephens Media requires a different
6 result. None addresses the type of intellectual property context here, and none deals with a
7 situation where, as here, the Counterclaim raises numerous issues that may not be adjudicated in
8 the underlying claim and as to which affirmative relief is sought.

9 Instead, Stephens Media’s cases themselves recognize that “it is not always appropriate to
10 strike declaratory judgment counterclaims,” noting as examples intellectual property cases where
11 a finding of non-infringement could be made “without adjudicating the validity of the underlying
12 intellectual property,” or where the counterclaim seeks additional relief. See *Stickrath*, 2008 U.S.
13 Dist. Lexis 95127, at **10-11 (eventually only striking the counterclaims because of a “complete
14 identity of factual and legal issues,” that does not presents itself in this case). The rest of the
15 cases are wholly inapposite to the present context. See *Tenneco, Inc. v. Saxony Bar & Tube, Inc.*,
16 776 F.2d 1375, 1379 (7th Cir. 1985) (denying existing defendant permission to intervene in midst
17 of same action to obtain interpretation of contract, noting that “the original complaint puts in play
18 all of the factual and legal theories” at issue); *Solenoid Devices, Inc. v. Ledex, Inc.*, 375 F.2d 444,
19 445 (9th Cir. 1967) (a case completely unrelated to “duplicative” counterclaims, that addresses
20 only the lack of a genuine controversy where the dispute never got past the stage of a “business
21 argument”); *Englewood Lending, Inc. v. G&G Coachella Invs., LLC*, 651 F. Supp. 2d. 1141,
22 1143-44 (C.D. Cal. 2009) (dealing with the narrow scenario of dispute over contract where the
23 counterclaims merely asserted the contrary interpretation of the underlying claims, they therefore
24 “overlap[ped] entirely,” and the relief sought was “indistinct”).

25 Finally, this matter is presently just in the pleading stage. Exactly how its issues will
26 unfold through discovery cannot yet be foretold. Nonetheless, what is clear is that the
27 Counterclaim should not add burdens of discovery, as Stephens Media asserts that every legal and
28 factual issues raised in the Counterclaim would already be subject to discovery by virtue of being

1 raised in the Complaint and Answer (SM MTD at 10). Thus, if the Court were ever to exercise its
 2 discretion to truncate some or all of the request for declaratory relief, the pleading stage is not the
 3 time. As Wright and Miller make clear, “the safer course for the court to follow is to deny a
 4 request to dismiss a counterclaim for declaratory relief unless there is no doubt that it will be
 5 rendered moot by the adjudication of the main action.” Wright & Miller, 6 Fed. Prac. & Proc.
 6 Civ.2d § 1406. As there is no certainty that the important issues raised in this Counterclaim will
 7 be resolved in rejecting the Plaintiff’s claims, the Counterclaim is not superfluous, and should not
 8 be dismissed.

9 **C. VOLUNTARY DISMISSAL OF THE ORIGINAL COMPLAINT CANNOT**
 10 **POSSIBLY ADJUDICATE THE COUNTERCLAIM AS TO STEPHENS**
 11 **MEDIA**

12 Stephens Media also misses the mark in its joinder in Righthaven’s argument that “there
 13 will no longer be a case or controversy to support a declaratory relief claim” after the original
 14 Complaint has been voluntarily dismissed. SM MTD at 11. Stephens Media apparently intends
 15 to say that the Counterclaim *against Stephens Media* should be dismissed if *Righthaven*
 16 voluntarily dismisses its Complaint. This argument is wrong for two independent reasons.

17 First, as discussed above, Stephens Media is not a party to the Complaint. Hence, a
 18 voluntary dismissal by Righthaven is not binding on Stephens Media. Whatever the effect of that
 19 proposed dismissal on precluding future legal action by Righthaven, it would do nothing to
 20 preclude Stephens Media from proceeding against Democratic Underground based on its
 21 reversionary interest, or based on new posts of *LVRJ* materials.¹⁴ Since Stephens Media is a
 22 proper party in this action today, as we demonstrated above, there is a live dispute with that party
 23 will not be resolved just because Righthaven throws in the towel.

24 Second, even as to Righthaven, its dismissal of the Complaint’s claims of infringement
 25 will not adjudicate or moot all the issues in the Counterclaim as against anyone. As explained in
 26 detail in the Opposition to Righthaven’s Motion to Dismiss (at 27-29), a dismissal by Righthaven

27 ¹⁴ Indeed, Stephens Media has not agreed that it would be bound by *any* dismissal of the Complaint or, by implication
 28 by any “adjudication” of the Counterclaim that might result. Although Righthaven has requested dismissal of its
 Complaint on the merits, and requested that the Court deem such dismissal an adjudication on the Counterclaim (RH
 MTD at 23), Stephens Media has *not* joined in that request. Its Joinder in Righthaven’s Motion is carefully limited to
 only Righthaven’s arguments that the Counterclaim is redundant and that there *will be no case or controversy* if
 Righthaven’s dismissal with prejudice proceeds. SM MTD at 11.

1 is no substitute for adjudication of the issues in the Counterclaim—indeed, it is a maneuver to
2 avoid any such adjudication. The Supreme Court’s *Cardinal Chemical* decision and its progeny
3 make clear that a case and controversy survives resolution of plaintiff’s infringement claims when
4 there remain independent and unresolved issues. *See* Part II.B *supra* at 13-14. Here, the
5 unresolved issues will include the validity of the rights Righthaven and Stephens Media purport
6 to assert.

7 Moreover, the voluntary dismissal of the Complaint, though providing an undifferentiated
8 victory for Democratic Underground, would provide no determination as to fair use. Dismissal of
9 the Counterclaim would leave Democratic Underground uncertain as to whether it has the fair use
10 right to restore Pampango’s post. The Counterclaim therefore would remain live against both
11 Counter-Defendants, notwithstanding the Complaint’s dismissal.

12 In sum, Defendants are just as concerned about the threat of future baseless claims
13 advanced by or on behalf of Stephens Media as they are about the threat of baseless claims from
14 its instrumentality, Righthaven. With a right of reversion in hand, there is nothing—save for
15 specific declaratory relief—that would prevent Stephens Media from bringing suit on identical
16 grounds, whether Righthaven’s suit is dismissed or otherwise defeated. This is precisely the
17 reason that Stephens Media is named in the Counterclaim, and precisely the reason that the Court
18 should allow the Counterclaim to proceed, regardless of its ruling on Righthaven’s Motion for
19 Voluntary Dismissal.

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CONCLUSION

For the foregoing reasons, Democratic Underground respectfully requests that the Court deny Stephens Media’s Motion to Dismiss or Strike in its entirety.

Dated this 7th day of December, 2010

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