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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RIGHTHAVEN LLC, a Nevada limited liability company, Plaintiff, v. DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company; and DAVID ALLEN, an individual, Defendants.	Case No. 2:10-01356-RLH (GWF) **DEFENDANTS' REPLY IN SUPPORT OF FIRST MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS AGAINST RIGHTHAVEN**
DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company, Counterclaimant, v. RIGHTHAVEN LLC, a Nevada limited liability company, and STEPHENS MEDIA LLC, a Nevada limited-liability company, Counterdefendants.	

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Righthaven continues to waste the parties' time and money by repeatedly failing to comply with its discovery obligations, then flipping its refusal into a claim that Defendants are attempting to drive up litigation costs – costs that would be avoided if Righthaven simply appropriately followed the federal rules and rules of this Court. Righthaven's tired tactics are not lost on the Court, which has noted that Righthaven is "now offended when someone has turned the tables on them and is insisting on a judgment in their favor rather than a simple dismissal of the lawsuit." Order on Motion for Reconsideration, Docket ("Dkt.") 94 at 2. As Righthaven has no legitimate reason for previously failing to produce a single document, it fills its Opposition with unsubstantiated jabs at Defendants and conclusions it deems "obvious" and "without question" while providing no legal support and little argument as to why it should not be compelled to produce the discovery sought by Defendants.[1]

Righthaven repeatedly asserts that it has complied with all discovery obligations because it will produce documents "when they are ascertained" and that waiting for Stephens Media to produce documents and then identifying the documents by Bates number somehow alleviates Righthaven's responsibility to produce documents in its own possession custody and control. It does not – especially in light of Stephens Media's assertion that certain documents at issue in this motion would be in the possession of Righthaven. *See* Stephens Media Opp. at 14. Righthaven has been "in the process of ascertaining materials" for five months. Documents are far past due. Righthaven cannot simply continue asserting that it is in the "process of ascertaining materials" until the close of discovery.

Righthaven further claims its failure to provide a privilege log is excused by its claim of a

[1] It is disappointing that Righthaven continues to complain of the discovery to which it stipulated. Dkt. 106 at 3:5-4:11; 5:26-27. Righthaven filed its conditional motion for voluntary dismissal on November 15, 2010. Dkt. 36. Nearly three weeks later, on December 3, Righthaven filed the stipulated proposed discovery plan which governs discovery in this action—and which expressly permitted the discovery about which Righthaven now complains: "The subjects as to which discovery will be allowed include all factual issues raised in and/or relevant to the claims or defenses." Dkt. 54. Mindful of the 180-day discovery schedule, Defendants commenced discovery. While Righthaven has complained of the discovery to which it had stipulated in previous briefs, it never once raised the suggestion of a stay until February 2010. Defendants *agreed*. On February 24, 2010, this Court signed another stipulated discovery order, which stayed deposition discovery, but allowed defendant to "seek compliance with or rulings on responses and/or objections lodged with regard to previously propounded written discovery requests." Dkt. 71. Defendants now have done so.

common interest privilege with Stephens Media. Yet Righthaven has not only failed to prove such a common interest privilege; it has inexcusably failed, in response to a specific request to produce all documents upon which a common interest *might* be based, even to *log* the documents that would allow determination of the common interest privilege. No privilege can be maintained after deliberate refusal to reveal the purportedly privileged documents, or the basis for the claim, for four months. The privilege claims are waived.

As stated in its Motion, Defendants ask the Court to compel production of documents that are directly relevant to this suit, including Democratic Underground's Counterclaim and Defendants' affirmative defenses – documents about (1) the formation of Righthaven and (2) the assignment of the copyright at issue, including communications leading up to the Strategic Alliance Agreement ("SAA"). As Righthaven has evaded this discovery for five months and has yet to meet its burden of showing that this information is not discoverable, Righthaven should be ordered to produce the requested discovery, including that as to which any conceivable privilege has been waived, within ten days of the Court's order.

II. ARGUMENT

Righthaven does not even attempt to dispute the familiar legal principles governing this motion. Under Rule 26, "the scope of discovery is broad[,] and discovery should be allowed unless the information sought has no conceivable bearing on the case." *Jackson v. Montgomery Ward & Co*., 173 F.R.D. 524, 528 (D. Nev. 1997). The party resisting discovery carries a "heavy burden" of showing why discovery should not be allowed. *Blankenship v. Hearst Corp*., 519 F.2d 418, 429 (9th Cir. 1975). This burden includes "clarifying, explaining, and supporting its objections." *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002) (citing *Blankenship*); *see also Koninklijke Philips Elecs. N.V v. KXD Tech., Inc.,* 2007 U.S. Dist. LEXIS 17540, at *12 (D. Nev. March 12, 2007) (Foley, J.) ("the objecting party must specifically detail the reasons why each request is irrelevant"). Righthaven has still not met its burden of showing that the sought information is not discoverable.

A. Righthaven's Assertion That Its Supplemental Responses Are Consistent With Its Obligations Under The Federal Rules Assumes Righthaven Will Produce Documents At Some Point In The Indefinite Future.

Righthaven asserts that its Supplemental Responses are consistent with the Federal Rules, thus Righthaven "is in full compliance with its discovery obligations." Righthaven misunderstands its obligations. Even assuming Righthaven's Supplemental Responses were actually consistent with the Federal Rules, Righthaven predicates its argument on the assumption that it will produce documents at some point in the indefinite future, when Righthaven's past and present behavior indicates that this assumption is difficult to believe, at best.

First, despite Defendants' meet and confer efforts, Righthaven has made minimal, if any, efforts in return. Righthaven highlights Defendants' efforts to meet and confer in good faith, and then comes to the conclusion that "meaningful meet and confer efforts were engaged in between Defendant and Righthaven." Opp. at 5. Indeed, even by Righthaven's own account, all meaningful efforts were a one-way stream from Defendants to Righthaven.[2] *Id.* As Defendants set forth in their Motion, Righthaven has repeatedly promised production of documents and failed to produce a single one.[3] Motion to Compel at 8-10; Webb Decl. ¶¶ 6, 8, 19-29 Exhs. G, T-DD. Now, Righthaven says that it will only produce documents if ordered by the Court. Opp. at 12. The meet and confer process is meaningless if Righthaven does not intend to produce any responsive documents absent an order from the Court requiring it to do so.

Second, Righthaven has consistently shown unreliability in adhering to the Federal Rules until prodded by Defendants. With respect to its initial disclosures, Righthaven boasts its

[2] Righthaven also mischaracterizes Defendants' good faith efforts to meaningfully meet and confer as concessions regarding the merits of Righthaven's objections originally lodged. Defendants made no such concessions, but rather engaged in the meet and confer process, with the understanding that Righthaven would produce responsive documents in return. It has not. Furthermore, Righthaven's Supplemental Responses purported to add more objections, contrary to Righthaven's claim that this assertion is "ludicrous." As none of those Requests are at issue in this motion, Defendants will not waste the Court's time relisting them here; however, Defendants identified and listed the objections added by Righthaven in its March 10, 2011 letter to Righthaven. Dkt. 96, Exh. DD at 5 (point iii).

[3] Righthaven did not provide a single document until its most recent supplemental disclosure, served after this Motion was filed. It still has not produced any documents *in response to discovery*. Supplemental initial disclosures, while welcome, do not substitute for discovery responses. While it is unclear what stratagem is behind Righthaven's focus on supplemental disclosures under Rule 26(a) instead of discovery responses, Righthaven's obligations cannot be met simply by offering documents limited to those that Righthaven "*may use* to *support* its claims or defenses." *See* FRCP 26(a)(1)(A)(ii) (describing scope of initial document disclosures). It must also produce documents responsive to discovery requests that fall outside the scope of initial disclosures. *See also* Discovery Plan, Dkt. 54 at 3 (permitting the full scope of discovery, and not limiting document discovery to initial disclosures).

production of five supplemental sets[4] when in reality, this only demonstrates that the first sets were wholly inadequate.[5] The initial disclosures failed to identify by name a single individual at Righthaven likely to have discoverable information, and failed to identify categories of discoverable documents. As "broad categories of witnesses do not satisfy the disclosure requirements of Rule 26," Righthaven's disclosure was clearly insufficient. *Smith v. Pfizer, Inc*., 265 F.R.D. 278, 283 (M.D. Tenn. 2010) (citing 6 Moore's Federal Practice, § 26.22[4][a] [i] (3d ed.) ("It is not sufficient to identify [witnesses] through the use of a collective description, such as 'employees or representatives of the defendant.' "); *Labadie v. Dennis*, 2008 WL 5411901, at *2 (W.D. Mich. Dec. 23, 2008) ("Plaintiff lists generic categories of persons, such as 'all members of plaintiff's family,' or 'all investigating persons.' This is patently insufficient and amounts to a non-disclosure.").

The first supplemental disclosures identified only individuals at Democratic Underground and—spuriously—its attorney, Kurt Opsahl, adding "all materials attached as exhibits to the Complaint and all other motions, oppositions and/or replies thereto, which are publicly available through the Court's electronic filing system" as the only category of discoverable documents. *See* Dkt. 63, Exh. B (Righthaven First Supplemental Initial Disclosure). Its second supplemental disclosures finally identified individuals by name. Its third set merely identified substitute counsel for Mr. Coons. Righthaven did not produce a fourth set of supplemental disclosures, and its subsequent initial disclosures – the only ones attaching documents – were not produced until after this motion was filed.[6]

Despite all of these supplemental initial disclosures, Righthaven did not produce the

[4] At the time, Righthaven had actually produced four supplemental sets, incorrectly labeling its fourth the "fifth."

[5] It was not until Defendants pressed in meet and confer with Righthaven that Righthaven agreed to produce the first two supplemental disclosures. Ironically, Righthaven boasts its production of multiple sets of initial disclosures (Opp. at 4) while simultaneously bashing Defendants for meeting and conferring regarding its inadequate first sets of disclosures (Opp. at 1). Righthaven neglects to mention that its First Supplemental was little more than a deliberate insult to Defendants' counsel.

[6] To be exact, it attached three documents: (1) a copy of a letter from Righthaven to Stephens Media regarding unauthorized reproduction by a *different* defendant on a *different* website, (2) a copy of the News Article at issue in this case and (3) a copy of the Operating Agreement produced earlier by Stephens Media (from SI Content Monitor). Reply Declaration of Jennifer J. Johnson In Support Of Defendants' First Motion to Compel The Production of Documents Against Righthaven ("Johnson Decl."), ¶ 2, Exh. A. Two days ago, Righthaven produced a "sixth" (fifth) supplemental set, which also attached three documents, including the July 8, 2010 Assignment. Johnson Decl., ¶ 3, Exh. B. Righthaven has never produced this Assignment, or any other document, in response to Defendants' discovery Requests.

purported Assignment of the News Article until it recently attached it to its responsive briefing to Judge Hunt on the meaning of the SAA. *See* Dkt. 101, Exh. 1. The new Assignment produced to Judge Hunt is dated July 8, 2010. Incredibly, it had never been produced in discovery by Stephens Media or Righthaven.[7] Instead, Righthaven's discovery responses repeatedly refer to the July 19, 2010 Assignment, which Stephens Media provided to the Court in November of 2010 as indicative of its purported lack of ownership interest. *See* Righthaven's Supplemental Responses to Democratic Underground's Requests for Production (Dkt. 96, Exh. CC), as quoted in Democratic Underground's Motion to Compel (Dkt. 95). Where did the new assignment come from? Why was it not produced five months ago? Defendants do not know, because, in addition to failing to produce it in discovery, Righthaven refuses to produce (or log) any other communications. What Defendants do know is that the new Assignment is suspicious at least. The original Assignment's date of July 19, 2010 is ten days *after* the date Righthaven purported to register the copyright in its own name—meaning, its registration with the copyright office would have occurred before it even received anything from Stephens Media. The new Assignment dated as of July 8, 2010, seems intended to solve that problem, but at least begs the question of the legitimacy of this entire process—and makes even more necessary production of other communications internal and external to Righthaven.[8]

Third, Righthaven has repeatedly admitted that it is indeed *not* ascertaining what documents are in its possession, custody and control, despite having had ample time to do so. *See* Opp. at 12 ("[i]f the Court overrules Righthaven's objections, it will promptly comply by ascertaining whether or not responsive information exists.")[9]; Dkt. 96, ¶ 24, Exh. Y (March 3

[7] The first Defendants saw of this Assignment was when it was attached to declarations filed on May 9, 2011. Dkts. 101, Exh. 1; 102, Exh. 1.

[8] On May 24, 2011 Righthaven filed an Erratum and Clarification to Response to Defendants' Supplemental Memorandum acknowledging the discrepancies existing between execution dates of the Assignment, yet Righthaven fails to explain why there are two Assignments, or why Righthaven has failed to produce the July 8 Assignment in discovery, months after it realized that there were two Assignments. *See* Dkt. 109 at 2-3.

[9] This assertion that Righthaven will only look for and produce documents if the Court requires it to is especially concerning. Righthaven highlights that Defendants have moved to compel production on less than 10 percent of its requests. As Righthaven has not provided documents in response to any requests, Defendants have focused their motion on limited discovery directed at the most significant evidence sought on the issues of formation of Righthaven and assignment of the News Article. Defendants do not want to seek Court intervention each time Righthaven fails to produce documents at the outset. By establishing a precedent of requiring Defendants to file a motion to compel before producing documents, Righthaven is not only burdening the Court and wasting judicial resources, but it is also driving up litigation costs.

correspondence from Mr. Mangano replying that he will produce documents "when they are located"). As Righthaven repeatedly asserted that it was previously investigating what documents are in its possession, then reveals it is actually not, Defendants cannot possibly trust that Righthaven is actually looking and will produce responsive documents. An order to compel is required.

Fourth, Righthaven has had five months to ascertain what documents are in its possession. Responsive documents were due four months ago. Righthaven cannot continue to assert that it is "ascertaining" what documents are in its possession, especially in light of admissions that it has not done so. Righthaven has had long enough.

B. Righthaven Has Not Met Its Burden Of Showing That Information Related to the Formation of Righthaven Is Not Discoverable.[10]

The only Request related to the creation of Righthaven that Righthaven has explicitly addressed in its motion is Request 58, which seeks all documents related to the creation of Righthaven. Righthaven argues that it has fulfilled its discovery obligations by "compliance with the spirit of the request." To the contrary, responding to discovery does not require compliance with the "spirit" of the request – it requires compliance with the request, especially where the responding party has unilaterally determined what qualifies as "compliance with the spirit." Righthaven asserts that "Defendant has obtained[11] Righthaven's articles of organization, its operating agreement, the SAA and the Amendment… this, however is apparently not enough." It is not enough. Given the broad scope of discovery allowed under Rule 26, the party objecting to discovery bears heavy burden of clarifying, explaining and supporting its objections to show why discovery should not be allowed. *See Jackson* , 173 F.R.D. at 528; *Blankenship*, 519 F.2d at 429; *DIRECTV, Inc.*, 209 F.R.D. at 458; *Koninklijke Philips Elecs. N.V.*, 2007 U.S. Dist. LEXIS

[10] Among other Requests, Defendants have moved on the following Requests related to the formation of Righthaven: 58 (seeking all documents related to the creation of Righthaven), 41 (seeking all communications with Mark Hinueber, counsel for Stephens Media) and 42 (seeking all communications with Jackson Farrow, counsel for SI Content Monitor).

[11] Notably, Righthaven asserts that "Defendants have obtained" these documents, not that Righthaven has produced them, as Righthaven has not produced any of these documents, despite the documents being in Righthaven's possession, custody and control.

17540, at *12 ("the objecting party must specifically detail the reasons why each request is irrelevant").

Righthaven's sole attempt to "address" how additional information is irrelevant is to ask the question, "how is it relevant in view of a fully executed operating agreement for Righthaven?" This question, without further explanation, nor citation to even a single case, does not meet the "heavy burden" of showing why discovery is not allowed.[12] Defendant claims the formation of Righthaven was part of a champertous, sham and collusive scheme to avoid the requirements for standing. The documents designed for the world to see, like the Operating Agreement, cannot be expected to reveal the reality that Agreement is to paper over. Furthermore, Righthaven asserts the "obvious privilege and work product issues" (Opp. at 12) yet has failed to provide a log, despite repeated efforts by Defendants to obtain one and the Court Order requiring production of a privilege log by February 8. *See* Order, Dkt. 54; Motion to Compel at 27.

It is far from obvious that any privilege applies, and impossible to show one does without a privilege log. For example, communications between Stephens Media, SI Content Monitor, Net Sortie and Righthaven were between adverse parties negotiating a complex business transaction. *See generally* SAA, Sections 9.11 - 9.12 (acknowledging conflict between Mr. Gibson's interests and Stephens Media's and that Mr. Gibson is not acting as counsel to Stephens Media). Communications in a legally "adverse" process are not privileged by "common" interest. In addition, the formation of Righthaven, the negotiation of the SAA and the Operating Agreement (Dkt. 107-2) (including drafts sent back and forth), and their champertous plans for Righthaven are all business matters. "Communications which relate to business rather than legal matters do not fall within the protection of the privilege." *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990). It is immaterial if Righthaven's CEO and Stephens Media's point of contact happen to have law degrees. *United States v. Huberts*, 637 F.2d 630, 640 (9th Cir. 1980) ("Generally, an attorney who serves as a business agent to a client may not assert the attorney-

[12] Assuming Righthaven is referring to the parol evidence rule, which is unclear as the rule is not mentioned anywhere in its brief, Defendants direct the Court's attention to its response to Stephens Media regarding inapplicability of the parol evidence rule under the circumstances presented here. *See* Reply In Support of Motion to Compel Production of Documents Against Stephens Media, Section II.B.

client privilege, because no confidential relationship attaches."); *see also Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp*., 1996 WL 29392, at *4-5 (S.D.N.Y. 1996) (finding no privilege where in-house counsel acting as negotiator in a business capacity); *Boca Investerings P'ship v. U.S*., 31 F.Supp.2d 9, 12 (D.D.C. 1998) (denying privilege: "When a lawyer acts merely to implement a business transaction . . . the lawyer is like any other agent of the corporation whose communications are not privileged."). Furthermore, as discussed below, Righthaven's objections as to privilege have been waived. *See* Section II.D, *infra.*

Defendants have made more than an appropriate showing that documents related to the formation of Righthaven, the SAA and the Assignment are relevant to its affirmative defenses and Counterclaim, despite it being Righthaven's burden to show how they are not relevant.[13] *Blankenship*, 519 F.2d at 429; *DIRECTV, Inc.*, 209 F.R.D. at 458; *Koninklijke Philips Elecs. N.V.*, 2007 U.S. Dist. LEXIS 17540, at *12. Righthaven's blanket assertion that "the alleged responsive material is not relevant" (Opp. at 13) without further support for its conclusion is insufficient. *Id.*

C. Righthaven Has Not Met Its Burden Of Showing That Information Related to the News Article, Including Communications About the SAA, Is Not Discoverable.[14]

Righthaven now asserts, for the first time, that Defendants' argument that Righthaven and Stephens Media have failed to produce materials related to the assignment of the work at issue and the SAA are "predicated on the flawed assumption that such materials exist and that

[13] Discovery into the communications surrounding the formation of Righthaven and the SAA is also necessary to show that Righthaven knowingly or recklessly proliferated the proceedings by hiding the SAA, refusing to provide it in discovery or initial disclosures, while knowing that it pertained to the claims at issue. Pursuant to 27 U.S.C. 1927, the Court may impose sanctions against any lawyer who wrongfully proliferates litigation proceedings once a case has commenced. *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1121-22 (9th Cir. 1991) ("We assess an attorney's bad faith under a subjective standard. Knowing or reckless conduct meets this standard."). The Operating Agreement candidly admits that Righthaven knew there was a risk that its customers (i.e. newspapers) would catch on to the sham nature of the assignment. *See* Operating Agreement, Section 19.1(d) ("the willingness of consumers to understand and agree to the assignment and license-back structure that is inherent in the Company's business structure may not be consistent or even prevalent"). Other documents may show that Righthaven was well aware of the dubious nature of its legal position from the beginning, demonstrating that its efforts to conceal the SAA and related documents were in bad faith.

[14] Defendants have moved on the following Requests: 3 (documents concerning assignment of the News Article), 4 (documents reflecting communications between Righthaven and other relating to the assignment or reversion of rights in the News Article), 10 (documents that refer or relate to any "right of reversion" referenced in the assignment), 41 (communications with Mark Hinueber) and 42 (communications with Jackson Farrow).

Righthaven and Stephens Media are refusing to disclose them. This is simply not true." Opp. at 13. Righthaven further asserts: "[t]here is no requirement under the SAA that the cited materials and notices be placed in writing in order to effectuate a contemplated transaction." *Id.* These statements directly contradict the plain language of the Operating Agreement and SAA, which reference communications and the requirement that they be in writing. The SAA explicitly states: "All notices and other communications hereunder *shall only be in writing*. . . ." SAA, Section 17 (emphasis added); *see also* Operating Agreement, Section 18.1.

Moreover, the Operating Agreement explicitly states: "Each Member covenants that: (a) with respect to such Member, such respective Member *has received various documentation* and has *engaged in various communications* whereby the Business has been discussed and described, apart from this Agreement, prior to the Effective Date (the "Explanatory Communications") by and between Stephens and Net Sortie. . . ." Operating Agreement, Dkt. 107-2, at § 19.1 (emphasis added). Unless Righthaven was covenanting a falsehood, the Operating Agreement shows that responsive materials exist. Thus, Righthaven's assertion that there is no writing requirement (Opp. at 13) is patently false. Furthermore, while Righthaven indicates it recently produced a cover letter sent to Stephens Media concerning the Assignment for the copyrighted work at issue in this case (Opp. at 13), the letter relates to a different defendant and a different website. Johnson Decl.¶ 2, Exh. A at Exh. 1. If no such writings exist, Righthaven need not produce them; however, if either Righthaven or Stephens Media complies with the requirements of the SAA, one or both of them must be in possession of the requisite notices and communications, and must produce them. And, if no such documents exist, then Righthaven must also say so in a written discovery response—not a brief to the Court.

D. Righthaven Has Waived Its Objections Based on the Attorney-Client or Work-Product Privileges By Failing To Produce A Privilege Log.

Righthaven argues that, although it has not logged a single privileged document in five months, its privileges are not waived because it never agreed to produce anything, and therefore there is still nothing yet "otherwise discoverable." But Righthaven's after-the-fact characterization of whether it has a production obligation is not controlling.

First, there were no unresolved objections to the Requests that are the subject of this motion. Motion to Compel at 8-9, 12-13, 16, 26.

Second, even by Righthaven's own cited authorities, Righthaven has waived its privilege-based objections by its conduct here. The Advisory Committee Notes which Righthaven quotes state that Righthaven "should make its objection to the breadth of the request and, with respect to the documents [that are not overbroad], produce the unprivileged documents and describe those withheld under the claim of privilege." Opp. at 15; Advisory Committee Notes, 146 F.R.D. 401 (1993). Righthaven's objection that Request 58 is overbroad cannot excuse its refusal to produce any documents, or its failure to log privileged communications. Righthaven was required to produce and/or log relevant documents and object to the remainder as overbroad, not withhold all. If, as Righthaven suggests, a party need only assert unsubstantiated and unexplained objections to justify its refusal to produce a privilege log as to obviously relevant material, and a party need only produce a log after the Court orders the production, the Court would need to intervene in the discovery process for every case in which privilege was asserted, and there would be no consequence for failing to log privileged documents and communications. This is not the law. *See Koninklijke Philips Elecs. N.V.*, 2007 U.S. Dist. LEXIS 17540, at *14 (privilege objections waived where party did not provide privilege logs or affidavits supporting generalized objections based on privilege); *Akers v. Keszei*, 2009 U.S. Dist. LEXIS 106247, at * 8-9 (D. Nev. Oct. 27, 2009) (Foley, J.) (same).

Third, as also noted by Righthaven, Righthaven's failure to produce a log could be tolerated only if the grounds for objection were "sufficiently substantial to excuse immediate presentation of detailed justification for privilege claims." Opp. at 15; 8 Wright & Miller, *Federal Practice and Procedure* § 2016.1 (3d Ed. 2010). They are not. Indeed, Righthaven provides little support, if any, for its purported objections.

Fourth, Righthaven has not provided sufficient proof of a common interest with Stephens Media to possibly justify that privilege. As this Court has held, the party claiming privilege must show "(1) that both parties' interests be identical, not similar, (2) that the common interest is legal, not solely commercial, and (3) that the communication is shared with the *attorney* of the

member of the community of interest. *Phase II Chin, LLC, et al. v. Forum Shops, LLC, et al.*, Dkt. 198, Case No. 2:08-cv-00162-JCM-GWF, at *12 (D. Nev. March 2, 2010) (emphasis in original) (citing *Carl Zeiss Vision Intern'l GMBH v. Signet Armorlite*, 2009 WL 4642388, at *7 (S.D. Cal. 2009)). The Court further held that "[a]lthough a written agreement is the most effective method of establishing common interest agreement, an oral agreement whose existence, terms and scope are proved by the party asserting it, may provide a basis for the requisite showing." *Id.* at *13.[15] Righthaven has made no such showing. It has not provided the terms or scope of any agreement, oral or written. It merely asserts that Stephens Media and Righthaven "have operated with the understanding that all communications between them are protected."[16] Opp. at 15, fn. 1; Williams Decl., ¶ 4. This is plainly insufficient to support any such privilege claim. *See Phase II Chin*, Dkt. 198, Case No. 2:08-cv-00162-JCM-GWF, at *12-13. Furthermore, as discussed above, it is likely that most, if not all, of these communications were about business issues, and not subject to the privilege. *See* Section B, *supra.*

Moreover, although Righthaven asserts that it has not "executed a final joint defense agreement" with Stephens Media, it does not deny that there *are* unproduced documents relating to the alleged joint defense. Opp. at 15, fn. 1. Defendants explicitly asked for all documents concerning such a relationship, not merely final agreements. Request 7; Motion to Compel at 28. Not only has it failed to produce such documents, it has failed to produce a log of them—even though they are obviously within the scope of discovery absent existence of a privilege. Indeed, in its actual response to the Requests, Righthaven responded that it would produce, or make available for inspection and copying responsive documents – without limiting its response to

[15] The only purportedly binding authority cited by Righthaven with respect to the non-requirement of a written agreement, "*United States v. Stepney*, 246 F.Supp.2d 1069, 1080, fn. 5 (9th Cir. 2003)" is not actually a Ninth Circuit case, but is a non-binding Northern District of California case. Moreover, the full footnote provides better context as to this requirement: "No written agreement is generally required to invoke the joint defense privilege. The existence of a writing does establish that defendants are collaborating, thus guarding against a possible finding that a particular communication was made spontaneously rather than pursuant to a joint defense effort. *See United States v. Weissman*, 195 F.3d 96, 98-99 (2d Cir.1999) (finding no joint defense agreement in place at the time communication took place). A written joint defense agreement also protects against misunderstandings and varying accounts of what was agreed to by the attorneys and their clients." The Court ultimately ordered that "any joint defense agreement entered into by defendants must be committed to writing, signed by defendants and their attorneys, and submitted *in camera* to the court for review prior to going into effect." *Id.*

[16] Furthermore, Mr. Williams has not established foundation to show how he has personal knowledge as to the beliefs held by Stephens Media and Righthaven when negotiating the SAA, as the SAA was negotiated eleven months before Mr. Williams began representing Stephens Media in this matter.

"final executed agreements," yet it has not produced or logged any communications or drafts. Where Righthaven has not even logged the documents purportedly forming the basis for a joint defense agreement—despite an obligation over three months ago to do so, despite repeated requests from Defendants to do so, and despite the Order of this Court that such log be provided within 21 days of the date for production of documents (Dkt. 54 at 7)—it has waived the protection of privilege for such Requests, as well as protection of the joint defense agreement itself. *See Koninklijke Philips Elecs. N.V.*, 2007 U.S. Dist. LEXIS 17540, at *14 (waiver where party fails to produce a log).

Righthaven cannot assert common interest privilege, refuse to present a privilege log, prevent Defendants from refuting its common interest claim and still maintain its privilege claim.

III. CONCLUSION

For these reasons, Defendant Democratic Underground respectfully requests that this Court grant Defendant's Motion to Compel Production of Documents from Righthaven on Requests 3, 4, 7, 10, 41, 42 and 58. The Court should order all documents in Righthaven's possession, custody and control, including those in the control of its agents including SI Content Monitor, produced within ten days of its order. And the Court should order that all privileges have been waived as to these categories and as to any responsive materials within the scope of the Court's order.

Dated: May 27, 2011

FENWICK & WEST LLP

By: /s/ *Jennifer J. Johnson*
JENNIFER J. JOHNSON

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