

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

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

11 CHAD BOWERS (NV State Bar No. 7283)  
[bowers@lawyer.com](mailto:bowers@lawyer.com)  
 12 CHAD A. BOWERS, LTD  
 3202 West Charleston Boulevard  
 13 Las Vegas, Nevada 89102  
 Telephone: (702) 457-1001  
 14 Attorneys for Defendant and Counterclaimant  
 15 DEMOCRATIC UNDERGROUND, LLC, and  
 Defendant DAVID ALLEN

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

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

Case No. 10-01356-RLH (GWF)

**CONDITIONAL MOTION TO  
 FILE DOCUMENTS UNDER  
 SEAL**

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

1                                    **CONDITIONAL REQUEST TO SUBMIT DOCUMENTS UNDER SEAL**

2            Defendant and Counterclaimant Democratic Underground, LLC and Defendant David  
3 Allen (collectively, “Democratic Underground” or “Defendants”) hereby respectfully request that  
4 the Court permit Defendants to submit portions of Defendants’ Motion for Leave, Supplemental  
5 Memorandum Addressing Recently Produced Evidence Relating to Pending Motions  
6 (“Supplemental Memorandum”), and Exhibit A to the Supporting Declaration of Laurence  
7 Pulgram under seal, pending agreement with opposing counsel or a decision of this Court as to  
8 which portions, if any, of such material should be publicly available.

9            Exhibit A to the Declaration of Laurence Pulgram is a document belatedly produced by  
10 Counterdefendant Stephens Media LLC (“Stephens Media”) in this action. Exhibit A was  
11 designated as “Confidential Attorneys’ Eyes Only” by Stephens Media under the Stipulated  
12 Protective Order entered by the Court on February 14, 2011. Documents and information that  
13 have been designated by a party as “Confidential Attorneys’ Eyes Only” can only be submitted to  
14 the Court under seal. *See* Dkt. 65, ¶ 12. While Defendants do not believe that Exhibit A is  
15 appropriately designated under either the terms of the Stipulated Protective Order or applicable  
16 law as appropriate for restriction from public access, and do not believe Exhibit A should  
17 ultimately be maintained under seal (at least in its entirety), Defendants are required at this time  
18 to submit it under seal. The same is true for portions of Defendants’ Supplemental Memorandum  
19 and Motion for Leave which quote from or summarize the contents of Exhibit A.

20            Generally, the Ninth Circuit recognizes a “strong presumption in favor of public access”  
21 for materials produced in discovery and submitted to the court, holding further that discovery  
22 documents’ “status changes” when submitted to the court with a dispositive motion. *See, e.g.,*  
23 *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1137 (9th Cir. 2003). In such a case, the  
24 presumption of public access requires the proponent of non-access to show ““compelling reasons  
25 supported by specific factual findings’ that outweigh the general history of access and public  
26 policies favoring disclosure.” *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79  
27 (9th Cir. 2006) (citations omitted).

1 Defendants do not believe that Stephens Media or Righthaven can meet this high standard  
2 here. As such, Defendants have requested that Stephens Media and Righthaven agree to  
3 dedesignate all or at least portions of Exhibit A to allow for public disclosure. See Declaration of  
4 Laurence F. Pulgram in Support of Defendants' Supplemental Memorandum Addressing  
5 Recently Produced Evidence Relating to Pending Motions, ¶ 11; Dkt. 65. Provided an agreement  
6 can be reached with Stephens Media and Righthaven, Defendants intend to submit a stipulation  
7 for filing Exhibit A, redacted as may be agreed, for public filing. If no such agreement can be  
8 reached, Stephens Media and Righthaven may attempt to justify the sealing of the entirety of  
9 Exhibit A in response to this Motion.

10 Accordingly, Defendants conditionally request that they be allowed to submit portions of  
11 Defendants' Motion for Leave, Supplemental Memorandum, and Exhibit A to the Supporting  
12 Declaration of Laurence Pulgram under seal, pending agreement of the parties that only portions  
13 of Exhibit A should be sealed or a decision by the Court that the documents as a whole should be  
14 available for public access. Defendants request that the Court enter the submitted proposed order  
15 to provide a process for determination of the sealing of this document.

16  
17 Dated: March 4, 2011

FENWICK & WEST LLP

18  
19 By: /s/ Laurence F. Pulgram  
20 LAURENCE F. PULGRAM, ESQ

21 Attorneys for Defendant and Counterclaimant  
22 DEMOCRATIC UNDERGROUND, LLC, and  
23 Defendant DAVID ALLEN  
24  
25  
26  
27  
28