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

18 RIGHTHAVEN LLC, a Nevada limited liability company,  
 19 Plaintiff,

20 v.

21 DEMOCRATIC UNDERGROUND, LLC, a District of  
 Columbia limited-liability company; and DAVID ALLEN,  
 an individual,

22 Defendants.

23 DEMOCRATIC UNDERGROUND, LLC, a District of  
 Columbia limited-liability company,

24 Counterclaimant,

25 v.

26 RIGHTHAVEN LLC, a Nevada limited liability company,  
 27 and STEPHENS MEDIA LLC, a Nevada limited-liability  
 company,

28 Counterdefendants.

Case No. 2:10-01356-RLH (GWF)

**DEFENDANT DEMOCRATIC  
 UNDERGROUND LLC'S FIRST  
 NOTICE OF MOTION AND  
 MOTION TO COMPEL THE  
 PRODUCTION OF  
 DOCUMENTS AND  
 MEMORANDUM OF POINTS  
 AND AUTHORITIES IN  
 SUPPORT THEREOF**

## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| NOTICE OF MOTION AND MOTION TO COMPEL .....   | 1           |
| LOCAL RULE 26-7(B) CERTIFICATION .....  | 1           |
| MEMORANDUM OF POINTS AND AUTHORITIES .....  | 2           |
| I. INTRODUCTION .....   | 2           |
| II. FACTUAL BACKGROUND .....  | 3           |
| A. Case Overview .....  | 3           |
| B. Background of the Present Discovery Dispute .....  | 5           |
| 1. Meet and Confer with Stephens Media.....   | 6           |
| 2. Meet and Confer with Righthaven .....  | 8           |
| III. ARGUMENT .....   | 10          |
| A. Righthaven and Stephens Media Must Produce Documents Related to the<br>Formation of Righthaven .....   | 11          |
| 1. Documents Relating To The Creation Of Righthaven Are Highly<br>Relevant To Defendants’ Affirmative Defenses And Democratic<br>Underground’s Counterclaim.....  | 15          |
| 2. Righthaven Has Not Met Its Burden Of Showing That Information<br>Related To The Formation Of Righthaven Is Not Discoverable.....   | 15          |
| 3. Righthaven and Stephens Media Have Improperly Failed to<br>Produce Relevant Documents .....  | 16          |
| 4. Stephens Media Has Admitted It Is In Possession Of Relevant<br>Documents Which It Is Withholding Based On Its “Previously<br>Asserted Objections” Despite Asserting In Its Responses That It Is<br>Not In Possession Of Responsive Documents ..... | 17          |
| B. Righthaven and Stephens Media Must Produce Documents Related to The<br>Assignment of Rights In The News Article, Including Communications<br>About the SAA.....  | 18          |
| 1. Stephens Media’s Confidentiality Objections Are Moot Since Entry<br>of the Stipulated Protective Order.....  | 25          |
| 2. Righthaven Has Improperly Failed to Produce Relevant Documents .....   | 26          |
| C. Righthaven and Stephens Media Have Waived Their Objections Based on<br>the Attorney-Client or Work-Product Privileges By Failing To Produce A<br>Privilege Log.....  | 26          |

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**  
**(Continued)**

|                      | <b><u>Page</u></b> |
|----------------------|--------------------|
| IV. CONCLUSION ..... | 29                 |

## **TABLE OF AUTHORITIES**

### **Page(s)**

#### **CASES**

|   |               |
|---|---------------|
| <i>Akers v. Keszei</i> ,<br>2009 U.S. Dist. LEXIS 106247 (D. Nev. Oct. 27, 2009) (Foley, J.) .....                        | 26, 27        |
| <i>Blankenship v. Hearst Corp.</i> ,<br>519 F.2d 418 (9th Cir. 1975).....   | 10, 11        |
| <i>Del Webb Communities, Inc. v. Partington</i> ,<br>2009 WL 3053709 (D. Nev. Sept. 18, 2009) .....                       | 11            |
| <i>DIRECTV, Inc. v. Trone</i> ,<br>209 F.R.D. 455 (C.D. Cal. 2002) .....  | 11, 12, 15    |
| <i>Gracenote v. Musicmatch, Inc.</i> ,<br>2003 U.S. Dist. LEXIS 26015 (N.D. Cal Oct. 14, 2003).....                       | 16            |
| <i>Jackson v. Montgomery Ward &amp; Co.</i> ,<br>173 F.R.D. 524 (D. Nev. 1997).....                                       | 10, 15        |
| <i>Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc.</i> ,<br>2007 U.S. Dist. LEXIS 17540 (D. Nev. March 12, 2007) ..... | <i>passim</i> |
| <i>Marchand v. Mercy Med. Ctr.</i> ,<br>22 F.3d 933 (9th Cir. 1994).....  | 16            |
| <i>Nidec Corp. v. Victor Company of Japan</i> ,<br>249 F.R.D. 575 (N.D. Cal. 2007).....                                   | 14, 25, 28    |
| <i>Silvers v. Sony Pictures Entm't, Inc.</i> ,<br>402 F.3d 881 (9th Cir. 2005).....                                       | 11            |

#### **RULES**

|   |               |
|---|---------------|
| Federal Rule of Civil Procedure 26..... | <i>passim</i> |
| Federal Rule of Civil Procedure 34..... | <i>passim</i> |
| Federal Rule of Civil Procedure 37..... | 1             |
| Local Rule 26-7 .....                   | 1             |
| Local Rule 26-7(a) .....                | 12, 19, 28    |
| Local Rule 26-7(b) .....                | 1             |

#### **OTHER AUTHORITIES**

|   |   |
|---|---|
| <i>Las Vegas Review Journal</i> article ..... | 2 |
|---|---|

- 1
- 2
- 3
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 As the Court aptly stated in its most recent Order in this action, “Righthaven and Stephens  
4 Media have attempted to create a cottage industry of filing copyright claims, making large claims  
5 for damages and then settling claims for pennies on the dollar, with defendants who do not want  
6 to incur the costs of defending the lawsuits[. They] are now offended when someone has turned  
7 the tables on them and is insisting on a judgment in their favor rather than a simple dismissal of  
8 the lawsuit.”<sup>1</sup> Defendants, Democratic Underground (“DU”) and its founder, David Allen, have  
9 refused to be intimidated. They have defended against claims that they infringed Righthaven’s  
10 copyrights when a blogger posted on the DU website a five sentence excerpt from a fifty sentence  
11 *Las Vegas Review Journal* article. In their defense, Defendants have not only claimed fair use,  
12 but also challenged Righthaven’s standing to sue, asserting that the purported assignment of  
13 rights from Stephens Media to Righthaven is a sham, champertous, and invalid.

14 With this Motion, Defendants ask the Court to compel documents that are directly  
15 relevant to the last issue: Righthaven’s standing. Specifically, this includes documents about (1)  
16 the formation of Righthaven and (2) the assignment of the copyright at issue. These documents  
17 are not only relevant to the claims and defenses in this action, but also to the hundreds of other  
18 actions Righthaven has filed. As the Court stated in its Order Granting Defendants’ Motion to  
19 Unseal, which made public the Strategic Alliance Agreement (one of the few documents  
20 produced by Stephens Media thus far): “it appears to the Court that there is certainly an interest  
21 and even a right in all the other defendants sued by Plaintiff to have access to this material.  
22 Furthermore, because these cases have generated a great deal of public interest, particularly in the  
23 media and on the internet, that there is a right of the public to this information which overrides  
24 any claimed confidential commercial rights.”<sup>2</sup>

25 Righthaven and Steven Media have refused to produce these documents for over four  
26 months. Indeed, Righthaven has refused to produce a *single* document in discovery in this case.

27 \_\_\_\_\_  
28 <sup>1</sup> Order on Motion for Reconsideration, Docket (“Dkt.”) 94 at 2.

<sup>2</sup> Docket 93 at 4.

1 Instead, Righthaven has time and time again promised to produce documents or reply to  
2 Defendants regarding the status of production, and then failed to do so. Meanwhile, Stephens  
3 Media has unilaterally limited its discovery responses, producing a tiny subset of information. It  
4 has claimed as to certain requests that documents are only in its affiliates' possession, while later  
5 contradicting itself and stating that, although Stephens Media is itself in possession of responsive  
6 documents, those documents will not be produced or identified in privilege logs. After over two  
7 months of meeting and conferring, Righthaven and Stephens Media continue to abuse the  
8 discovery process by withholding relevant documents. Further, each has failed for four months to  
9 produce *any* privilege log—thereby waiving the unclaimed privilege—while, at the same time  
10 refusing to produce communications relating to the formation of Righthaven on the basis that they  
11 are purportedly privileged.

12 There is no further excuse for Righthaven and Stephens Media's obstruction. They should  
13 be ordered to produce the documentation of their relationship, including those as to which any  
14 conceivable privilege has been waived, within ten days of the Court's order.

## 15 **II. FACTUAL BACKGROUND**

### 16 **A. Case Overview**

17 In this copyright infringement action, one of over 250 filed by Righthaven against various  
18 defendants in the past year, Righthaven claims that Democratic Underground and its owner David  
19 Allen, have allowed a blogger to post on the DU website an Excerpt from a News Article, the  
20 copyright for which was purportedly assigned to Righthaven by Stephens Media. Defendant  
21 Democratic Underground filed a counterclaim alleging that there can be no infringement, that the  
22 assignment was a sham, that Righthaven exists solely to file copyright claims, and that Stephens  
23 Media is the real party in interest. Dkt. 13. Defendants have also asserted several other  
24 affirmative defenses, including unclean hands, barratry, champerty, and maintenance, copyright  
25 misuse, fair use and lack of damages. *Id.*

26 The few documents that have been obtained to date provide support for Defendants'  
27 defenses and claims. In support of a motion to dismiss, Stephens Media offered up a form of  
28 "Assignment" that purported to assign its rights in the News Article to Righthaven, but which, on

1 its face, indicated that Stephens Media retained a right of reversion that the “Assignment” did not  
2 disclose. When Defendants pushed to obtain the documentation of that right of reversion,  
3 Stephens Media ultimately produced a Strategic Alliance Agreement (“SAA”), which purports to  
4 be the master agreement that governs all the assignments Righthaven has sued upon in this Court.  
5 Declaration of Clifford C. Webb In Support of Defendant Democratic Underground LLC’s  
6 Motion to Compel the Production of Documents (“Webb Decl.”) ¶ 2, Exh. A.

7 The terms of the SAA provide substantial evidence that: (1) Righthaven has been  
8 conveyed no rights in the work at issue other than the right to sue for infringement, a fact that  
9 renders the assignment to Righthaven invalid; (2) Stephens Media is the real party in interest,  
10 engaging Righthaven as its agent to prosecute this action; (3) Stephens Media retains the right to  
11 sue Democratic Underground under the Agreement, thereby giving rise to a live and genuine  
12 controversy with Stephens Media; and (4) Righthaven has been granted no rights to exploit the  
13 work in question, and thus, for the purpose of fair use analysis, can suffer no harm from the use of  
14 the Excerpt by Democratic Underground. Specifically, the SAA reflects:

- 15 • It is part of an “integrated transaction” through which Stephens Media, by its affiliate  
16 “SI Content Monitor,” appears to control Righthaven. SAA ¶ 2.
- 17 • Righthaven has various—all unproduced—communications with Stephens Media  
18 about which works to have assigned to it, including:

19 Righthaven provides an “**Infringement Notice**” to Stephens Media prompting  
20 assignment of copyrights. SAA ¶ 3.1

21 “Righthaven shall have sixty (60) days after each respective assignment of each  
22 respective Assigned Infringed Copyright to Notify Stephens Media of whether  
23 Righthaven will pursue an Infringement Action of said respective Assigned  
24 Infringed Copyright (the “**Remediation Option Notice**”).” SAA ¶ 3.3.

25 “Stephens Media shall provide Notice to Righthaven of each copyright (each a  
26 “Notified Copyright”) that is required to be the subject of a Copyright Assignment  
27 (a “**Copyright Assignment Notice**”) by no later than five (5) Business Days prior  
28 to the last day upon which each respective Copyright Assignment is required to be  
executed by Stephens Media as provided in Section 3.1.” SAA ¶ 7.1

“Righthaven shall then provide to Stephens Media a **conforming Copyright Assignment** for Stephens Media to execute with respect to each Notified Copyright within three business Days after receipt of the Copyright Assignment Notice.” *Id.*



- Stephens Media has a right to prevent Righthaven from bringing suit on any such work after receiving notice:

“Notwithstanding any other provision of this Agreement, Stephens Media shall have the right to notify Righthaven within five (5) Business Days after receipt of a respective Remediation Option Notice, that Righthaven should not take any Infringement Action with respect to a particular putative infringer as indicated in any respective Remediation Option Notice (the “Declination Notice”).” SAA ¶ 3.3.

- Stephens Media also has a right of reversion to reclaim ownership of any work at will:

“Stephens Media shall have the right at any time to terminate, in good faith, any Copyright Assignment (“The Assignment Termination”) and enjoy a right of complete reversion to the ownership of any copyright that is the subject of a Copyright Assignment[.]” SAA ¶ 8.

- Despite the purported “assignment” of all rights in the copyright to Righthaven, the SAA in fact provides that:

**“Stephens Media shall retain (and is hereby granted by Righthaven) an exclusive license to Exploit the Stephens Media Assigned Copyrights for any lawful purpose whatsoever and Righthaven shall have no right or license to Exploit or participate in the receipt of royalties from the Exploitation of the Stephens Media Assigned Copyrights other than the right to proceeds in association with a Recovery.”** SAA ¶ 7.2 (emphasis added).

- Righthaven and Stephens Media split the proceeds of any recovery 50/50, minus Righthaven’s costs, except that if Stephens Media reclaims the copyright, it has to pay Righthaven’s expenses to date. SAA ¶¶ 5 8.

Nonetheless, Stephens Media and Righthaven continue to assert that the assignment is valid, that the relationship between them is not merely an agency relationship, and that Righthaven has sufficient control and ownership to constitute standing under the Copyright Act. Dkts. 36, 38, 56, 78. Therefore, Democratic Underground has a right to discovery of all documents that might bear on this supposed relationship, such as other communications about the assignment, communications leading to the formation of the SAA and negotiation of its terms, communications regarding the effectuation of assignment for the News Article or the relationship between Stephens Media and Righthaven, and so on.

#### **B. Background of the Present Discovery Dispute**

Defendants, over the course of the last three months, have communicated the clear

1 relevancy of the documents at issue and the inadequacy of Righthaven's and Stephens Media's  
2 responses and production, both in writing and during telephone discussions. Righthaven has  
3 repeatedly promised dates on which it will produce documents but then failed to deliver anything.  
4 To date, Righthaven has failed to produce a single document in response to any of Defendant's  
5 document requests. While Stephens Media has produced a handful of relevant documents, it  
6 refuses to produce others that go to the heart of the pending action and Counterclaim.

7 Democratic Underground served its First Sets of Requests for Production of Documents  
8 on Righthaven and Stephens Media, respectively on December 17, 2010. *See* Webb Decl. ¶ 4,  
9 Exhs. B, C. Stephens Media served responses on January 18, 2011. *Id.* ¶ 5, Exh. D. Righthaven  
10 served responses on or around January 18, 2011.<sup>3</sup> Between January 21, 2011 and February 3,  
11 2011, counsel for Defendants contacted counsel for Righthaven and Stephens Media in attempts  
12 to arrange a meet and confer call regarding their responses. *Id.* ¶ 7. After three weeks of delay,  
13 on February 10, 2011, counsel for Defendants finally was afforded separate meet and confer calls  
14 with Righthaven and with Stephens Media. *Id.* During those calls, the parties resolved some of  
15 Righthaven's and Stephens Media's objections, and Defendants agreed to narrow certain requests  
16 in scope. *Id.* ¶ 8. That same day, counsel for Defendants sent Righthaven and Stephens Media  
17 letters memorializing their respective meet and confer calls. *Id.*, Exhs. G, H. Defendants sent  
18 additional emails clarifying the meet and confer letter on February 16, 2011. *Id.* ¶ 9, Exhs. I, J.

19 1. Meet and Confer with Stephens Media

20 Stephens Media provided its First Supplemental Responses to Defendants on February 28,  
21 2011 along with 14 documents, including the SAA. *Id.* ¶ 10, Exh. K. Those responses were  
22 clearly incomplete. For example, they included only one single email between Stephens Media  
23 and Righthaven. *Id.* Defendants therefore emailed Stephens Media on March 1, 2011 listing  
24 several specific categories of documents that Defendants expected to receive in Stephens Media's

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25 <sup>3</sup> Righthaven's responses were due on January 18, 2011, but were postmarked January 19. Despite an agreement  
26 between Defendants and Righthaven and Stephens Media to serve by email, Righthaven did not. While the proof of  
27 service signed by Shawn Mangano, Righthaven's counsel, indicates that he personally mailed the documents on  
28 January 18, Mr. Mangano later revealed to Defendants' counsel: "Righthaven was handling their service. If they did  
not go out electronically, then they may have only gone out via U.S. Mail. I know they were prepared by me and  
provided to Righthaven to print out and serve." *See* Webb Decl. ¶ 6, Exhs. E, F. Defendants did not receive  
Responses from Righthaven until January 21, 2011, and the envelope was clearly postmarked January 19, 2011, one  
day after the responses were due.

1 production and asking when Defendants would receive such documents, including:

- 2 • “[T]he Operating Agreement referred to in the Strategic Alliance Agreement (SAA)  
3 and the other documents reflecting the integrated transaction for creation of SI Content  
4 Monitor and operations of Righthaven
- 5 • documents relating to the formation of Righthaven beyond the ultimate SAA (emails,  
6 drafts, discussions of structure, etc.)
- 7 • documents relating to the various elections and notices required by the SAA to be  
8 made by Stephens Media or Righthaven relating to the News Article, including, e.g.,  
9 the Searching Decision, the Material Risk Conclusion, The Remediation Option  
10 Notice, the Assignment (documents apart from the form already supplied)
- 11 • other documents showing the notification of search results and any communication  
12 about them that resulted in the actual decision to and act of assignment.”

13 *Id.* ¶ 11, Exh. L. Defendants also requested that Stephens Media produce its past-due privilege  
14 log. *Id.* Under this Court’s scheduling order, “[a] party. . . shall submit a detailed privilege log .  
15 . . within (21) days following the date that the documents memorialized in the privilege log were  
16 to be produced.” Dkt. 54 at 7. Stephens Media’s log was thus due on February 8.

17 After a week, counsel for Stephens Media, Mr. Colby Williams, replied that his  
18 understanding was that all documents, aside from the SAA, were in the possession of SI Content  
19 Monitor, a subsidiary of Stephens Media’s parent company. *Id.* ¶ 12, Exh. M. In addition, Mr.  
20 Williams stated that he was—apparently for the first time, nearly three months after the service of  
21 the document requests—asking Stephens Media’s general counsel, Mr. Hinueber, to review the  
22 documents he had. *Id.* On March 11, 2011, counsel for Defendants emailed Mr. Williams stating  
23 that it was surprising that Stephens Media claimed not to have possession of or even access to the  
24 Operating Agreement, as that Agreement, according to paragraph 2 of the SAA, was part of the  
25 integrated transaction that also included the SAA, to which Stephens Media was a party and  
26 which it had produced. *Id.* ¶ 13, Exh. N.<sup>4</sup> On March 17, Mr. Williams stated that he would  
27

28 <sup>4</sup> Additionally, the SAA imposes obligations on Stephens Media to ensure that SI Content Monitor and Stephens Media have common ownership. SAA ¶ 2.

1 attempt to obtain all the documents requested from SI Content Monitor, and that he would get  
2 back to Defendants the next day with an answer. *Id.* ¶ 14, Exh. O.

3 On March 21, having heard nothing, counsel for Defendants emailed Mr. Williams asking  
4 for the status on documents from SI Content Monitor and from Mr. Hinueber, Stephens Media’s  
5 general counsel, which Defendants reminded Stephen Media must be included on its overdue  
6 privilege log. *Id.* ¶ 15, Exh. P. On March 22, 2011, Mr. Williams stated that he was able to  
7 obtain a copy of the Operating Agreement from SI Content Monitor that he produced along with  
8 Stephens Media’s Second Supplemental Responses. *Id.* ¶ 16, Exh. Q. But he did not produce the  
9 remainder of the documents sought.

10 As to the documents in the possession of Mr. Hinueber, Stephens Media’s general  
11 counsel, Mr. Williams now admitted that responsive documents existed, but still refused to  
12 produce them or to disclose what they were in a privilege log. *Id.* Mr. Williams stated that he  
13 was maintaining the position that the Hinueber documents were “not ‘otherwise discoverable’”  
14 based on Stephens Media’s previous written objections to the document requests calling for their  
15 production. *Id.*

16 Counsel for Defendants responded by listing a small subset of the Requests to which  
17 Mr. Hinueber’s documents would be relevant and detailing how any purported objection by  
18 Stephens Media had already been resolved. *Id.* ¶ 17, Exh. R. For those categories, the objections  
19 had been only (1) that the documents were “confidential”—an issue resolved over a month earlier  
20 by entry of a protective order, or (2) that documents might be privileged—which would not have  
21 excused production of a privilege log. *Id.* Nonetheless, Mr. Williams continued to maintain that  
22 Stephens Media would not produce the documents unless the Court “rules that any of the subject  
23 documents are ‘otherwise discoverable’ despite the asserted objections.” *Id.* ¶ 18, Exh. S.

## 24 2. Meet and Confer with Righthaven

25 During the February 10, 2011 meet and confer, Defendants asked that Righthaven  
26 reevaluate its relevancy objections to matters that were quite obviously relevant in this action. *Id.*  
27 ¶ 8, Exh. G. For example, Righthaven had objected on relevancy grounds to: documents relating  
28 to the creation of Righthaven and its communications with Stephens Media; and documents

1 relating to the method of determining who Righthaven would sue—a process publicly referenced  
2 by its head, Steve Gibson. Righthaven responded that it would reevaluate its objection if  
3 Defendants provided reasoning for how each of these requests was relevant. Righthaven also  
4 agreed to provide supplemental responses by February 20, 2011 and to provide a privilege log  
5 and all relevant, responsive non-confidential documents by February 25. *Id.* Righthaven further  
6 agreed to produce confidential documents 7-10 days after entry of the protective order, which was  
7 subsequently entered on February 14. *Id.*

8 Pursuant to Righthaven’s request, and in an effort to have a meaningful meet and confer  
9 and resolve these objections, Defendants did provide a detailed list of each objected-to Request  
10 and the precise claims and affirmative defenses to which the requests are relevant. It did so  
11 despite it being *Righthaven’s* burden to provide reasoning for its own objections. *See Koninklijke*  
12 *Philips Elecs. N.V. v. KXD Tech., Inc.*, 2007 U.S. Dist. LEXIS 17540, at \*12 (D. Nev. March 12,  
13 2007) (“the objecting party must specifically detail the reasons why each request is irrelevant”)  
14 (emphasis added); Webb Decl. ¶ 8, Exh. G. Righthaven, however, failed to uphold its end of the  
15 bargain. Despite Righthaven’s agreement to produce all documents and supplemental responses  
16 no later than February 25, it provided nothing at all. Defendants’ counsel emailed Mr. Mangano,  
17 counsel for Righthaven, asking when Defendants would be receiving the promised documents,  
18 supplemental responses, and a privilege log. *Id.* ¶ 20, Exh. U. Mr. Mangano replied that he  
19 would get back to counsel for Defendants by March 2. *Id.* ¶ 21, Exh. V.

20 Having again received nothing by March 2, counsel for Defendants emailed Mr. Mangano  
21 on March 3 asking for documents and a privilege log and requesting a date certain as to when Mr.  
22 Mangano would provide the requested materials. *Id.* ¶ 23 Exh. X. Mr. Mangano stated that he  
23 would produce documents “when they are located” and promised that privileged materials would  
24 be included in a privilege log and provided to Defendants. *Id.* ¶ 24, Exh. Y. Counsel for  
25 Defendants *again* asked for a date certain, and Mr. Mangano refused to provide one, saying “you  
26 will get your privilege log shortly,” blaming his delay on his “busy briefing schedule and court  
27 appearances” and claiming that counsel for Defendants was refusing to extend “professional  
28 courtesy” and driving up litigation costs. *Id.* ¶¶ 25, 26, Exhs. Z, AA. Righthaven did ultimately

1 produce supplemental responses—but they did not reevaluate or withdraw objections—they  
2 actually purported to add *more*.<sup>5</sup> No documents were ever produced—not one.

3 Counsel for Defendants sent a letter to Mr. Mangano on March 10, 2010 detailing the  
4 status of the parties’ meet and confer to date and requesting that Mr. Mangano contact counsel for  
5 Defendants within a week if he believed any particular disagreement detailed in the letter could  
6 potentially benefit from further oral discussion. *Id.* ¶ 28, Exh. DD. He did not reply. On  
7 March 24, 2011, Counsel for Defendants sent another email inquiring about the documents and  
8 privilege log that had been originally due February 8, promised for February 25, and then  
9 promised for March 3. *Id.* ¶ 29, Exh. EE. Mr. Mangano has not since replied regarding  
10 documents or the privilege log.

11 Righthaven continues to refuse to produce any documents whatsoever, and has still failed  
12 to produce the privilege log the Court’s Order required “shall” be produced no later than  
13 February 8, 2011. While the parties in this action have agreed to a stay on deposition based  
14 discovery pending decisions on pending motions, they explicitly agreed to continue discovery on  
15 the requests that were already served prior to the stay. Joint Stipulation and Order to Stay  
16 Discovery, Dkt. 71. This is because, when deposition discovery reopens, there will be only  
17 approximately six weeks before expert reports are due, and Defendants therefore need to resolve  
18 their disputes now. Moreover, the materials being requested by, and withheld from, Defendants  
19 are needed now, to fully address these issues in this case and others like it.

### 20 **III. ARGUMENT**

21 Under Rule 26, “the scope of discovery is broad[,] and discovery should be allowed unless  
22 the information sought has no conceivable bearing on the case.” *Jackson v. Montgomery Ward &*  
23 *Co.*, 173 F.R.D. 524, 528 (D. Nev. 1997). The party resisting discovery carries a “heavy burden”  
24 of showing why discovery should not be allowed. *Blankenship v. Hearst Corp.*, 519 F.2d 418,  
25 429 (9th Cir. 1975). This burden includes “clarifying, explaining, and supporting its objections.”

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27 <sup>5</sup> On March 3, Mr. Mangano informed Defendants that he finally sent Righthaven’s Supplemental Responses. The  
28 Supplemental Responses were sent by postal mail, rather than email—a tactic that further delayed receipt of  
supplementation that had been originally promised for February 20, and despite Defendants requesting on February  
23 that Mr. Mangano serve them by email. *Id.* ¶¶ 19, 27, Exhs. T, CC.

1 *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002) (citing *Blankenship*); *see also*  
2 *Koninklijke Philips Elecs. N.V.*, 2007 U.S. Dist. LEXIS 17540, at \*12 (“the objecting party must  
3 specifically detail the reasons why each request is irrelevant”).

4       **A. Righthaven and Stephens Media Must Produce Documents Related to the**  
5       **Formation of Righthaven.**

6       A core issue in this action, and the hundreds of others filed by Righthaven, is whether or  
7 not the purported assignment to Righthaven is a sham and champertous. Democratic  
8 Underground believes that Righthaven was created as a tool to bring lawsuits on Stephens  
9 Media’s behalf, without Stephens Media taking responsibility for them. Defendants assert that  
10 Stephens Media intentionally designed the relationship with Righthaven to skirt the copyright  
11 laws, create a patina of legitimacy for Righthaven, while providing nothing of value to  
12 Righthaven other than the right to sue people. Counterclaim, Dkt. 13, ¶¶ 8-11, 15-17.  
13 Defendants contend that under the Ninth Circuit’s decision in *Silvers v. Sony Pictures Entm’t,*  
14 *Inc.*, 402 F.3d 881 (9th Cir. 2005), this relationship between two companies cannot vest  
15 Righthaven with the right to sue. Defendants further contend that the structure renders  
16 Righthaven merely an agent of Stephens Media, and that Stephens Media is the real party in  
17 interest properly subject to Democratic Underground’s Counterclaim—notwithstanding Stephens  
18 Media’s insistence that the Counterclaim must be dismissed. Counterclaim, Dkt 13, ¶¶ 33-42.  
19 Defendants also contend that the relationship was structured in a manner that constitutes  
20 champerty, that is, “maintaining a suit in return for a financial interest in the outcome.” *Del*  
21 *Webb Communities, Inc. v. Partington*, 2009 WL 3053709, at \* 3 (D. Nev. Sept. 18, 2009).

22       In furtherance of these defenses, Defendants served requests on both Stephens Media and  
23 Righthaven seeking documents relating to the creation of Righthaven, but have only received one  
24 document from Stephens Media in response – the Operating Agreement – which Stephens Media  
25 produced only after *Defendants* identified the document to Stephens Media by name during the  
26 meet and confer process. Webb Decl. ¶ 11, Exh. L. This category of documents is directly  
27 relevant to Defendants’ affirmative defenses and Counterclaim, especially in light of the few  
28 documents produced by Stephens Media, which—even prior to receipt of the actual

1 communications among the founders of Righthaven—suggest that Righthaven was created solely  
2 for the purpose of bringing copyright infringement actions. Defendants explained the relevance  
3 of these materials in its meet and confer letter to Righthaven on February 10, 2010. *Id.* ¶ 8, Exh.  
4 G. Righthaven and Stephens Media have never met their burden of explaining why these  
5 materials should not be produced. *Koninklijke Philips Elecs. N.V.*, 2007 U.S. Dist. LEXIS 17540,  
6 at \*12. The objections asserted by Righthaven and Stephens Media are neither valid nor clarified,  
7 explained or supported, as required by Rule 26. *DIRECTV, Inc.*, 209 F.R.D. at 458.

8 Pursuant to Local Rule 26-7(a), the full text of the discovery originally sought and the  
9 responses thereto appears below:

10 **DOCUMENT REQUEST NO. 58 TO RIGHTHAVEN:**

11 ALL DOCUMENTS referring or RELATING TO the creation of Righthaven,  
12 including, without limitation, ALL COMMUNICATION among its founders and funders.

13 **RESPONSE:**

14 Righthaven objects to this request on the grounds that the definitions of  
15 “DOCUMENTS,” “referring or RELATING TO,” “Righthaven” and  
16 “COMMUNICATION” as [sic] vague, ambiguous, overly broad and  
17 impose compliance requirements outside of those authorized under  
18 Rule 34. Righthaven further objects to this request as compound, overly  
19 broad, vague and ambiguous in its use of the phrases “refer or RELATE  
20 TO” and “the creation of Righthaven, including, without limitation, ALL  
21 COMMUNICATION among its founders and funders.” Righthaven  
22 additionally objects to this request as calling for the production of  
23 irrelevant material and has been done solely for the purpose of harassment.  
24 Righthaven additionally objects to this request on the grounds that it calls  
25 for the production of materials protected from discovery under the attorney  
26 work product doctrine and/or attorney client privilege. Moreover, this  
27 request may invade the privacy rights of third parties. Righthaven further  
28 objects to this request on the ground that it calls for the disclosure of  
confidential and/or proprietary information and the parties have yet to enter  
into an agreeable Stipulated Protective Order in this case. As such, no  
protective order one [sic] has been entered by the Court under which an  
appropriate confidentiality designation, if any, could be applied to  
responsive materials to the extent such materials exist.

24 **SUPPLEMENTAL RESPONSE:**

25 Righthaven supplements its prior response to this request by objecting to it  
26 grounds [sic] that that [sic] the definitions of “referring or RELATING  
27 TO,” and “COMMUNICATION” as [sic] vague, ambiguous, overly broad  
28 and impose compliance requirements outside of those authorized under  
Rule 34. Righthaven further objects to this request as compound, overly  
broad, vague and ambiguous in its use of the phrases “refer or RELATE  
TO” and “the creation of Righthaven, including, without limitation, ALL  
COMMUNICATION among its founders and funders.” Righthaven  
additionally objects to this request as calling for the production of



1 irrelevant material and has been done solely for the purpose of harassment.

2 **DOCUMENT REQUEST NO. 41 TO RIGHTHAVEN:**  
3 **ALL COMMUNICATIONS between YOU and Mark Hinueber.**

4 **RESPONSE:**

5 Righthaven objects to this request on the grounds that the definitions of  
6 “COMMUNICATIONS” and “YOU”<sup>6</sup> are vague, ambiguous, overly broad  
7 and impose compliance requirements outside of those authorized under  
8 Rule 34. Righthaven also objects to this request as overly broad as it is not  
9 limited to any particular time period. As such, Righthaven objects to this  
10 request to the extent it is interpreted to require the production of irrelevant  
11 material outside the permissible scope of discovery in this action.  
12 Righthaven additionally objects to this request on the grounds that it calls  
13 for the production of materials protected from discovery under the attorney  
14 work product doctrine and/or attorney client privilege. Moreover, this  
15 request may invade the privacy rights of third parties. Righthaven further  
16 objects to this request on the ground that it calls for the disclosure of  
17 confidential and/or proprietary information and the parties have yet to enter  
18 into an agreeable Stipulated Protective Order in this case. As such, no  
19 protective order one [sic] has been entered by the Court under which an  
20 appropriate confidentiality designation, if any, could be applied to  
21 responsive materials to the extent such materials exist.

22 **SUPPLEMENTAL RESPONSE:**

23 Righthaven supplements its prior response to this request by objecting to it  
24 on the grounds that the definitions [sic] of “COMMUNICATIONS” is  
25 vague, ambiguous, overly broad and imposes compliance requirements  
26 outside of those authorized under Rule 34. Righthaven objects to this  
27 request to the extent it is interpreted to require the production of irrelevant  
28 material outside the permissible scope of discovery in this action.  
Subject to the foregoing, Righthaven is in the process of investigating  
whether any relevant, responsive material exists and, if so, whether said  
material should be designated under the Stipulated Protective Order entered  
in this action. Righthaven will supplement this response and produce, or  
arrange for the production, of additional responsive material consistent  
with its obligations under the Federal Rules of Civil Procedure. Righthaven  
additionally directs Democratic Underground to the July 29, 2010  
Assignment and the Strategic Alliance Agreement (Bates Nos. SM000078-  
94), which have been previously produced in this action by Stephens  
Media.

22 **DOCUMENT REQUEST NO. 42 TO RIGHTHAVEN:**  
23 **ALL COMMUNICATIONS between YOU and Jackson Farrow.**

24 **RESPONSE:**

25 Righthaven objects to this request on the grounds that the definitions of  
26 “COMMUNICATIONS” and “YOU” are vague, ambiguous, overly broad  
27 and impose compliance requirements outside of those authorized under  
28 Rule 34. Righthaven also objects to this request as overly broad as it is not  
limited to any particular time period. As such, Righthaven objects to this  
request to the extent it is interpreted to require the production of irrelevant

<sup>6</sup> During the February 10, 2010 meet and confer call, Defendants agreed to limit the definition of “YOU” to mean  
“Righthaven LLC (i.e. not including those acting on its behalf).” See Webb Decl. ¶ 8, Exh. G.

1 material outside the permissible scope of discovery in this action.  
2 Righthaven additionally objects to this request on the grounds that it calls  
3 for the production of materials protected from discovery under the attorney  
4 work product doctrine and/or attorney client privilege. Moreover, this  
5 request may invade the privacy rights of third parties. Righthaven further  
6 objects to this request on the ground that it calls for the disclosure of  
7 confidential and/or proprietary information and the parties have yet to enter  
8 into an agreeable Stipulated Protective Order in this case. As such, no  
9 protective order one [sic] has been entered by the Court under which an  
10 appropriate confidentiality designation, if any, could be applied to  
11 responsive materials to the extent such materials exist.

12 **SUPPLEMENTAL RESPONSE:**

13 Righthaven supplements its prior response to this request by objecting to it  
14 on the grounds that the definitions [sic] of “COMMUNICATIONS” is  
15 vague, ambiguous, overly broad and imposes compliance requirements  
16 outside of those authorized under Rule 34. Righthaven objects to this  
17 request to the extent it is interpreted to require the production of irrelevant  
18 material outside the permissible scope of discovery in this action.  
19 Subject to the foregoing, Righthaven is in the process of investigating  
20 whether any relevant, responsive material exists and, if so, whether said  
21 material should be designated under the Stipulated Protective Order entered  
22 in this action. Righthaven will supplement this response and produce, or  
23 arrange for the production, of additional responsive material consistent  
24 with its obligations under the Federal Rules of Civil Procedure.

25 **DOCUMENT REQUEST NO. 36 TO STEPHENS MEDIA:**

26 ALL DOCUMENTS referring or RELATING TO the creation of Righthaven,  
27 including, without limitation, ALL COMMUNICATION among its founders and  
28 funders.

**RESPONSE:**

Objection. The foregoing document Request is overbroad and unduly  
burdensome insofar as it is asking Stephens Media to produce documents  
from a wholly separate entity. Without waiving the foregoing [objections],  
Stephens Media is not in possession of responsive documents.

**SUPPLEMENTAL RESPONSE:**

Without waiving the foregoing objections, *see* Righthaven Operating  
Agreement, Bates Nos. SM000095-161.

**DOCUMENT REQUEST NO. 53 TO STEPHENS MEDIA:**

ALL COMMUNICATIONS between YOU and Jackson Farrow.

**RESPONSE:**

Objection. The foregoing document Request is overbroad and unduly  
burdensome as it is not limited in time or scope. The foregoing Document  
Request seeks material protected by the common interest theory of the  
attorney-client privilege. *See, e.g., Nidec Corp. v. Victor Company of  
Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007). Without waiving the  
foregoing objections, Stephens Media has not located any non-privileged  
documents responsive to this Request. To the extent privileged  
communications responsive to this Request regarding the subject lawsuit  
exist, Stephens Media will provide an appropriate privilege log.

1                   1.     Documents Relating To The Creation Of Righthaven Are Highly Relevant  
2                                   To Defendants' Affirmative Defenses And Democratic Underground's  
3                                   Counterclaim.

4                   Rule 26 “has been construed broadly to encompass any matter that bears on, or that  
5 reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”  
6 *Jackson*, 173 F.R.D. at 526. Documents relating to Righthaven’s creation are directly relevant to  
7 the existence of an agency relationship between Righthaven and Stephens Media and to  
8 Defendants’ affirmative defenses of unclean hands, sham license, barratry, champerty and  
9 maintenance, and copyright misuse. Dkt 13.

10                  Furthermore, the minimal documents produced thus far by Stephens Media have  
11 supported Defendants’ claims, further showing that the request encompasses a “matter that bears  
12 on, or that reasonably could lead to other matter that could bear on” issues in this case. *Jackson*,  
13 173 F.R.D. at 526. As stated in the SAA, the “integrated transaction” of which the SAA is a part,  
14 also included the formation of Righthaven, supporting Defendants’ allegation that Righthaven’s  
15 purpose is to bring copyright infringement actions, as repeatedly alleged in Defendant Democratic  
16 Underground’s pleadings in this action. Dkts. 13, 44, 45, 79. The integrated transaction further  
17 suggests that Righthaven has no legitimate ownership interest in the News Article, that the  
18 purported copyright assignment was a sham, and that Righthaven exists solely to pursue lawsuits  
19 under the guise that Righthaven is the copyright owner.

20                  Defendants thus rightly believe that the candid emails, correspondence, drafts, and other  
21 communications about formation of Righthaven are likely to provide further evidence supporting  
22 the sham purpose of its creation and the “Assignment.” In light of this information, there is no  
23 justification for Righthaven’s claim that documents relating to its formation are irrelevant and  
24 undiscoverable.

25                   2.     Righthaven Has Not Met Its Burden Of Showing That Information Related  
26                                   To The Formation Of Righthaven Is Not Discoverable.

27                  “The party who resists discovery has the burden to show that discovery should not be  
28 allowed, and has the burden of clarifying, explaining, and supporting its objections.” *DIRECTV*,  
*Inc.*, 209 F.R.D. at 458. Righthaven has made no such showing. Righthaven made four initial

1 objections, none of which justifies withholding materials.

2 First, as to relevance, as just explained, this objection was frivolous from the start.

3 Second, as to confidentiality, a protective order has been in place since February.

4 Third, as to objection based on privilege, a log was long ago required, and as discussed  
5 below, failure to produce one has waived any continuing privilege. Furthermore, Request 58  
6 seeks more than just privileged communications, as it explicitly includes “all communications  
7 among its founders and funders,” which necessarily calls for production of non-privileged  
8 information, as the parties were adverse in negotiating the SAA. *See* SAA ¶¶ 9.10-9.12.

9 Fourth, as to “vagueness and ambiguity,” there is nothing vague about a request for  
10 communications about the formation of Righthaven, including between its founders and funders.  
11 If those objections ever had any merit, they were resolved in the initial meet and confer call on  
12 February 10, 2011. Webb Decl. ¶ 8, Exh. G. In its follow up letter to Righthaven after the initial  
13 meet and confer, Democratic Underground noted that, with respect to Righthaven’s objections as  
14 to “vague and ambiguous” phrasing, using standard dictionary definitions of the words, the  
15 request are not so ambiguous that Righthaven cannot, in good faith, “frame an intelligent reply.”  
16 *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 938 (9th Cir. 1994). Righthaven should have given a  
17 plain dictionary meaning to the terms. Moreover, if Righthaven wished to maintain such  
18 objections following multiple meet and confer efforts, Righthaven had to propose good faith  
19 alternative wording. *Id.*; *see also Gracenote v. Musicmatch, Inc.*, 2003 U.S. Dist. LEXIS 26015,  
20 at \* 13 (N.D. Cal Oct. 14, 2003). To the contrary, Righthaven simply refused to respond to  
21 Defendants, and continues to refuse to produce documents. Accordingly, Righthaven has no  
22 objections to stand on.

23 3. Righthaven and Stephens Media Have Improperly Failed to Produce  
24 Relevant Documents.

25 Righthaven has failed to produce a single communication in response to Request Nos. 41  
26 (for its communications with Mr. Hinueber, Stephens Media’s general counsel) and 42 (for its  
27 communications with Mr. Farrow, general counsel for SI Content Monitor). As to  
28 communications with Mr. Hinueber, the SAA was signed by Steven Gibson as the representative

1 for Righthaven LLC, and by Mark Hinueber as the representative for Stephens Media LLC. SAA  
2 at 10. The parties must have had communications leading up to the execution of the SAA, yet not  
3 one has been produced or logged. Further, Mr. Hinueber has publicly stated that he had the  
4 ability to stop Righthaven from bringing lawsuits. Webb Decl. ¶ 30, Exh. FF. There is little  
5 questions that he communicated with Righthaven's assignee in the process of pursuit of lawsuits  
6 about the assigned interests.

7 As to communications with Jackson Farrow, general counsel for SI Content Monitor, the  
8 SAA reveals that SI Content Monitor is party to the Operating Agreement forming Righthaven:

9 The parties hereby covenant that this Agreement is part of an integrated  
10 transaction with the transaction (the "Righthaven Transaction") represented by the  
11 formation of Righthaven and the corresponding Operating Agreement by and  
12 amongst Net Sortie Systems, LLC, a Nevada limited-liability company ("Net  
Sortie"), Righthaven and the Stephens Media's [sic] affiliated company, SI  
Content Monitor LLC[.]" SAA ¶ 2.

13 Yet, neither Righthaven nor Stephens Media has produced or logged a single communication with  
14 Jackson Farrow. Presumably there were discussions leading up to the formation of Righthaven  
15 which would have included Mr. Farrow, given SI Content Monitor's involvement in its  
16 formation. And to the extent that Stephens Media has taken the position that communications  
17 about the assignment are in the possession of SI Content Monitor, not itself (Webb Decl. ¶ 12,  
18 Exh. M), Mr. Farrow is the probable participant.

19 Accordingly, Righthaven and Stephens Media should be ordered to produce within ten  
20 days all documents in the categories identified.

21 4. Stephens Media Has Admitted It Is In Possession Of Relevant Documents  
22 Which It Is Withholding Based On Its "Previously Asserted Objections"  
23 Despite Asserting In Its Responses That It Is Not In Possession Of  
Responsive Documents.

24 Stephens Media's only objection to Request No. 36 about formation of Righthaven reads:  
25 "The foregoing document Request is overbroad and unduly burdensome *insofar as it is asking*  
26 **Stephens Media to produce documents from a wholly separate entity**" (emphases added). In  
27 other words, it objected that it need not produce documents to the extent they were in the  
28 possession of others. Stephens Media's next sentence stated: "Without waiving the foregoing

1 objections, Stephens Media is **not in possession of responsive documents**” (emphasis added). A  
2 month and a half later, however, Stephens Media revealed that its initial response was false—that  
3 it actually *is* in possession of responsive documents found by Mr. Hinueber, but is withholding  
4 them. Webb Decl. ¶ 16, Exh. Q. Nonetheless, Stephens Media still refuses to produce these  
5 documents or disclose them in a privilege log, instead asserting its position that such documents  
6 are “not ‘otherwise discoverable’” based on Stephens Media’s previously asserted objections. *Id.*  
7 ¶ 18, Exh. S. But this objection was only applicable “insofar as” the documents were in another  
8 entity’s possession. *Id.* ¶ 10, Exh. K. Stephens Media’s possession of relevant documents  
9 renders its objection moot, and renders its refusal to produce utterly improper.

10 Moreover, as Stephens Media has demonstrated by production of the Operating  
11 Agreement, it is able to obtain relevant documents in SI Content Monitor’s control as well.  
12 Request No. 53 seeks all communications between Stephens Media and Jackson Farrow, SI  
13 Content Monitor’s general counsel. As discussed below in Section III.C, Stephens Media has  
14 waived its objection as to privilege, its only objection to this Request. Thus, Stephens Media  
15 should be ordered to produce all responsive documents from SI Content Monitor, not merely the  
16 Operating Agreement, and it should include any documents claimed to be privileged but not  
17 timely logged in this case.

18 **B. Righthaven and Stephens Media Must Produce Documents Related to The**  
19 **Assignment of Rights In The News Article, Including Communications About**  
20 **the SAA.**

21 Equally as relevant to the claims and defenses in this action are documents relating to the  
22 assignment of rights in the News Article, including communications relating to and called for  
23 under the SAA. The SAA contemplates: (i) that Stephens Media would make a “Searching  
24 Decision” about searches for potential copyrights to be enforced (¶ 3.1); (ii) that Stephens Media  
25 would make a “Material Risk Conclusion” in relation to assignment of copyrights (*id.*); (iii) that  
26 Righthaven would provide an “Infringement Notice” to Stephens Media prompting assignment of  
27 copyrights (*id.*); (iv) that Stephens Media would provide a “Copyright Assignment Notice”  
28 within five days of each assignment, triggering duties by Righthaven (¶ 7.1); (v) that Righthaven  
would supply a “Remediation Option Notice” of its intention to sue or not on infringed copyrights

1 (¶ 3.3); (vi) that Stephens Media would have a right to supply a “Declination Notice” preventing  
2 suit within five days of receipt of the “Remediation Option Notice” (*id.*); and (vii) that Stephens  
3 Media would cooperate fully with Righthaven with respect to the Infringement Action (¶ 9.6).  
4 Presumably there would also be emails or other written records of communications between  
5 Righthaven and Stephens Media (or its subsidiaries) reflecting these activities. All of this  
6 information relating to that assignment is undoubtedly within the scope of Rule 26 discovery.  
7 None of it has been produced.

8 Democratic Underground’s First Requests for Production of Documents contain several  
9 requests encompassing these topics. As to Stephens Media, though all objections have been  
10 resolved during the meet and confer process, it has only produced the SAA and one  
11 “Assignment,” without any of the surrounding documents or communications, internal or with  
12 Righthaven. In addition, though the SAA controls the relationship at issue, Stephens Media has  
13 failed to produce any documents leading up to the SAA, or negotiating terms in the SAA, nor has  
14 it produced a privilege log identifying such communications.

15 Righthaven’s response has been even worse. It has not produced any documents  
16 whatsoever, in blatant disregard of the discovery process as well as its own repeated  
17 commitments that it would be producing documents.

18 Pursuant to Local Rule 26-7(a), the full text of the discovery originally sought and the  
19 responses thereto appears below:

20 **DOCUMENT REQUEST NO. 3 TO RIGHTHAVEN:**

21 ALL DOCUMENTS concerning any potential or actual assignment of rights in the  
22 NEWS ARTICLE to Righthaven.

23 **RESPONSE:**

24 Righthaven objects to this request on the grounds that the definitions of  
25 “DOCUMENTS” and “Righthaven” are vague, ambiguous, overly broad  
26 and impose compliance requirements outside of those authorized under  
27 Rule 34. Righthaven also objects to this request as vague, ambiguous and  
28 compound in it [sic] use of the phrase “concerning any potential or actual  
assignment of the rights.” Righthaven additionally objects to this request  
on the grounds that it calls for the production of materials protected from  
discovery under the attorney work product doctrine and/or attorney client  
privilege. Righthaven further objects to this request on the ground that it  
potentially calls for the disclosure of confidential and/or proprietary  
information and the parties have yet to enter into an agreeable Stipulated  
Protective Order in this case. As such, no protective order one [sic] has

1           been entered by the Court under which an appropriate confidentiality  
2           designation, if any, could be applied to responsive materials to the extent  
3           such materials exist.

4           Subject to the foregoing objections, Righthaven has attached materials to  
5           the Complaint and to publicly available filings in this matter that are  
6           potentially responsive to this request. These materials are already in the  
7           possession of Democratic Underground's counsel. If required, Righthaven  
8           will make these same materials available for inspection and copying or  
9           otherwise arrange for their production.

10           **SUPPLEMENTAL RESPONSE:**

11           Righthaven supplements it [sic] prior response to this request by directing  
12           Democratic Underground to the materials attached to the Complaint and to  
13           the materials attached to its publicly available filings in this matter, which  
14           contain materials responsive to this request. These materials are already in  
15           the possession of Democratic Underground's counsel. If required,  
16           Righthaven will make these same materials available for inspection and  
17           copying or otherwise arrange for their production. Righthaven is in the  
18           process of reviewing potentially responsive material to this request for  
19           designation under the Stipulated Protective Order entered in this action.  
20           Righthaven will produce any materials designated by it or make such  
21           designated materials available for inspection and copying on a mutually  
22           agreeable date and time. Should Righthaven locate any additional  
23           materials responsive to this request during the course of litigation, it will  
24           supplement this response and make said materials available for inspection  
25           and copying or otherwise arrange for their production following their  
26           review for appropriate designation under the Stipulated Protective Order.  
27           Righthaven additionally directs Democratic Underground to the July 19,  
28           2010 Assignment and the Strategic Alliance Agreement (Bates Nos. SM  
29           000078-94), which have been previously produced in this action by  
30           Stephens Media.

31           **DOCUMENT REQUEST NO. 3 TO STEPHENS MEDIA:**

32           ALL DOCUMENTS concerning any assignment of rights in the NEWS ARTICLE  
33           to Righthaven.

34           **RESPONSE:**

35           Objection. The information sought by this Document Request seeks  
36           confidential business and/or commercially sensitive information.  
37           Additionally, to the extent any [such] information sought by this Document  
38           Request is the subject of legitimate discovery in this action, Stephens  
39           Media will only produce such information once a binding protective order  
40           is in place. Plaintiff/Counterdefendant Righthaven, LLC drafted a  
41           proposed protective order and sent it to DU for its comments on  
42           December 7, 2010. DU did not respond until two judicial days before the  
43           due date for these Responses. Without waiving the foregoing objections,  
44           see July 19, 2010 Assignment and News Article previously produced  
45           herein.

46           **SUPPLEMENTAL RESPONSE:**

47           Without waiving the foregoing objections, see Strategic Alliance  
48           Agreement, Bates Nos. SM000078-94.



**DOCUMENT REQUEST NO. 4 TO RIGHTHAVEN:**

ALL DOCUMENTS reflecting any COMMUNICATIONS between Righthaven and any other PERSON or entity RELATING TO assignment or reversion of rights in the NEWS ARTICLE.

**RESPONSE:**

Righthaven objects to this request on the grounds that the definitions of “DOCUMENTS,” “COMMUNICATIONS,” “Righthaven,” “PERSON,” and “RELATING TO” are vague, ambiguous, overly broad and impose compliance requirements outside of those authorized under Rule 34. Righthaven also objects to this request as vague, ambiguous and compound in it [sic] use of the phrases “reflecting any” and “assignment or reversion rights.” Righthaven additionally objects to this request on the grounds that it calls for the production of materials protected from discovery under the attorney work product doctrine and/or attorney client privilege. Righthaven further objects to this request on the ground that it potentially calls for the disclosure of confidential and/or proprietary information and the parties have yet to enter into an agreeable Stipulated Protective Order in this case. As such, no protective order one [sic] has been entered by the Court under which an appropriate confidentiality designation, if any, could be applied to responsive materials to the extent such materials exist.

Subject to the foregoing objections, Righthaven has attached materials to the Complaint and to publicly available filings in this matter that are potentially responsive to this request. These materials are already in the possession of Democratic Underground’s counsel. If required, Righthaven will make these same materials available for inspection and copying or otherwise arrange for their production.

**SUPPLEMENTAL RESPONSE:**

Righthaven supplements its prior response to this request by objecting to it on the grounds that the definitions of “COMMUNICATIONS,” and “RELATING TO” are vague, ambiguous, overly broad and impose compliance requirements outside of those authorized under Rule 34. Righthaven also objects to this request as vague, ambiguous and compound in it [sic] use of the phrases “reflecting any” and “assignment or reversion rights.”

Subject to the foregoing, Righthaven supplements it [sic] prior response to this request by directing Democratic Underground to the materials attached to the Complaint and to the materials attached to its publicly available filings in this matter, which contain materials responsive to this request. These materials are already in the possession of Democratic Underground’s counsel. If required, Righthaven will make these same materials available for inspection and copying or otherwise arrange for their production. Righthaven is in the process of reviewing potentially responsive material to this request for designation under the Stipulated Protective Order entered in this action. Righthaven will produce any materials designated by it or make such designated materials available for inspection and copying on a mutually agreeable date and time. Should Righthaven locate any additional materials responsive to this request during the course of litigation, it will supplement this response and make said materials available for inspection and copying or otherwise arrange for the production following their review for appropriate designation under the Stipulated Protective Order. Righthaven additionally directs Democratic Underground to the July 19,

2010 Assignment and the Strategic Alliance Agreement (Bates Nos. SM 000078-94), which have been previously produced in this action by Stephens Media.

**DOCUMENT REQUEST NO. 4 TO STEPHENS MEDIA:**

ALL DOCUMENTS reflecting any COMMUNICATIONS between Righthaven and any other PERSON or entity, including YOU, RELATING TO assignment or reversion of rights in the NEWS ARTICLE.

**RESPONSE:**

Objection. The information sought by this Document Request seeks confidential business and/or commercially sensitive information. Additionally, to the extent any [such] information sought by this Document Request is the subject of legitimate discovery in this action, Stephens Media will only produce such information once a binding protective order is in place. Plaintiff/Counterdefendant Righthaven, LLC drafted a proposed protective order and sent it to DU for its comments on December 7, 2010. DU did not respond until two judicial days before the due date for these Responses. The Document Request also seeks material that may be protected by the attorney-client and work product privileges.

Without waiving the foregoing objections, Stephens Media is not aware of any documents responsive to this Request but will supplement the same upon the entry of a Stipulated Protective Order if responsive documents are located.

**DOCUMENT REQUEST NO. 10 TO RIGHTHAVEN:**

ALL DOCUMENTS that refer or RELATE TO any “right of reversion” referenced in the JULY 19, 2010 ASSIGNMENT.

**RESPONSE:**

Righthaven objects to this request on the grounds that the definitions of “DOCUMENTS” and “refer or RELATE TO” are vague, ambiguous, overly broad and impose compliance requirements outside of those authorized under Rule 34. Righthaven additionally objects to this request on the grounds that it calls for the production of materials protected from discovery under the attorney work product doctrine and/or attorney client privilege. Righthaven further objects to this request on the ground that it potentially calls for the disclosure of confidential and/or proprietary information and the parties have yet to enter into an agreeable Stipulated Protective Order in this case. As such, no protective order one [sic] has been entered by the Court under which an appropriate confidentiality designation, if any, could be applied to responsive materials to the extent such materials exist.

Subject to the foregoing objections, Righthaven has attached materials to the Complaint and to publicly available filings in this matter that are potentially responsive to this request. These materials are already in the possession of Democratic Underground’s counsel. If required, Righthaven will make these same materials available for inspection and copying or otherwise arrange for their production.

**SUPPLEMENTAL RESPONSE:**

Righthaven supplements its prior response to this request by objecting to it on the grounds that the phrase “refer or RELATE TO” is vague,

1 ambiguous, overly broad and impose [sic] compliance requirements outside  
2 of those authorized under Rule 34.

3 Subject to the foregoing, Righthaven additionally directs Democratic  
4 Underground to the July 19, 2010 Assignment and the Strategic Alliance  
5 Agreement (Bates Nos. SM 000078-94), which have been previously  
6 produced in this action by Stephens Media. Righthaven is presently  
unaware of the existence of any additional materials responsive to this  
request. Righthaven will supplement this response and produce, or arrange  
for the production, of additional responsive material consistent with its  
obligations under the Federal Rules of Civil Procedure.

7 **DOCUMENT REQUEST NO. 41 TO RIGHTHAVEN:**  
8 **ALL COMMUNICATIONS between YOU and Mark Hinueber.**

9 **RESPONSE:**

10 Righthaven objects to this request on the grounds that the definitions of  
11 “COMMUNICATIONS” and “YOU” are vague, ambiguous, overly broad  
12 and impose compliance requirements outside of those authorized under  
13 Rule 34. Righthaven also objects to this request as overly broad as it is not  
14 limited to any particular time period. As such, Righthaven objects to this  
15 request to the extent it is interpreted to require the production of irrelevant  
16 material outside the permissible scope of discovery in this action.  
17 Righthaven additionally objects to this request on the grounds that it calls  
for the production of materials protected from discovery under the attorney  
work product doctrine and/or attorney client privilege. Moreover, this  
request may invade the privacy rights of third parties. Righthaven further  
objects to this request on the ground that it calls for the disclosure of  
confidential and/or proprietary information and the parties have yet to enter  
into an agreeable Stipulated Protective Order in this case. As such, no  
protective order one [sic] has been entered by the Court under which an  
appropriate confidentiality designation, if any, could be applied to  
responsive materials to the extent such materials exist.

18 **SUPPLEMENTAL RESPONSE:**

19 Righthaven supplements its prior response to this request by objecting to it  
20 on the grounds that the definitions [sic] of “COMMUNICATIONS” is  
21 vague, ambiguous, overly broad and imposes compliance requirements  
outside of those authorized under Rule 34. Righthaven objects to this  
request to the extent it is interpreted to require the production of irrelevant  
material outside the permissible scope of discovery in this action.

22 Subject to the foregoing, Righthaven is in the process of investigating  
23 whether any relevant, responsive material exists and, if so, whether said  
24 material should be designated under the Stipulated Protective Order entered  
25 in this action. Righthaven will supplement this response and produce, or  
26 arrange for the production, of additional responsive material consistent  
27 with its obligations under the Federal Rules of Civil Procedure. Righthaven  
28 additionally directs Democratic Underground to the July 29, 2010  
Assignment and the Strategic Alliance Agreement (Bates Nos. SM000078-  
94), which have been previously produced in this action by Stephens  
Media.

**DOCUMENT REQUEST NO. 42 TO RIGHTHAVEN:**  
**ALL COMMUNICATIONS between YOU and Jackson Farrow.**

**RESPONSE:**

Righthaven objects to this request on the grounds that the definitions of “COMMUNICATIONS” and “YOU” are vague, ambiguous, overly broad and impose compliance requirements outside of those authorized under Rule 34. Righthaven also objects to this request as overly broad as it is not limited to any particular time period. As such, Righthaven objects to this request to the extent it is interpreted to require the production of irrelevant material outside the permissible scope of discovery in this action. Righthaven additionally objects to this request on the grounds that it calls for the production of materials protected from discovery under the attorney work product doctrine and/or attorney client privilege. Moreover, this request may invade the privacy rights of third parties. Righthaven further objects to this request on the ground that it calls for the disclosure of confidential and/or proprietary information and the parties have yet to enter into an agreeable Stipulated Protective Order in this case. As such, no protective order one [sic] has been entered by the Court under which an appropriate confidentiality designation, if any, could be applied to responsive materials to the extent such materials exist.

**SUPPLEMENTAL RESPONSE:**

Righthaven supplements its prior response to this request by objecting to it on the grounds that the definitions [sic] of “COMMUNICATIONS” is vague, ambiguous, overly broad and imposes compliance requirements outside of those authorized under Rule 34. Righthaven objects to this request to the extent it is interpreted to require the production of irrelevant material outside the permissible scope of discovery in this action.

Subject to the foregoing, Righthaven is in the process of investigating whether any relevant, responsive material exists and, if so, whether said material should be designated under the Stipulated Protective Order entered in this action. Righthaven will supplement this response and produce, or arrange for the production, of additional responsive material consistent with its obligations under the Federal Rules of Civil Procedure.

**DOCUMENT REQUEST NO. 10 TO STEPHENS MEDIA:**

ALL DOCUMENTS that refer or RELATE TO any “right of reversion” referenced in the JULY 19, 2010 ASSIGNMENT.

**RESPONSE:**

Objection. The information sought by this Document Request seeks confidential business and/or commercially sensitive information. Additionally, to the extent any such information is sought by this Document Request is the subject of legitimate discovery in this action, Stephens Media will only produce such information once a binding protective order is in place. Plaintiff/Counterdefendant Righthaven, LLC drafted a proposed protective order and sent it to DU for its comments on December 7, 2010. DU did not respond until two judicial days before the due date for these Responses. Without waiving the foregoing objections, *see* July 19, 2010 Assignment previously produced herein.

**SUPPLEMENTAL RESPONSE:**

Without waiving the foregoing objections, *see* Strategic Alliance Agreement, Bates Nos. SM000078-94.

1                   **DOCUMENT REQUEST NO. 53 TO STEPHENS MEDIA:**  
2                   ALL COMMUNICATIONS between YOU and Jackson Farrow.

3                   **RESPONSE:**

4                   Objection. The foregoing document Request is overbroad and unduly  
5                   burdensome as it is not limited in time or scope. The foregoing Document  
6                   Request seeks material protected by the common interest theory of the  
7                   attorney-client privilege. *See, e.g., Nidec Corp. v. Victor Company of*  
8                   *Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007). Without waiving the  
9                   foregoing objections, Stephens Media has not located any non-privileged  
10                  documents responsive to this Request. To the extent privileged  
11                  communications responsive to this Request regarding the subject lawsuit  
12                  exist, Stephens Media will provide an appropriate privilege log.

13                  **DOCUMENT REQUEST NO. 69 TO STEPHENS MEDIA:**

14                  ALL DOCUMENTS that refer or RELATE TO the facts underlying YOUR  
15                  statement on page 2 of Docket 38 that “Stephens Media’s involvement with  
16                  Righthaven...is limited to its role as the assignor of the subject copyright.”

17                  **RESPONSE:**

18                  Objection. The information sought by this Document Request seeks  
19                  confidential business and/or commercially sensitive information.  
20                  Additionally, to the extent any [such] information sought by this Document  
21                  Request is the subject of legitimate discovery in this action, Stephens  
22                  Media will only produce such information once a binding protective order  
23                  is in place. Plaintiff/Counterdefendant Righthaven, LLC drafted a  
24                  proposed protective order and sent it to DU for its comments on December  
25                  7, 2010. DU did not respond until two judicial days before the due date for  
26                  these Responses. Without waiving the foregoing objections, *see* July 19,  
27                  2010 Assignment and News Article previously produced herein.

28                  **SUPPLEMENTAL RESPONSE:**

                  Without waiving the foregoing objections, *see* Strategic Alliance  
                  Agreement, Bates Nos. SM000078-94.

                  1.       **Stephens Media’s Confidentiality Objections Are Moot Since Entry of the**  
                  **Stipulated Protective Order.**

                  Stephens Media’s sole objection to the four requests above, which each seek information  
                  relevant to the assignment of the News Article at issue in this action, is that a protective order had  
                  not been entered in this case. Since entry of the Stipulated Protective Order on February 14,  
                  2010, this objection is moot. Dkt. 65; *see Koninklijke Philips Elecs. N.V*, 2007 U.S. Dist. LEXIS  
                  17540, at \*15 (“a stipulated protective order regarding the production of confidential and  
                  proprietary information has been entered in this case. Therefore Defendants’ objection to  
                  producing documents based on the proprietary or confidential nature of the requested information  
                  [is] overruled, and Defendants are required to produce relevant documents or information”).

                  It is inconceivable that Stephens Media does not have additional responsive documents,

1 given those specifically *required* to be *created by Stephens Media* or to be *sent to Stephens Media*  
2 under the SAA. *See* SAA, ¶¶ 3.1, 3.3, 7.1. If it claims that it does not possess such documents  
3 because they are in the hands of “SI Content Monitor,” this could only be by virtue of SI Content  
4 Monitor acting as Stephens’ Media’s agent under the SAA—a relationship that certainly allows  
5 Stephens Media to obtain and produce the documents itself (as it did with the Operating  
6 Agreement). Accordingly, the Court should order Stephens Media to produce all documents in  
7 its possession, custody and control within ten days of its order, including those in the possession  
8 of SI Content Monitor, responsive to these requests.

9           2.       Righthaven Has Improperly Failed to Produce Relevant Documents.

10           In its Supplemental Responses, Righthaven engages in a game of “directing Defendants”  
11 to the SAA document produced by Stephens Media and to documents attached to its pleadings,  
12 without actually producing any documents. Righthaven’s response also claims it will produce  
13 documents it chooses to “designate”—notably, not all responsive documents—at a date uncertain,  
14 depending on when it chooses to review them. Webb Decl. ¶ 27, Exh. CC. Righthaven has had  
15 long enough—over four months—to locate and review documents. Righthaven’s assertion that it  
16 will produce documents on a “mutually agreeable date and time” is demonstrably false.  
17 Righthaven previously chose, unilaterally, the dates for its compliance, but then failed,  
18 repeatedly, to meet even its own schedule. *Id.* Righthaven’s last “promise” of a date to provide  
19 documents was that it would provide them “when they are located.” *Id.* ¶ 24, Exh. Y.  
20 Defendants have been more than patient; there is no excuse for such game playing in this case.

21           Accordingly, Righthaven should be ordered to produce within ten days all documents in  
22 the categories identified.

23           C.       Righthaven and Stephens Media Have Waived Their Objections Based on the  
24                   Attorney-Client or Work-Product Privileges By Failing To Produce A  
25                   Privilege Log.

26           This Court has repeatedly held that where, as here, a party fails to produce a privilege log,  
27 that party’s objections based on privilege are waived. *See Koninklijke Philips Elecs. N.V.*, 2007  
28 U.S. Dist. LEXIS 17540, at \* 14 (Foley, J.); *Akers v. Keszzi*, 2009 U.S. Dist. LEXIS 106247, at \*  
8-9 (D. Nev. Oct. 27, 2009) (Foley, J.). The “party asserting the attorney-client privilege has the

1 burden of making a *prima facie* showing that the privilege protects the information” and must  
2 produce a privilege log or affidavits supporting application of the work product doctrine or  
3 demonstrating attorney-client privilege. *Koninklijke Philips Elecs.*, 2007 U.S. Dist. LEXIS  
4 17540, at \*14. Where Defendants do not provide privilege logs or affidavits supporting their  
5 generalized objections based on privilege, the party waives its privilege objections. *Id.*; *Akers*,  
6 2009 U.S. Dist. LEXIS 106247, at \*8-9, n. 2 (finding plaintiff’s privilege objection waived as  
7 improper where plaintiff had not produce a privilege log).

8       Beyond this general obligation to produce a log, however, the failure of Stephens Media  
9 and Righthaven in this case is also a direct violation of the Court’s scheduling order, which  
10 specifically ordered production of a log no later than February 8. *See* Order, Dkt. 54 (“A party. . .  
11 shall submit a detailed privilege log detailing the nature of the privilege or the basis for the item’s  
12 or items’ protection as trial preparation material. Such a privilege log shall be limited to  
13 communications prior to the commencement of this action, and shall be produced within (21)  
14 days following the date that the documents memorialized in the privilege log were to be produced  
15 by the party from whom discovery is being sought.”). Because generalized objections are  
16 improper without submission of a privilege log, Righthaven and Stephens Media have waived all  
17 objections based on privilege, and the Court should so order on this motion. *Koninklijke Philips*  
18 *Elecs.*, 2007 U.S. Dist. LEXIS 17540 at \*14.

19       That the waiver here should be enforced finds further support in two other facts. First,  
20 Defendants are not belatedly springing some trap upon Righthaven or Stephens Media; rather  
21 Defendants have been requesting privilege logs for three months, repeatedly reminding of the  
22 Court’s prior order, only to have Righthaven and Stephens Media thumb their noses. *See, e.g.*,  
23 Webb Decl. ¶¶ 8, 11, 13, 17, 19, 20, 22, 23, 25, 28, 29, Exhs. G, H, L, N, R, T, U, W, X, Z, DD,  
24 EE. Second, the deliberate stalling of resolution of privilege issues has been in pursuit of tactical  
25 advantage. Both Righthaven and Stephens Media apparently hoped to shield the nature of their  
26 relationship behind a claim of “common interest” privilege—apparently including within that  
27 privilege communications about the formation of Righthaven and the assignments that  
28 Defendants assert are a sham. *Id.* ¶¶ 10, 18, Exhs. K, S. But they have a problem doing so: to

1 claim joint conduct further substantiates Defendants' claim of agency and sham and undermines  
2 their claim that they were engaged in any sort of arms' length, genuine transaction. Despite  
3 Defendants' Requests for documents that might substantiate or refute their common interest,  
4 Righthaven and Stephens Media have failed to produce any responsive documents.

5 Pursuant to Local Rule 26-7(a), the full text of the discovery originally sought and the  
6 responses thereto appears below:

7 **DOCUMENT REQUEST NO. 7 TO RIGHTHAVEN:**

8 ALL DOCUMENTS concerning any joint defense, common interest, or other  
9 agreements for cooperation in litigation or preservation of privileges between  
Righthaven and Stephens Media.

10 **RESPONSE:**

11 Righthaven objects to this request on the grounds that the definitions of  
12 "DOCUMENTS," "Righthaven," and "Stephens Media" are vague,  
13 ambiguous, overly broad and impose compliance requirements outside of  
14 those authorized under Rule 34. Righthaven also objects to this request as  
15 vague, ambiguous and compound in its use of the phrases "concerning  
16 any," "joint defense, common interest, or other agreements for cooperation  
17 in litigation" and "or preservation of privileges." Righthaven additionally  
18 objects to this request on the grounds that it calls for the production of  
materials protected from discovery under the attorney work product  
doctrine and/or attorney client privilege. Righthaven further objects to this  
request on the grounds that it potentially calls for the disclosure of  
confidential and/or proprietary information and the parties have yet to enter  
into an agreeable Stipulated Protective Order in this case. As such, no  
protective order one [sic] has been entered by the Court under which an  
appropriate confidentiality designation, if any, could be applied to  
responsive materials to the extent such materials exist.

19 **SUPPLEMENTAL RESPONSE:**

20 Righthaven supplements it [sic] response to this request by objecting to it  
21 as vague, ambiguous and compound in it [sic] use of the phrases  
22 "concerning any," "joint defense, common interest, or other agreements for  
23 cooperation in litigation" and "preservation of privileges." Subject to these  
objections, Righthaven is reviewing material in its possession that may be  
responsive to this request. Righthaven will produce, or make available for  
inspection and copying, any material deemed to be responsive to this  
request after it is [sic] been assigned an appropriate designation, if any,  
under the Stipulated Protective Order entered in this action.

24 **DOCUMENT REQUEST NO. 7 TO STEPHENS MEDIA:**

25 ALL DOCUMENTS concerning any joint defense, common interest, or other  
26 agreements for cooperation in litigation or preservation of privileges between  
Righthaven and Stephens Media.

27 **RESPONSE:**

28 Objection. The foregoing document Request seeks material protected by  
the common interest theory of the attorney-client privilege. *See, e.g.,*  
*Nidec Corp. v. Victor Company of Japan*, 249 F.R.D. 575, 578 (N.D. Cal.



2007). Without waiving the foregoing objections, Stephens Media has not located any non-privileged documents responsive to this Request. To the extent privileged communications responsive to this Request regarding the subject lawsuit exist, Stephens Media will provide an appropriate privilege log.

Despite responding that they would produce and/or log documents responsive to this Request, Stephens Media and Righthaven have refused to produce any such documents or to provide a privilege log. By refusing even to identify what privileges were being claimed, and as to what documents, Righthaven and Stephens Media intentionally halt the difficult process for resolving those issues. The just consequence for such conduct is to treat the privilege as waived.

#### IV. CONCLUSION

For these reasons, Defendant Democratic Underground respectfully requests that this Court grant Defendant's Motion to Compel Production of Documents from Stephens Media on Requests 3, 4, 7, 10, 36, 53 and 69 and from Righthaven on Requests 3, 4, 7, 10, 41, 42 and 58. The Court should order all documents in their possession, custody and control, including those in the control of their 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: April 28, 2011

FENWICK & WEST LLP

By: /s/ Clifford C. Webb  
CLIFFORD C. WEBB

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