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Defendant DAVID ALLEN

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

18 RIGHTHAVEN LLC, a Nevada limited liability company, | Case No. 2:10-01356-RLH (GWF)
19 Plaintiff,
v.

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

23 DEMOCRATIC UNDERGROUND, LLC, a District of | **DEFENDANT DEMOCRATIC
Columbia limited-liability company,**
24 Counterclaimant,
25 v.

26 RIGHTHAVEN LLC, a Nevada limited liability company, | **DEFENDANT DEMOCRATIC
and STEPHENS MEDIA LLC, a Nevada limited-liability
company,**
27 Counterdefendants.
28

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NOTICE OF MOTION AND MOTION TO COMPEL

2 Defendant and Counterclaimant Democratic Underground, LLC (“Democratic
3 Underground” or “Defendant”) hereby moves pursuant to Federal Rules of Civil Procedure 26, 34
4 and 37 and Local Rule 26-7 to compel Plaintiff and Counterdefendant Righthaven LLC
5 (“Righthaven”) and Counterdefendant Stephens Media LLC (“Stephens Media”) to produce all
6 documents responsive to certain requests in Defendant and Counterclaimant Democratic
7 Underground LLC’s First Set of Requests for Production of Documents (“First Set of Requests
8 for Production of Documents”) relating to (1) the creation of Righthaven and (2) the assignment
9 of the copyright at issue, including communications required by and relating to the Strategic
10 Alliance Agreement recently made public in this case.

11 This motion is based on the following Local Rule 26-7(b) Certification, the following
12 Memorandum of Points and Authorities, the accompanying Declaration of Clifford C. Webb and
13 such other written submissions and oral argument as may be presented to the Court at or before
14 the time this motion is taken under submission.

LOCAL RULE 26-7(B) CERTIFICATION

16 Pursuant to Local Rule 26-7(b), counsel for Democratic Underground certifies that it
17 conferred by email, by letter and by telephone with counsel for Righthaven and Stephens Media
18 from January 21, 2011 through March 24, 2011, in a sincere effort to resolve the issues raised by
19 this Motion to Compel without court action. Defendant's efforts have been unsuccessful,
20 necessitating this motion.

21 || Dated: April 28, 2011

FENWICK & WEST LLP

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

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

MEMORANDUM OF POINTS AND AUTHORITIES

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.”¹ 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.”²

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.

¹ Order on Motion for Reconsideration, Docket (“Dkt.”) 94 at 2.

² 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
Righthaven will pursue an Infringement Action of said respective Assigned
23 Infringed Copyright (the “**Remediation Option Notice**”).” SAA ¶ 3.3.

24 “Stephens Media shall provide Notice to Righthaven of each copyright (each a
“Notified Copyright”) that is required to be the subject of a Copyright Assignment
25 (a “**Copyright Assignment Notice**”) by no later than five (5) Business Days prior
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

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

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

3 “Notwithstanding any other provision of this Agreement, Stephens Media shall
4 have the right to notify *Righthaven* within five (5) Business Days after receipt of a
5 respective Remediation Option Notice, that *Righthaven* should not take any
6 Infringement Action with respect to a particular putative infringer as indicated in
7 any respective Remediation Option Notice (**the “Declination Notice”**).” SAA
8 ¶ 3.3.

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

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

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

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

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

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

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

34 Defendants, over the course of the last three months, have communicated the clear
35

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, 2011.³ 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

25 _____
26 ³ Righthaven's responses were due on January 18, 2011, but were postmarked January 19. Despite an agreement
27 between Defendants and Righthaven and Stephens Media to serve by email, Righthaven did not. While the proof of
28 service signed by Shawn Mangano, Righthaven's counsel, indicates that he personally mailed the documents on
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.⁴ On March 17, Mr. Williams stated that he would

27
28 ⁴ 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 Stephens 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*.⁵ 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.”

26

27 ⁵ 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, Inc.*, 402 F.3d 881 (9th Cir. 2005), this relationship between two companies cannot vest
14 Righthaven with the right to sue. Defendants further contend that the structure renders
15 Righthaven merely an agent of Stephens Media, and that Stephens Media is the real party in
16 interest properly subject to Democratic Underground’s Counterclaim—notwithstanding Stephens
17 Media’s insistence that the Counterclaim must be dismissed. Counterclaim, Dkt 13, ¶¶ 33-42.
18 Defendants also contend that the relationship was structured in a manner that constitutes
19 champerty, that is, “maintaining a suit in return for a financial interest in the outcome.” *Del*
20 *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 RIGHHAVEN:**

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

14 **RESPONSE:**

15 Righthaven objects to this request on the grounds that the definitions of
16 “DOCUMENTS,” “referring or RELATING TO,” “Righthaven” and
17 “COMMUNICATION” as [sic] vague, ambiguous, overly broad and
18 impose compliance requirements outside of those authorized under
19 Rule 34. Righthaven further objects to this request as compound, overly
20 broad, vague and ambiguous in its use of the phrases “refer or RELATE
21 TO” and “the creation of Righthaven, including, without limitation, ALL
22 COMMUNICATION among its founders and funders.” Righthaven
23 additionally objects to this request as calling for the production of
irrelevant material and has been done solely for the purpose of harassment.
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.

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
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
28 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 RIGHHAVEN:**
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”⁶ 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.

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

39 **DOCUMENT REQUEST NO. 42 TO RIGHHAVEN:**
40 ALL COMMUNICATIONS between YOU and Jackson Farrow.

41 **RESPONSE:**

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

48 ⁶ During the February 10, 2010 meet and confer call, Defendants agreed to limit the definition of “YOU” to mean
49 “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.

29 **RESPONSE:**

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

34 **SUPPLEMENTAL RESPONSE:**

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

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

38 ALL COMMUNICATIONS between YOU and Jackson Farrow.

39 **RESPONSE:**

40 Objection. The foregoing document Request is overbroad and unduly
41 burdensome as it is not limited in time or scope. The foregoing Document
42 Request seeks material protected by the common interest theory of the
43 attorney-client privilege. *See, e.g., Nidec Corp. v. Victor Company of*
44 *Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007). Without waiving the
45 foregoing objections, Stephens Media has not located any non-privileged
46 documents responsive to this Request. To the extent privileged
47 communications responsive to this Request regarding the subject lawsuit
48 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." *Jackson*, 173 F.R.D. at 526. Documents relating to Righthaven's creation are directly relevant to
6 the existence of an agency relationship between Righthaven and Stephens Media and to
7 Defendants' affirmative defenses of unclean hands, sham license, barratry, champerty and
8 maintenance, and copyright misuse. Dkt 13.

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

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

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

26 "The party who resists discovery has the burden to show that discovery should not be
27 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
13 Sortie"), Righthaven and the Stephens Media's [sic] affiliated company, SI
14 Content Monitor LLC[.]" SAA ¶ 2.

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

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

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

27 Stephens Media's only objection to Request No. 36 about formation of Righthaven reads:
28 "The foregoing document Request is overbroad and unduly burdensome **insofar as it is asking**
29 **Stephens Media to produce documents from a wholly separate entity**" (emphases added). In
30 other words, it objected that it need not produce documents to the extent they were in the
31 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**
the SAA.

20 Equally as relevant to the claims and defenses in this action are documents relating to the
21 assignment of rights in the News Article, including communications relating to and called for
22 under the SAA. The SAA contemplates: (i) that Stephens Media would make a “Searching
23 Decision” about searches for potential copyrights to be enforced (¶ 3.1); (ii) that Stephens Media
24 would make a “Material Risk Conclusion” in relation to assignment of copyrights (*id.*); (iii) that
25 Righthaven would provide an “Infringement Notice” to Stephens Media prompting assignment of
26 copyrights (*id.*); (iv) that Stephens Media would provide a “Copyright Assignment Notice”
27 within five days of each assignment, triggering duties by Righthaven (¶ 7.1); (v) that Righthaven
28 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 RIGHHAVEN:**

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

22 **RESPONSE:**

23 Righthaven objects to this request on the grounds that the definitions of
“DOCUMENTS” and “Righthaven” are vague, ambiguous, overly broad
24 and impose compliance requirements outside of those authorized under
Rule 34. Righthaven also objects to this request as vague, ambiguous and
25 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
26 privilege. Righthaven further objects to this request on the ground that it
potentially calls for the disclosure of confidential and/or proprietary
27 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
28

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 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 their 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. 3 TO STEPHENS MEDIA:

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

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. Without waiving the foregoing objections, *see* July 19, 2010 Assignment and News Article previously produced herein.

SUPPLEMENTAL RESPONSE:

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

DOCUMENT REQUEST NO. 4 TO RIGHHAVEN:

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,

1 2010 Assignment and the Strategic Alliance Agreement (Bates Nos.
2 SM 000078-94), which have been previously produced in this action by
Stephens Media.

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

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

6 **RESPONSE:**

7 Objection. The information sought by this Document Request seeks
8 confidential business and/or commercially sensitive information.
9 Additionally, to the extent any [such] information sought by this Document
10 Request is the subject of legitimate discovery in this action, Stephens
11 Media will only produce such information once a binding protective order
12 is in place. Plaintiff/Counterdefendant Righthaven, LLC drafted a
13 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.

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

17 **DOCUMENT REQUEST NO. 10 TO RIGHHAVEN:**

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

20 **RESPONSE:**

21 Righthaven objects to this request on the grounds that the definitions of
22 “DOCUMENTS” and “refer or RELATE TO” are vague, ambiguous,
23 overly broad and impose compliance requirements outside of those
24 authorized under Rule 34. Righthaven additionally objects to this request
25 on the grounds that it calls for the production of materials protected from
26 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.

27 Subject to the foregoing objections, Righthaven has attached materials to
28 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.

27 **SUPPLEMENTAL RESPONSE:**

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

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

Subject to the foregoing, 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. 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.

DOCUMENT REQUEST NO. 41 TO RIGHHAVEN:
ALL COMMUNICATIONS between YOU and Mark Hinueber.

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. 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.

DOCUMENT REQUEST NO. 42 TO RIGHHAVEN:
ALL COMMUNICATIONS between YOU and Jackson Fa

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.

**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.

DOCUMENT REQUEST NO. 69 TO STEPHENS MEDIA:

ALL DOCUMENTS that refer or **RELATE TO** the facts underlying **YOUR** statement on page 2 of Docket 38 that "Stephens Media's involvement with Righthaven...is limited to its role as the assignor of the subject copyright."

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. Without waiving the foregoing objections, *see* July 19, 2010 Assignment and News Article previously produced herein.

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. Keszei*, 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 RIGHHAVEN:**

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
19 materials protected from discovery under the attorney work product
20 doctrine and/or attorney client privilege. Righthaven further objects to this
21 request on the grounds that it potentially calls for the disclosure of
22 confidential and/or proprietary information and the parties have yet to enter
23 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 [sic] response to this request by objecting to it
26 as vague, ambiguous and compound in its [sic] use of the phrases
"concerning any," "joint defense, common interest, or other agreements for
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.

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

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

29 **RESPONSE:**

30 Objection. The foregoing document Request seeks material protected by
31 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

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