EXHIBIT DD

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VIA EMAIL

Shawn Mangano
shawn@manganolaw.com

Re: *Righthaven v. Democratic Underground*;
USDC, District of Nevada Case No.: 2:10 CIV 01356-RLH-GWF

Dear Mr. Mangano:

This letter is in response to Righthaven's supplemental discovery responses and our outstanding issues therewith. This is our final effort to meet and confer on these issues. Where Righthaven has otherwise refused our prior requests to correct its responses, we will proceed by motion. We request that any further information requested below be provided within 7 days of this date.

1. Discovery Requests

    a. Requests for Admission

        i. Definition objections: You continue to assert objections to definitions that we attempted to resolve in our last meet and confer, a summary of which was provided to you in my follow-up letter on Feb. 10, including a modification of the definition of the term "PERSONS" to remove the words "without limitation." Your supplemental responses continue to object without recognizing this modification. Please clarify whether you are standing by this objection notwithstanding our written modification of the definition.

        ii. Legal conclusion: We previously pointed out to you that Rule 36(a)(1)(A) expressly permits Requests for Admission relating to the application of law to fact, and our position is that the requests to which you objected on the basis of calling for legal conclusion are actually application of law to fact. You agreed to revisit your objections provided we send you a list of the requests to which we refer. Several of these Requests relate to the

assignment from Stephens Media to Righthaven and appear to be answered by the Strategic Alliance Agreement between Righthaven and Stephens Media produced by Stephens Media in this action (SM000078-94). We note that Rule 36(a)(1)(A) also allows for law to fact application of the meaning of documents. We interpret your decision to stand on this objection as refusal to respond to these Requests.

iii. Relevance: With respect to your objection as to relevance, we explained the relevance of the requests to which you objected. As you continue to object to the relevance of Requests30-31, 39-41, 47-48, 50, 54-82, we are at an impasse on this issue.

iv. Righthaven has clearly waived the additional objections asserted in Righthaven's Supplemental Response which did not appear in your original response (e.g. privacy objection in response to Request 75), as Righthaven did not provide these objections in a timely manner. In all events, those objections are without merit for the following reasons:

1. You have added relevance objections to Requests 26 and 27. Both of these requests are relevant to Defendants' affirmative defenses, including fair use and lack of damages. "Under the Federal Rules, the scope of discovery is broad[,] and discovery should be allowed unless the information sought has no conceivable bearing on the case." *Jackson v. Montgomery Ward & Co.*, 173 F.R.D. 524, 528 (D. Nev. 1997). Moreover, Righthaven carries a "heavy burden" of showing why discovery should not be allowed. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). "The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *DIRECT TV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002) (citing *Blankenship*). Thus, (1) DU has no obligation to make an "offer of proof," and (2) our good faith efforts to resolve this dispute should not be construed as limiting RH's burden.

2. You have added an objection to RFA 36 on the basis that it is compound. The request is not compound. It asks that you admit

that Stephens Media is a part owner of Righthaven, regardless of whether it is directly or indirectly a part owner.

3. You have added an objection to Request 78 on the basis that the phrase "partially owned by" is vague and ambiguous. As we noted in our previous meet and confer, using standard dictionary definitions of these words, the request is not so ambiguous that Righthaven cannot, in good faith, "frame an intelligent reply." *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 938 (9th Cir. 1994). To comply with its obligations under the rules, Righthaven can and should propose good faith alternative wording if it genuinely needs clarity on the meaning of the term. *Id.*; *see also Gracenote v. Musicmatch,* 2003 U.S. Dist. LEXIS 26015 (N.D. Cal Oct. 14, 2003); *S.A. Healy Co. v. United States*, 37 Fed.Cl. 204, 205-06 (1997) ("If defendant understood the term to have some other possible meaning, it should have specified that meaning and admitted or denied each request based on both meanings").

If the new objections are not withdrawn and the answers provided within seven days, we are at impasse on all of them.

v. With respect to your remaining objections, we raised the problems with your objections in our last meet and confer. As you have eliminated the language from each of your responses regarding your willingness to meet and confer regarding your objections (without providing any response even after the meet and confer), we understand that for those Requests for Admission to which you provided no actual response, you are standing on objections only.

b. Interrogatories

i. You previously stated that you would take another look at case law regarding compound objections and to reevaluate your objections on that basis. Specifically, we walked you through Interrogatory 3 and the basis for our belief that your calculation of "at least sixteen" subparts is absurd. Further, even if the totality of alleged subparts in the interrogatories did add up to more than 25, which it does not, you concede in your responses that "[a] responding party may also pick and chose which 25

interrogatories to answer." You have not answered a single interrogatory. As you continue to stand by your objection, we are at an impasse as to this issue.

ii. You object to Interrogatories 2-6 on the basis that these interrogatories "are more appropriately directed to Stephens Media." We note that the Strategic Alliance Agreement between Righthaven and Stephens Media, as produced in this action (SM000078-94) requires at section 9.7 that Stephens Media provide to Righthaven all content known or available to Stephens Media that may aid Righthaven in the conduct of an infringement action. By the terms of this Agreement, the information requested in Interrogatories 2-6 is "available to the party [Righthaven]" for purposes of Federal Rule of Civil Procedure 33(a), and should be produced. Unless you provide full responses within seven days, we are at impasse on this issue.

iii. We consider waived the additional objections asserted in Righthaven's Supplemental Response which did not appear in your original response (e.g. relevance objection in response to Interrogatories 10 and 11), as Righthaven did not provide these objections in a timely manner. In all events, they are without merit for the reasons set forth in the above paragraph (2.b.ii.) and because "[u]nder the Federal Rules, the scope of discovery is broad[,] and discovery should be allowed unless the information sought has no conceivable bearing on the case." *Jackson v. Montgomery Ward & Co.*, 173 F.R.D. 524, 528 (D. Nev. 1997). Moreover, Righthaven carries a "heavy burden" of showing why discovery should not be allowed. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). "The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *DIRECT TV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002) (citing *Blankenship*).

If the new objections are not withdrawn within seven days, we will be at impasse on this issue.

c. Requests for Production

i. Relevance: With respect to your objection as to relevance, we explained the relevance of the requests to which you objected. As you continue to object to the relevance of Requests 17-18, 25, 30, 33-46, 48-58, 60-62 we are at an impasse on this issue.

ii. With respect to Request 31, we previously noted that your response referred to documents attached to the complaint as responsive but did not indicate whether you were agreeing to produce additional documents. We asked that if you were, you should state so in your supplemental responses. You stated that you would address this request to the extent there are other responsive documents. Your supplemental response refers to documents attached to the complaint as well as materials produced by Stephens Media, but you fail to indicate whether Righthaven is agreeing to produce additional documents. Unless you advise, within seven days, that you will be producing the other requested documents, we understand you are refusing and are at impasse on this issue.

iii. We deem waived the additional objections asserted in Righthaven's Supplemental Response which did not appear in your original response (e.g. not reasonably calculated to lead to the discovery of admissible evidence objection in response to Requests 14, 22 and 47), as Righthaven did not provide these objections in a timely manner. In all events, they are without merit, as each of these requests seeks discrete categories of documents relevant to the subject matter of this suitIf the new objections are not withdrawn within seven days, we will be at impasse on this issue.

iv. Your objection to Requests 61 and 62 on the basis of privacy rights is inappropriate, as the protective order is specifically designed to protect the exchange of this information. If you do not inform us that you will produce the requested documents within seven days, we are at impasse on this issue.

v. With respect to your responses in which you only object, we understand you are standing on your objections and refusing to produce any documents: Requests 2, 17, 18, 19, 22, 23, 24, 47, 48, 49, 50, 51, 52, 53, 54, 60, 61, 62.

vi. With respect to your responses in which you have stated that you are in the process of reviewing potentially responsive material, we need a response as to whether documents will be produced within seven days.

We have yet to receive any documents or a privilege log from Righthaven. On our meet and confer call on February 10, and as confirmed by our follow-up letter to you that same day, you agreed to have us a privilege log and non-confidential documents by Feb. 25. You agreed to produce confidential documents 7-10 days after entry of the protective order, which was Feb. 24. Having received nothing from you by Feb. 25, I emailed you asking when we would be receiving documents and the privilege log. You replied that you would get back to me by March 2. On March 3, having again received neither documents nor a privilege log, I emailed you again regarding the documents and privilege log, and I asked you to provide a date certain as to when we would be receiving them. In our correspondence since then, you have continued to avoid providing a date certain as to when we will receive documents or the privilege log.

Documents were due to us on January 18. The privilege log was due on February 8, per the Court's order [Dkt 54]. As Magistrate Judge Foley has repeatedly held, given the lack of production of any privilege log, any privilege claims have been waived. *See Koninklijke Philips Elecs N.V. v. KXD Tech., Inc.*, 2007 U.S. Dist. LEXIS 17540 (D. Nev. March 12, 2007) (objections based on the attorney-client or work-product privilege are waived where party asserting privilege did not produce privilege logs); *Akers v. Keszei,* 2009 U.S. Dist. LEXIS 106247, (D. Nev. Oct. 27, 2009). We have time and time again extended you professional courtesy in awaiting the dates you have promised. We would prefer to avoid the time and costs associated with preparing a motion to compel; however, if you continue to fail to abide by the discovery rules, we will have no choice but to seek relief from the Court. The fact that there is a hold on depositions does not change this fact. When deposition discovery reopens, there will be approximately 6 weeks before expert reports are due, and we therefore need to complete the briefing and decision on the motion to compel now.

If you have any further materials you are agreeable to produce, we look forward to receiving them within seven days. If you think any particular subject above could potentially benefit from further oral discussion, please identify that subject and suggest a time workable to you within that time frame.

Regards,

FENWICK & WEST LLP

Jennifer J. Johnson