

1 LAURENCE F. PULGRAM (CA State Bar No. 115163) (*pro hac vice*)  
2 [lpulgram@fenwick.com](mailto:lpulgram@fenwick.com)  
3 CLIFFORD C. WEBB (CA State Bar No. 260885) (*pro hac vice*)  
4 [cwebb@fenwick.com](mailto:cwebb@fenwick.com)  
5 FENWICK & WEST LLP  
6 555 California Street, 12th Floor  
7 San Francisco, California 94104  
8 Telephone: (415) 875-2300  
9 Facsimile: (415) 281-1350

6 KURT OPSAHL (CA State Bar No. 191303) (*pro hac vice*)  
7 [kurt@eff.org](mailto:kurt@eff.org)  
8 CORYNNE MCSHERRY (CA State Bar No. 221504) (*pro hac vice*)  
9 [corynne@eff.org](mailto:corynne@eff.org)  
10 ELECTRONIC FRONTIER FOUNDATION  
11 454 Shotwell Street  
12 San Francisco, California 94110  
13 Telephone: (415) 436-9333  
14 Facsimile: (415) 436-9993

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

20 **UNITED STATES DISTRICT COURT**  
21 **FOR THE DISTRICT OF NEVADA**

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

20 v.

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

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

26 v.

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

Case No. 10-01356-RLH (GWF)

**DEFENDANTS’  
SUPPLEMENTAL  
MEMORANDUM  
ADDRESSING RECENTLY  
PRODUCED EVIDENCE  
RELATING TO PENDING  
MOTIONS**

## INTRODUCTION

1  
2 Defendant / Counterclaimant Democratic Underground LLC and Defendant David Allen  
3 (collectively “Democratic Underground” or “Defendants”), respectfully submit this Supplemental  
4 Memorandum to bring to the Court’s attention key evidence just produced in discovery that is  
5 highly relevant to the three currently pending motions. Specifically, on February 28, 2011,  
6 Cross-Defendant Stephens Media, LLC produced, belatedly, a copy of the Strategic Alliance  
7 Agreement between itself and Righthaven, LLC.<sup>1</sup> *See* Declaration of Laurence Pulgram  
8 (“Pulgram Decl.”), Exhibit A (hereafter, the “Agreement”). This Agreement, never before  
9 revealed to any Court in this District, on its face purports to be the master agreement that governs  
10 *all the assignments Righthaven has sued upon in this Court.*

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

19 Defendants request that the Court consider this Agreement as a further basis upon which  
20 to deny the two Motions to Dismiss filed by Righthaven and Stevens Media, and to grant  
21 Defendants’ Motion for Summary Judgment on the issue of fair use. Given that this material was  
22 only recently and belatedly produced, Defendants could not have addressed it in any of the prior  
23 briefing. *See, e.g., United States v. Maris*, 2011 WL 468554, at \*5 n.5 (D. Nev. Feb. 4, 2011)  
24 (granting leave to file supplemental materials even after the hearing on a motion for summary  
25 judgment); *Mitchel v. Holder*, 2010 WL 816761, at \*1 n.1 (N.D. Cal. Mar. 9, 2010) (granting

26  
27 <sup>1</sup> Stephens Media’s responses to Defendants’ First Requests For Production of Documents were due on January 18,  
28 2011, ten days before Defendants’ Reply in Support of their Cross-Motion. By failing to produce this evidence until  
February 28, Stephens Media precluded its earlier submission. For its part, Righthaven has still not produced this, or  
any other, document.

1 leave to file supplemental brief in support of motion for summary judgment addressing newly  
2 discovered evidence); *Lumsden v. United States*, 2010 WL 2232946, at \*1 (E.D. N.C. June 3,  
3 2010) (granting leave to submit additional newly discovered evidence in support of motion for  
4 summary judgment).

5 In particular, Defendants submit that the Agreement demonstrates a compelling need for  
6 the Court to adjudicate the issues raised by the Counterclaim as to the sham and unenforceable  
7 nature of the assignments to Righthaven, as that issue may affect and dispose of hundreds of cases  
8 now improperly pending in this District.

### 9 THE STRATEGIC ALLIANCE AGREEMENT

10 In Support of its Motion to Dismiss, Stephens Media presented the Court with a purported  
11 “Copyright Assignment,” in the same form Righthaven has repeatedly presented in this District as  
12 purportedly creating its right to sue. *See* Stephens Media’s Motion to Dismiss or Strike (“Dkt.  
13 38”), Exh. 1. Stephens Media relied on this Copyright Assignment as the sole evidence from  
14 which it claimed that: (1) “Righthaven, not Stephens Media, holds the exclusive right to seek  
15 legal redress” for infringement (Dkt. 38. at 6); (2) “Stephens Media **would be legally barred**  
16 **from [suing]**” Democratic Underground, even if it wanted to (*id* at 7); and (3) there was  
17 “absolutely no evidence” to support Defendant’s assertion that the assignment was a sham or that  
18 Righthaven is acting as Stephens Media’s agent. *Id.*

19 In response, Defendants pointed out that the “Copyright Assignment” did not identify any  
20 actual rights under the Copyright Act assigned to Righthaven. *See* Defendants’ Memorandum in  
21 Opposition to Stephens Media LLC’s Motion to Dismiss and Joinder (“Dkt. 46”) at 6. Rather  
22 the Assignment circularly defined the rights assigned to include “all copyrights requisite to have  
23 Righthaven recognized as the copyright owner of the Work for purpose of Righthaven being able  
24 to claim ownership.” Dkt. 38, Exh. 1. Defendants also noted that, by its terms, the “Copyright  
25 Assignment” provided that it was subject to an undefined “right of reversion” to Stephens Media  
26 and also referred to unidentified “monetary commitments and commitment to services provided”  
27 which had not been disclosed to the Court. *See* Dkt. 46 at 5-6. Defendants advised the Court that  
28

1 “when produced in discovery, [additional documents would] reveal the actual flow of obligations,  
2 control, and funding between Righthaven and Stephens Media.” *Id.*

3 The Strategic Alliance Agreement, dated January 18, 2010, now supplies much of the  
4 missing information. This Agreement provides for a 50/50 split of lawsuit recoveries between  
5 Stephens Media and Righthaven (less “Costs”). *See* Agreement, Section 5.<sup>2</sup> The Agreement  
6 further reveals a naked assignment to Righthaven of rights to sue for infringement, without  
7 conveying any exclusive rights under Section 106 of the Copyright Act to exploit Stephens  
8 Media’s work. Section 7.2 expressly *denies* Righthaven any rights other than to pursue  
9 infringement actions:

10 7.2 Despite any such Copyright Assignment, Stephens Media  
11 shall retain (and is hereby granted by Righthaven) an exclusive  
12 license to Exploit the Stephens Media Assigned Copyrights for any  
13 lawful purpose whatsoever and **Righthaven shall have no right or  
14 license to Exploit or participate in the receipt of royalties from  
15 the Exploitation of the Stephens Media Assigned Copyrights  
16 other than the right to proceeds in association with a Recovery.**  
17 To the extent that *Righthaven's* maintenance of rights to pursue  
18 infringers of the Stephens Media Assigned Copyrights in any  
19 manner would be deemed to diminish Stephens Media's right to  
20 Exploit the Stephens Media Assigned Copyrights, *Righthaven*  
21 hereby grants an exclusive license to Stephens Media to the greatest  
22 extent permitted by law so that Stephens Media shall have  
23 unfettered and exclusive ability to Exploit the Stephens Media  
24 Assigned Copyrights.

25 Section 7.2. (bold emphasis added); *see also* Schedule 1 – Definitions (defining “Exploit”). Thus,  
26 although the “Copyright Assignment” characterized itself as a transfer of “all copyrights *requisite*  
27 to have Righthaven recognized as the copyright owner of the Work for purposes of Righthaven  
28 being able to claim ownership as well as the right to seek redress for past, present and further  
infringements of the copyright,” (Dkt. 38, Exh. 1 (emphasis added)), the Strategic Alliance  
Agreement’s specific terms provide that “Righthaven shall have no right or license to Exploit ...  
the Stephens Media Assigned Copyrights ” other than to share the proceeds of a Recovery in  
litigation.<sup>3</sup> Section 7.2. Indeed, the Agreement specifically says that Stephens Media “shall

<sup>2</sup> All citations to “Sections” will refer to the Agreement, Pulgram Declaration Exhibit A.

<sup>3</sup> “Recovery” is defined as “any and all Sums received, transferred to, assigned, conveyed, paid or otherwise obtained by Stephens Media and/or Righthaven relating to, arising or resulting from (whether directly or indirectly) a  
DEFENDANTS.’ SUPPL. MEMO ADDRESSING RECENTLY  
PRODUCED EVIDENCE RELATING TO PENDING  
MOTIONS

1 *retain*” these rights, showing that no rights were transferred in the first place. *Id.* (emphasis  
2 added).

3 In operation, the Agreement also makes clear Righthaven’s role as Stephens Media’s  
4 agent. Stephens Media may assign copyrights of its choice to Righthaven to search for  
5 infringement. Sections 3.1; 3.2. Once a copyright is purportedly “assigned” to Righthaven,  
6 Stephens Media “engages” Righthaven on an exclusive basis to perform searching for copyright  
7 infringement and pursuit of infringement actions. Section 3.1 - 3.3. Should Righthaven  
8 ultimately choose not to serve as agent to commence an infringement action on a particular  
9 assignment, “then Righthaven shall reassign the Assigned Copyright to Stephens Media.”  
10 Section 3.3. Should Righthaven desire to sue, however, Stephens Media still controls whether  
11 suit will be brought through its right to send a “Declination Notice,” upon receipt of which  
12 “Righthaven shall not take any Infringement Action with respect to the particular putative  
13 infringer set forth in any Declination Notice.” Section 3.3. The bases upon which Stephens  
14 Media may stop a suit – even after it has “assigned” the purported right to sue – include whenever  
15 the person targeted “is a present or likely future valued business relationship of Stephens Media  
16 or otherwise would . . . result in an adverse result to Stephens Media.” *Id.*

17 Even after suit is brought, Stephens Media retains an absolute right of reversion, subject  
18 only to later reimbursement of Righthaven’s investment in the litigation. Section 8, entitled  
19 “**Stephens Media’s Right of Reversion**” states: “Stephens Media shall have the right at any time  
20 to terminate, in good faith, any Copyright Assignment (the ‘Assignment Termination’) and enjoy  
21 a right to complete reversion to the ownership of any copyright that is the subject of a Copyright  
22 Assignment . . . .” Section 8.

23 The right of reversion specifically contemplates that Stephens Media may, in such  
24 instances, continue to prosecute any litigation itself, providing that Stephens Media must, after  
25 such reversion, pay Righthaven’s costs associated with the “early termination” of the assignment  
26 “[w]ithin ten (10) days of receipt of any Recovery by Stephens Media” for the alleged

27 \_\_\_\_\_  
28 Disposition, including, without limitation, all Sums paid by way of damages, costs and attorneys fees with respect to  
or arising from an Infringement Action.” *See* Schedule 1 – Definitions.

1 infringement. Section 8.

2 Moreover, the Strategic Alliance Agreement also suggests that Stephens Media continues  
3 to exert direct control over Righthaven’s internal operations. The Agreement recites that it is part  
4 of an “integrated transaction” that requires that Righthaven proceed under a separate Operating  
5 Agreement that has been requested by Defendants, though not yet produced. Section 2; Pulgram  
6 Decl., ¶ 10. The Strategic Alliance Agreement recites that, under the Operating Agreement, one  
7 of the owners of Righthaven must be a “Stephens Media Affiliate” called SI Content Monitor,  
8 LLC, which “is presently and shall throughout the Term be Controlled by common owners [with  
9 Stephens Media] with no material variation in said ownership.” Section 2(a). This further  
10 suggests that Stephens Media, through the Operating Agreement can also exert direct control over  
11 Righthaven – though the precise facts await further document production.

## 12 DISCUSSION

### 13 **I. THE AGREEMENT SUBSTANTIATES DEMOCRATIC UNDERGROUND’S** 14 **STANDING TO SUE STEPHENS MEDIA AS REAL PARTY IN INTEREST.**

15 Stephens Media has argued that it is an improper party because, “[c]omplete ownership of  
16 the work being sued upon has been transferred to Righthaven without any ambiguity” and  
17 because “Righthaven, not Stephens Media, is . . . the only party vested with the right to sue . . . .”  
18 Stephens Media’s Reply in Support of Motion to Dismiss or Strike (“Dkt. 56”) at 4, 10. The  
19 Strategic Alliance Agreement eviscerates this argument and exposes the plain falsity of these  
20 assertions. The Agreement shows not only (1) that Stephens Media controlled the choice to  
21 “assign” rights in this particular News Article (Section 3.1), and then (2) controlled whether the  
22 News Article would actually be sued upon (Section 3.3), but also, (3) that Stephens Media, to this  
23 day, has an absolute right to reversion, under which it may continue the lawsuit as it wishes in its  
24 own name (Section 8). Indeed, Stephens Media even retains the ability to encumber the asset it  
25 has purportedly assigned with a “security interest, pledge, hypothecation, lien or other  
26 encumbrance” – behavior consistent only with ownership. *See* Section 9.3 and Schedule 1 -  
27 Definitions.

28 Likewise, the Agreement destroys Stephens Media’s assertion that there is nothing but

1 “fantasy” behind Defendants assertion that Righthaven acts as Stephens Media’s agent. Dkt. 56  
2 at 8. The Agreement describes Stephens Media’s “engagement” of Righthaven to bring suit;  
3 gives Stephens Media the ability to decide, even after “assignment,” whether to sue; gives  
4 Stephens Media the proceeds after Righthaven receives a 50% commission;<sup>4</sup> and allows Stephens  
5 Media to terminate the agency at any time by exercising its reversion rights. Sections 3.3, 7, 8.  
6 And the Agreement also describes an Operating Agreement that *requires* a Stephens Media  
7 Affiliate with common ownership to participate in operating Righthaven. Section 2.

8 In short, the Agreement adds substantial additional evidence to the already extensive  
9 factual allegations showing a live case and controversy against Stephens Media.

10 **II. THE AGREEMENT SUBSTANTIATES THE NEED TO RESOLVE THE**  
11 **COUNTERCLAIM’S ALLEGATIONS THAT THE ASSIGNMENT IS INVALID,**  
12 **SHAM, AND UNENFORCEABLE.**

13 The Agreement also further undermines the arguments of both Stephens Media and  
14 Righthaven that this Court need not decide the Counterclaim’s request for declaration of the  
15 invalidity and unenforceability of the assignment. As Defendants have already argued, it is  
16 *precisely* this sort of counterclaim, seeking resolution of the *validity* of the right assertedly  
17 infringed, that the Supreme Court has held must survive a dismissal with prejudice of a claim for  
18 infringement. Dkt. 46 at 13-14 (citing *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83  
19 (1993)). This newly-produced evidence underscores the importance of addressing that question  
20 now.

21 On the question of validity, the Counterdefendants have argued that other rulings on  
22 motions to dismiss Righthaven’s prior lawsuits supposedly “upheld the validity” of the form  
23 “Copyright Assignment.” *See, e.g.*, Dkt. 56 at 4-5; and Righthaven’s Motion for Voluntary  
24 Dismissal (“Dkt. 36”) at 20-21. But for each of those rulings (which came on motions to dismiss)  
25 Righthaven had withheld from the Court the Strategic Alliance Agreement and its definition of  
26 rights actually conveyed – thereby concealing that “Righthaven shall have no right or license to

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27 <sup>4</sup> Defendants also note that the litigation proceeds due Stephens Media pursuant to this Agreement provide the  
28 company with a direct, pecuniary interest in the outcome of this case, and therefore Stephens Media should have  
been listed in Righthaven’s Certificate of Interested Parties. Dkt. 5.

1 Exploit . . . the Stephens Media Assigned Copyrights” other than to share with Stephens Media  
2 the “Recovery” from litigation.<sup>5</sup> Sections 5 and 7.2. As a result, this is the first case in which any  
3 Court will have the information necessary to assess the validity of the assignment.

4 Rather than dismiss the Counterclaim as “unnecessary,” this Court will need to determine  
5 whether the rights assigned under the Agreement comport with the settled requirement that “only  
6 owners of an exclusive right in a copyright may sue” for infringement. *Silvers v. Sony Pictures*  
7 *Entm’t, Inc.*, 402 F.3d 881, 884 (9th Cir. 2005). In *Silvers*, the *en banc* Ninth Circuit held that an  
8 assigned “right to sue for an accrued claim for infringement is not [one of the] exclusive  
9 right[s]” in copyright that can provide standing to sue. Such exclusive rights are limited to those  
10 specified in Section 106 of the Copyright Act, such as the right to copy, distribute, perform, etc.  
11 *See id.* at 884. Thus, in *Silvers*, the author of a work made for hire, who subsequently had been  
12 granted by her employer (the copyright holder) “all right, title and interest in and to any claims  
13 and causes of action against [specified infringers],” had no legal or beneficial interest in the  
14 underlying copyright itself, and thus could not initiate suit, because none of the individual  
15 exclusive rights under § 106 had been granted to her. *See id.* at 883. In support of its  
16 Counterclaim, Democratic Underground asserts that the same rule applies here. The Agreement  
17 expressly *denies* Righthaven *any* rights other than the right to sue on the copyright, with all rights  
18 to exploit the copyright being retained by Stephens Media. *See* Section 7.2. Thus, Righthaven’s  
19 claim has been baseless and Stephens Media has been the real party in interest from the outset.

20 The fact that the Agreement applies to *all* Righthaven assignments from Stephens Media,  
21 not merely to this News Article, makes the Counterclaim all the more important. Now that the  
22 Agreement’s terms are finally before the Court, this Court’s determination of the validity of  
23 Righthaven’s assignment may effectively dispose of hundreds of Righthaven cases.

24  
25 <sup>5</sup> For example, in *Righthaven LLC v. Dr. Shezad Malik Law Firm P.C.*, (D. Nev.) 2:10-cv-0636-RLH-RJJ (cited in  
26 RH’s motion (Dkt. 36) at 21), Righthaven incorrectly stated that “[i]n the present action, there is no division of  
27 copyright ownership as was the case in *Silvers*; Righthaven is the owner of both the exclusive rights in and to the  
28 Work and the owner of all accrued causes of action.” 2:10-cv-0636, Dkt. 11 at 13: 2-3 and Dkt. 13 at 12:24-26.  
This is incorrect because Righthaven owns none of the exclusive rights specified in Section 106, all of which were  
“retained” by Stephens Media.

1 **III. THE AGREEMENT SUBSTANTIATES THE OBJECTIVE**  
2 **UNREASONABLENESS OF PLAINTIFF'S CLAIMS AND THE PROPRIETY OF**  
3 **AN ATTORNEYS' FEE AWARD.**

4 Righthaven argued in its Motion that it should be allowed to voluntarily dismiss without  
5 paying attorneys' fees because the "objective reasonableness" of its claims had purportedly been  
6 validated by the courts' refusal to dismiss its prior claims for lack of standing. Dkt. 36. at 20-22.  
7 As just explained, however, those prior rulings resulted from Righthaven's withholding of the  
8 Agreement from the Court. With the Agreement now on record, it appears indisputable that  
9 Righthaven's assignment of the cause of action is invalid under *Silvers*, rendering Righthaven's  
claim objectively unreasonable.

10 **IV. THE AGREEMENT SUBSTANTIATES THE FACT THAT RIGHTHAVEN**  
11 **FACES NO POSSIBLE MARKET HARM THROUGH DEFENDANTS' USE**

12 Finally, the Agreement further substantiates the impossibility of harm to Righthaven's  
13 market for the work, as relevant to the fourth factor of the fair use analysis. Under the  
14 Agreement, Righthaven is expressly prohibited from *any rights* to exploit the work – other than  
15 the supposed right to sue for copyright infringement. Section 7.2. Thus, no use of the work  
16 could have any possible impact on Righthaven (even if the use "should become widespread," *cf.*  
17 *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)), because Righthaven  
18 has no rights in the work – other than the illusory "right" to litigate the work for a share of the  
19 recovery. *See generally* Defendants' Reply Memorandum in Support of Cross Motion for  
20 Summary Judgment ("Dkt. 62") at 13-14 (discussing lack of market harm).

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**CONCLUSION**

For these reasons, Defendants respectfully request that the Court consider the Strategic Alliance Agreement in its adjudication of the three motions now pending before it.

Dated: March 4, 2011

FENWICK & WEST LLP

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

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