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18 DEMOCRATIC UNDERGROUND, LLC, and
19 Defendant DAVID ALLEN

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

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

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

Case No. 10-01356-RLH (GWF)

**MOTION FOR LEAVE TO
FILE DEFENDANTS'
SUPPLEMENTAL
MEMORANDUM
ADDRESSING RECENTLY
PRODUCED EVIDENCE
RELATING TO PENDING
MOTIONS AND THE
SUPPORTING
DECLARATION OF
LAURENCE PULGRAM**

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MOTION FOR LEAVE

Defendant and Counterclaimant Democratic Underground, LLC and Defendant David Allen (collectively, “Democratic Underground” or “Defendants”) hereby respectfully request that the Court permit Defendants to file a Supplemental Memorandum Addressing Recently Produced Evidence Relating to Pending Motions (“Supplemental Memorandum”) and the Supporting Declaration of Laurence Pulgram (“Pulgram Decl.”), attached hereto as Exhibits 1 and 2 respectively. As fully explained by Defendants’ Supplemental Memorandum, this briefing is necessary to address belatedly produced information highly relevant to the three currently pending motions. *See* Dkt. 36 (Righthaven’s Motion to Dismiss); Dkt. 38-39 (Stephens Media’s Motion to Dismiss and Joinder); and Dkt. 45 (Democratic Underground’s Cross Motion for Summary Judgment).

Specifically, on February 28, 2011, Cross-Defendant Stephens Media, LLC (“Stephens Media”) produced a copy of [REDACTED]. *See* Declaration of Laurence Pulgram (“Pulgram Decl.”), Exhibit A [REDACTED] never before revealed to any Court in this District, on its face purports to [REDACTED]. *Id.* While Righthaven has previously represented to the Court [REDACTED] it (and Stephens Media) has heretofore failed to provide [REDACTED].

[REDACTED] provide substantial evidence relevant to the pending motions, including that: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1 [REDACTED]
2 [REDACTED]
3 Defendants request that the Court consider the Supplemental Memorandum and the
4 supporting Declaration of Laurence Pulgram as they address this new evidence and provide a
5 further basis upon which to deny the two Motions to Dismiss and to grant summary judgment on
6 the issue of fair use. Given that this material was only recently and belatedly produced,
7 Defendants could not have addressed it in any of the prior briefing. *See, e.g., United States v.*
8 *Maris*, 2011 WL 468554, at *5 n.5 (D. Nev. Feb. 4, 2011) (granting leave to file supplemental
9 materials even after the hearing on a motion for summary judgment); *Mitchel v. Holder*, 2010 WL
10 816761, at *1 n.1 (N.D. Cal. Mar. 9, 2010) (granting leave to file supplemental brief in support of
11 motion for summary judgment addressing newly discovered evidence); *Lumsden v. United States*,
12 2010 WL 2232946, at *1 (E.D. N.C. June 3, 2010) (granting leave to submit additional newly
13 discovered evidence in support of motion for summary judgment).

14
15 Dated: March 4, 2011

Respectfully submitted,

FENWICK & WEST LLP

17
18 By: /s/ Laurence F. Pulgram
19 LAURENCE F. PULGRAM, ESQ

20 Attorneys for Defendant and Counterclaimant
21 DEMOCRATIC UNDERGROUND, LLC, and
22 Defendant DAVID ALLEN
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EXHIBIT 1

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22 Columbia limited-liability company; and DAVID ALLEN,
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**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 [REDACTED]
7 [REDACTED] ¹ See Declaration of Laurence Pulgram
8 (“Pulgram Decl.”), Exhibit A [REDACTED], never before
9 revealed to any Court in this District, on its face purports to [REDACTED]

10 [REDACTED].
11 [REDACTED] provide substantial evidence that: [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED].

19 Defendants request that the Court consider [REDACTED] 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 ¹ 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 [REDACTED] demonstrates a compelling need for
6 the Court to adjudicate the issues raised by the Counterclaim as to [REDACTED]
7 [REDACTED], as that issue may affect and dispose of hundreds of cases
8 now improperly pending in this District.

9
10 [REDACTED]
11 In Support of its Motion to Dismiss, Stephens Media presented the Court with a purported
12 “Copyright Assignment,” in the same form Righthaven has repeatedly presented in this District as
13 purportedly creating its right to sue. *See* Stephens Media’s Motion to Dismiss or Strike (“Dkt.
14 38”), Exh. 1. Stephens Media relied on this Copyright Assignment as the sole evidence from
15 which it claimed that: (1) “Righthaven, not Stephens Media, holds the exclusive right to seek
16 legal redress” for infringement (Dkt. 38. at 6); (2) “Stephens Media *would be legally barred*
17 *from [suing]*” Democratic Underground, even if it wanted to (*id* at 7); and (3) there was
18 “absolutely no evidence” to support Defendant’s assertion that the assignment was a sham or that
19 Righthaven is acting as Stephens Media’s agent. *Id.*

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

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 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 [REDACTED] Thus,
19 although the “Copyright Assignment” characterized itself as a transfer of “all copyrights *requisite*
20 to have Righthaven recognized as the copyright owner of the Work for purposes of Righthaven
21 being able to claim ownership as well as the right to seek redress for past, present and further
22 infringements of the copyright,” (Dkt. 38, Exh. 1 (emphasis added)), [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

27 ² [REDACTED]

28 ³ [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
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[REDACTED]

Moreover, [REDACTED] also suggests [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] that has been requested by Defendants, though not yet produced. [REDACTED] Pulgram Decl., ¶ 10. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] – though the precise facts await further document production.

DISCUSSION

I. [REDACTED] SUBSTANTIATES DEMOCRATIC UNDERGROUND’S STANDING TO SUE STEPHENS MEDIA AS REAL PARTY IN INTEREST.

Stephens Media has argued that it is an improper party because, “[c]omplete ownership of the work being sued upon has been transferred to Righthaven without any ambiguity” and because “Righthaven, not Stephens Media, is . . . the only party vested with the right to sue” Stephens Media’s Reply in Support of Motion to Dismiss or Strike (“Dkt. 56”) at 4, 10. [REDACTED] [REDACTED] eviscerates this argument and exposes the plain falsity of these assertions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

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

10 **II. [REDACTED] SUBSTANTIATES THE NEED TO RESOLVE THE**
 11 **COUNTERCLAIM'S ALLEGATIONS THAT THE ASSIGNMENT IS INVALID,**
 12 **SHAM, AND UNENFORCEABLE.**

13 [REDACTED] 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 [REDACTED]

26 [REDACTED]

27 ⁴ Defendants also note that [REDACTED]
 28 [REDACTED] Stephens Media should have
 been listed in Righthaven's Certificate of Interested Parties. Dkt. 5.

1 [REDACTED]

2 [REDACTED] As a result, this is the first case in which any
3 Court will have [REDACTED]

4 Rather than dismiss the Counterclaim as “unnecessary,” this Court will need to determine
5 whether [REDACTED] 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. [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 [REDACTED], makes the Counterclaim all the more important. [REDACTED]

22 [REDACTED]

23 [REDACTED] may effectively dispose of hundreds of Righthaven cases.

24
25 ⁵ 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 [REDACTED]

1 **III. [REDACTED] 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 [REDACTED]
8 [REDACTED] from the Court. With [REDACTED] now on record, [REDACTED]
9 [REDACTED], rendering Righthaven's
10 claim objectively unreasonable.

11 **IV. [REDACTED]**

12 Finally, [REDACTED] 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 [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 [REDACTED]. *See generally* Defendants' Reply Memorandum in Support of Cross Motion for
19 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 [REDACTED]
[REDACTED] 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

EXHIBIT 2

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Case No. 10-01356-RLH (GWF)

**DECLARATION OF
LAURENCE F. PULGRAM
IN SUPPORT OF
DEFENDANTS'
SUPPLEMENTAL
MEMORANDUM
ADDRESSING RECENTLY
PRODUCED EVIDENCE
RELATING TO PENDING
MOTIONS**

1 I, Laurence F. Pulgram, declare as follows:

2 1. I am an attorney licensed to practice law in the state of California and a partner at
3 Fenwick & West, LLP. I serve as one of the counsel for Defendant / Cross-Complainant
4 Democratic Underground, LLC and Defendant David Allen (hereinafter “Defendants”) in this
5 matter.

6 2. I have personal knowledge of the facts stated in this declaration, and if called upon
7 to do so, could and would competently testify thereto. I make this declaration in support of
8 Defendants’ Supplemental Memorandum Addressing Recently Produced Evidence Relating to
9 Pending Motions.

10 3. On December 17, 2010, Defendants served a first set of Requests for Production of
11 Documents on Plaintiff / Counterdefendant Righthaven, LLC and Counterdefendant Stephens
12 Media, LLC. Responses by both parties were due on January 18, 2011. The due date was ten
13 days before Defendants’ due date for their Reply in Support of the Motion for Summary
14 Judgment was to be filed.

15 4. Amongst the Requests for Production made to Stephens Media were the following:

- 16 ▪ (No. 3) “ALL DOCUMENTS concerning any assignment of rights in the News
17 Article to Righthaven”;
- 18 ▪ (No. 8) “ALL DOCUMENTS that refer or relate to any ‘monetary
19 commitments’ referenced in the JULY 19, 2010 ASSIGNMENT”;
- 20 ▪ (No. 10) “ALL DOCUMENTS that refer or relate to any ‘right of reversion’
21 referenced in the JULY 19, 2010 ASSIGNMENT”;
- 22 ▪ (No. 11) “ALL DOCUMENTS that refer or relate to any ‘good and valuable
23 consideration’ referenced in the JULY 19, 2010 ASSIGNMENT”;
- 24 ▪ (No. 56) “ALL contracts, agreements, investment DOCUMENTS, or other
25 terms between YOU and Righthaven.”

26 5. On January 18, 2011, Stephens Media responded with objections to the Requests
27 for Production. Stephens Media produced no responsive documents.

28

1 6. Amongst the Requests for Production made to Righthaven were the following:
2 ▪ (No. 3) “ALL DOCUMENTS concerning any potential or actual assignment of
3 rights in the NEWS ARTICLE to Righthaven”;
4 ▪ (No. 8) “ALL DOCUMENTS that refer or RELATE TO any ‘monetary
5 commitments’ referenced in the JULY 19, 2010 ASSIGNMENT”;
6 ▪ (No. 10) “ALL DOCUMENTS that refer or RELATE TO any ‘right of
7 reversion’ referenced in the JULY 19, 2010 ASSIGNMENT”;
8 ▪ (No. 11) “ALL DOCUMENTS that refer or RELATE TO any ‘good and
9 valuable consideration’ referenced in the JULY 19, 2010 ASSIGNMENT”;
10 ▪ (No. 45) “ALL contracts, agreements, investment DOCUMENTS, or other
11 terms between YOU and Stephens Media.

12 7. Righthaven, for its part, failed to respond or object to any of the Requests for
13 Production by the due date of January 18, 2011. When Righthaven did ultimately respond to the
14 Requests for Production, on January 24, 2011, it produced no responsive documents and has, to
15 this date, still produced no documents.

16 8. On February 28, 2011, after an extended meet and confer process, Stephens
17 Media made its first production of documents, totaling 94 pages, including a document Bates
18 numbered SM000078 – SM000094, a true and correct copy of which is attached hereto as Exhibit
19 A.

20 9. Defendants are submitting this document to the Court immediately to ensure that
21 the Court has access to it while considering the pending motions.

22 10. Although counsel for Defendants have requested to receive the additional
23 document referred to in Paragraph 2 of Exhibit A, it has not yet been provided by either
24 Righthaven or Stephens Media.

25 11. Stephens Media produced Exhibit A designated “Confidential Attorneys Eyes
26 Only” under the Stipulated Protective Order in this action. Dkt. 65. Defendants do not believe
27 that a filing of Exhibit A, or at least the entirety of Exhibit A, is appropriately withheld from
28 public view under the Stipulated Protective Order or governing law. Accordingly, pursuant to

1 Paragraph 19 of the Stipulated Protective Order, we have requested, in writing, that Stephens
2 Media and Righthaven agree within five days that Exhibit A may be filed not under seal, in whole
3 or in part. In the event that we are able to reach agreement with Stephens Media and Righthaven,
4 it is our intention to file a stipulation as to which portions of Exhibit A, if any, are to remain
5 under seal.

6 12. I declare under penalty of perjury under the laws of the United States that the
7 foregoing is true and correct. Executed on March 4, 2011, in San Francisco, California.

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/s/ Laurence F. Pulgram
Laurence F. Pulgram
Fenwick & West, LLP

EXHIBIT A
Filed Under Seal

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23 an individual,
24 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)

**[PROPOSED] ORDER
GRANTING DEFENDANTS'
MOTION FOR LEAVE TO
FILE SUPPLEMENTAL
MEMORANDUM
ADDRESSING RECENTLY
PRODUCED EVIDENCE
RELATING TO PENDING
MOTIONS AND THE
SUPPORTING
DECLARATION OF
LAURENCE PULGRAM**

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Having now considered Defendants' Motion For Leave to File Supplemental Memorandum Addressing Recently Produced Evidence Relating To Pending Motions and the supporting Declaration of Laurence Pulgram, and good cause appearing therefore,

IT IS HEREBY ORDERED:

That the Motion for Leave is GRANTED.

Dated: _____

The Honorable Roger L. Hunt
United States District Judge