

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1 LAURENCE F. PULGRAM (CA State Bar No. 115163) (*pro hac vice*)
lpulgram@fenwick.com
2 CLIFFORD C. WEBB (CA State Bar No. 260885) (*pro hac vice*)
cwebb@fenwick.com
3 JENNIFER J. JOHNSON (CA State Bar No. 252897) (*pro hac vice*)
jjjohnson@fenwick.com
4 FENWICK & WEST LLP
5 555 California Street, 12th Floor
San Francisco, California 94104
6 Telephone: (415) 875-2300
Facsimile: (415) 281-1350

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

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

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

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

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

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

**DEFENDANT DEMOCRATIC
UNDERGROUND'S RESPONSE
TO RIGHTHAVEN'S
APPLICATION FOR EXTENSION
OF TIME TO COMPLY WITH
JULY 14, 2011 ORDER AND FOR
CLARIFICATION OF SAME
[DKT 143]**

DU'S RESPONSE TO RIGHTHAVEN'S
APPLICATION FOR EXTENSION OF TIME
TO COMPLY

CASE NO. 2:10-cv-01356-RLH (GWF)

1 Defendant Democratic Underground hereby submits this Response to Righthaven's
 2 Application for Extension of Time to Comply with July 13, 2011 Order and For Clarification of
 3 Same ("Righthaven's Application") [Dkt. 143] to provide a complete record for the Court and to
 4 clarify certain misleading statements contained in Righthaven's Application. Democratic
 5 Underground submits the following reasons as to why Righthaven's Application should be denied
 6 and it should be held to compliance with the Court's orders:

7 (1) Righthaven attempts to justify delay in compliance with the Court's order based on
 8 delayed receipt of a copy of the transcript embodying the Courts sanctions order of July 14, 2011
 9 (the "Sanctions Transcript"). Righthaven represents that:

10 "While there was a transcript of the July 14th proceedings docketed in the matter,
 11 counsel could not access the transcript without ordering a copy. Righthaven, at
 12 counsel's instruction, ordered the transcript. A PDF copy of the transcript was
 received on July 26th, only a few days from the compliance date."

13 Righthaven's Application at 3. In fact, however, a copy of that transcript was issued by the court
 14 reporter to the parties, and received by Democratic Underground on July 15. Declaration of Kim
 15 McIntyre ¶ 3. On that date, the court reporter transmitted a copy and stated that Democratic
 16 Underground had to pay no expedite charge, despite its availability the day after the hearing,
 17 because the transcript had been originally ordered on an expedited basis (and presumably
 18 received) by Righthaven. *Id.* at ¶¶ 2-3.

19 (2) Righthaven's assertion that it could not serve a copy of the Sanctions Transcript
 20 because it did not receive it until July 26 is also demonstrably false for another reason. In the
 21 case of *Righthaven v. Pahrump, LLC*, Case No. 2:10-cv-01575-JCM (D. Nev), Democratic
 22 Underground, which appeared as *amicus curiae*, filed a copy of the Court's Sanctions Transcript
 23 with the Court (Judge Mahan) on July 20, 2011 as an exhibit to the declaration of Clifford Webb.
 24 *See Pahrump* Dkt. No. 58-2. ***That copy of the transcript was filed and electronically served on***
 25 ***Righthaven on July 20, 2011***, 6 days before Righthaven now claims to have first received a copy.

26 (3) Additionally, J. Malcom DeVoy, counsel for Wayne Hoehn in *Righthaven LLC v.*
 27 *Hoehn*, Case No. 2:11-cv-00050-PMP (D. Nev.), emailed a copy of the transcript to counsel for
 28 Righthaven on July 21, 2011 in connection with correspondence regarding Righthaven's need to

1 disclose the OSC hearing transcript in *Hoehn*. Declaration of J. Malcom DeVoy (“DeVoy
2 Decl.”), Exh. 1. Thus, Righthaven had received *multiple copies* of the transcript prior to July 26,
3 2011, the date it states it first received the transcript in its Application.

4 (4) Righthaven claims that “an issue has arisen as to whether cases that have been
5 closed through entry of judgment in the district court, but are on appeal to the Ninth Circuit,
6 constitute ‘pending actions’” in which the Sanctions Order must be filed. Righthaven’s claim of
7 confusion over this issue is mystifying. At page 19 of the Sanctions Transcript the Court directed
8 that its order to file copies “will not apply to those cases that have been dismissed *unless there’s*
9 *going to be an appeal in those cases.*” (emphasis added). Obviously, where appeals were taken,
10 the order was required to be filed.

11 (5) Further, Righthaven has attempted to skirt its obligation to inform other courts of
12 this Court’s order by taking the position that a case that has been dismissed and in which a
13 request for attorneys fees award is pending is not a “pending matter.” In *Righthaven v. Hoehn*,
14 despite requests from Hoehn’s counsel that Righthaven file the transcript with the Court as
15 relevant to Hoehn’s pending motion for attorneys fees, Righthaven claimed that a matter in which
16 this motion was pending was not a “pending matter” and refused to file the Sanctions
17 Transcript—necessitating the additional time and expense for Hoehn’s counsel to file the
18 Sanctions Order. DeVoy Decl., ¶¶ 3-13, Exh. 1.

19 (6) Although Righthaven claims that it was “virtually impossible” to procure a bond
20 for the \$5,000 sum this Court ordered paid, it provides no evidence to support this claim, and no
21 description of its efforts, if any, to obtain a bond. In all events, where the sanction was payable to
22 the Court, rather than to another party, Righthaven is not at risk that any payment that it makes
23 now would be unrecoverable. If Righthaven does appeal this order and obtain a reversal—an
24 event hard to imagine—it can simply obtain a refund from the Court upon reversal. By contrast,
25 if it does not pay the award now, there is no assurance that Righthaven will survive as a going
26 concern, or be further funded by its owners in a sufficient amount to ensure funding of the
27 sanctions award later. By not paying now, Righthaven and its owners avoid having to maintain or
28 contribute sufficient funds to ensure that payment will ever occur.

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1 (7) As a further excuse for its non-compliance with the Sanctions Order, Righthaven
2 claims to be “investigating” how to provide non-served parties with the materials required by the
3 Court’s order, asking for “clarification” of whether ECF filing would be sufficient. The Court’s
4 Sanction’s Transcript stated that “every case Righthaven has . . . must be provided with” the
5 materials and that “if I do issue a written opinion, counsel, I’m also going to direct that it be
6 provided, filed in every other case that Righthaven has.” Sanctions Transcript at 17-18; *see also*
7 *id.* at 22 (transcript is “to be provided to other courts”). This makes it unambiguous that the
8 materials must be filed in every case, whether or not a party had been served. If a party is later
9 served, the materials would, of course, already be in the record.¹

10 (8) Finally, Righthaven’s Application, dated July 28, 2011, was not filed until late on
11 Friday afternoon July 29, 2011, a day late and \$5,000 short of complying with the Court’s Order.
12 [Dkt. 138].

13 For the foregoing reasons, Democratic Underground respectfully requests that the Court
14 deny Righthaven’s Application For Extension of Time to Comply With the Court’s July 14th
15 Order, and Order Righthaven to comply immediately in order to protect other litigants and the
16 Court.

17
18 Dated: August 1, 2011

FENWICK & WEST LLP

19
20 By: /s/ Laurence F. Pulgram

Laurence F. Pulgram

21 Attorneys for Defendant and Counterclaimant
22 DEMOCRATIC UNDERGROUND, LLC

23
24
25
26 ¹ Democratic Underground notes that Righthaven has settled several cases before effecting service of the
27 Complaint. *See e.g. Righthaven LLC v. Kirvin Doak Communications et al*, Case No. 2:10-cv-01482-LRH-LRL (D.
28 Nev); *Righthaven LLC v. Rawguru*, Case No. 2:10-cv-01570-PMP-PAL (D. Nev); *Righthaven LLC v. Parson*, 2:10-
cv-01571-KJD-RJJ (D. Nev). While Righthaven might wish to be able to try to settle cases before the defendant is
aware of the SAA and this Court’s transcript, doing so would work an injustice.