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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)

**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.¹ *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 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 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 5.² 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.³ Section 7.2. Indeed, the Agreement specifically says that Stephens Media “shall

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

³ “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;⁴ 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

27 ⁴ 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.⁵ 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 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 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

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