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Attorneys for Counterdefendant
Stephens Media, LLC

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RIGHTHAVEN LLC, a Nevada limited-liability company,

Plaintiff,

v.

DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company; and DAVID ALLEN, an individual,

Defendants.

DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company,

Counterclaimant,

v.

RIGHTHAVEN LLC, a Nevada limited-liability company; and STEPHENS MEDIA LLC, a Nevada limited-liability company,

Counterdefendants.

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

COUNTER-DEFENDANT STEPHENS MEDIA LLC'S REPLY IN SUPPORT OF MOTION TO STRIKE DEFENDANTS' REQUEST TO UNSEAL EXHIBIT A TO PULGRAM DECLARATION AND RELATED FILINGS (#85) AND CLIFFORD C. WEBB'S SUPPORTING DECLARATION (#86) OR, IN THE ALTERNATIVE, RESPONSE THERETO

1 Counter-Defendant Stephens Media LLC (“Stephens Media”) hereby submits the instant
2 Reply in Support of Motion to Strike Defendants Request to Unseal Exhibit A to Pulgram
3 Declaration and Related Filings (#85) and Supporting Declaration of Clifford C. Webb (#86) or,
4 in the alternative, Response Thereto. This Reply is based upon the pleadings and papers on file
5 in this action, any oral argument this Court may allow, and any other matter of which this Court
6 takes notice.
7

8 MEMORANDUM OF POINTS AND AUTHORITIES

9 **I. INTRODUCTION**

10 Defendants’ Response (#90) to the Motion to Strike (#87) amounts to nothing more than
11 a fumbling attempt to justify Defendants’ failure to comply with the straightforward terms of
12 the parties’ Stipulated Protective Order (“SPO”) (#65). Defendants begin by presenting a
13 confusing factual background concerning the confidentiality of Exhibit A and then purposefully
14 muddle the unequivocal provisions of the SPO governing the procedures for contesting a party’s
15 confidentiality designations. *See Opp.* at 1-2. Defendants thereafter proffer unsupported
16 assertions concerning supposed delay tactics and an overall refusal to cooperate in discovery on
17 the part of Stephens Media. *Id.* Nothing could be further from the truth. Defendants’ meritless
18 positions are a transparent attempt to distract the Court from the fact that Defendants
19 disregarded the clear terms of the SPO in a misguided effort to place Stephens Media’s and
20 Righthaven, LLC’s confidential business information in the public forum.
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23 **II. ARGUMENT**

24 Defendants’ argument that they took “parallel” paths to seek a determination of the
25 status of Exhibit A is disingenuous at best. *See Opp.* at 2:9. It is abundantly clear that
26 Paragraph 17 of the SPO only applies to the “disclosure” or “use” of materials that are already
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1 subject to the SPO rather than the procedure for contesting the status of documents that have
2 been initially designated as confidential. Indeed, Paragraph 19 of the SPO expressly governs
3 disputes between the parties over whether a document should retain its confidential status. As
4 such, Paragraph 17 is a red herring upon which Defendants misplace reliance in order to give
5 them some semblance of an argument that they complied with the terms of the SPO. They did
6 not.
7

8 As noted in the Motion to Strike, Defendants failed to follow the direction of Paragraph
9 19. In fact, Defendants' weak attempt to explain their actions affirms Stephens Media's
10 position that the procedure set forth in Paragraph 19 was not met. Defendants objected to the
11 designation of Exhibit A as "Confidential - Attorneys Only" on March 3, 2011. Stephens
12 Media then had five days to modify or withdraw the designation or advise Defendants that it
13 would stand on its original designation. See SPO at ¶ 19. On March 9, 2011, Stephens Media
14 properly informed Defendants that it would not withdraw the "Confidential - Attorneys Only"
15 designation for Exhibit A. See Opposition, p. 2.
16

17 At that time, the burden under the SPO shifted to Defendants whereby they had the right
18 to file a "*motion to the Court*" challenging Stephens' Media's designation of Exhibit A. See
19 SPO at ¶ 19. Obviously, slipping a paragraph into a proposed order does not constitute filing a
20 motion to the Court seeking a determination of Exhibit A's status. In short, Defendants tried to
21 bypass the mutually agreed upon language of the SPO by shifting the burden of proving
22 confidentiality to Stephens Media at a premature stage and without the benefit of an opening
23 motion that set forth Defendants' substantive contentions as to why the subject document was
24 not entitled to a confidentiality designation. Defendants' complaints regarding "delay" by
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1 Stephens should be disregarded as Defendants brought this dispute on themselves by
2 unnecessarily cutting corners in the discovery process.¹

3 Seeking to deflect attention from their own shortcomings, Defendants utilize much of
4 their Response to launch baseless attacks against Stephens Media. For starters, Defendants
5 repeatedly assert that Stephens Media did not justify its designation of Exhibit A in any of its
6 recent pleadings. That is because Stephens Media is still waiting for Defendants to comply with
7 the SPO. When Defendants file a proper motion setting forth their substantive positions
8 challenging the confidentiality of the Exhibit A (*i.e.*, the Strategic Alliance Agreement
9 (“SAA”)) executed between Stephens Media and Righthaven, Stephens Media will gladly
10 respond thereto.² Suffice to say for now that disclosure of the SAA, the terms of which are not
11 public knowledge and contain confidential commercial information, would—at a minimum—
12 impair Righthaven’s ability to negotiate similar agreements with other clients and would
13 provide invaluable insight to Righthaven’s competitors regarding the way it structures client
14
15

16
17 ¹ Defendants’ complaint of delay also reeks of hypocrisy. When the language of the SPO
18 and Paragraph 19 in particular was being negotiated, Stephens Media sought to include a 20-day
19 time limit in which a party contesting a confidentiality designation must file a motion with the
20 Court. Otherwise, the documents would maintain their confidential status. *See Williams Decl.*
21 at Exh. 1. The purpose of a time limit was to ensure that disputes regarding the confidentiality
22 of designated documents would not languish indefinitely. Defendants objected to the inclusion
23 of any time limit for making such a motion, thus preserving their ability to keep confidentiality
24 disputes alive throughout the duration of the litigation. This is hardly the act of a party that is
25 interested in speedy resolution of discovery disputes.

26
27 ² After originally—albeit erroneously—filing their Request to Unseal (#85) as a “Reply,”
28 which was presumably done in an effort to deprive Stephens Media and Righthaven of the
opportunity to file a response thereto, Defendants now ask the Court to deem the Request to
Unseal as the opening motion required by Paragraph 19 of the SPO. *See Opp.* at 3. Defendants
then unilaterally impose a deadline of April 12, 2011 for Stephens Media to file its responsive
brief to the “motion.” Defendants, in other words, are asking the Court to bless its non-
compliance with the SPO. This, however, is unfair as the Request to Unseal contains no
substantive arguments regarding the alleged non-confidentiality of the SAA. Accordingly, it
hardly qualifies as the type of motion contemplated under Paragraph 19 of the SPO. Again,
when Defendants file a proper motion challenging the confidentiality of the SAA, Stephens
Media will promptly respond thereto.

1 contracts. *See* Williams Decl. at ¶ 6. This Court has recently upheld confidentiality
2 designations under a stipulated protective order in similar circumstances. *See Phase II Chin,*
3 *LLC v. Forum Shops, LLC*, 2010 WL 2695659 **1-2 (D.Nev. July 2, 2010) (permitting lease
4 agreement to be filed under seal where all parties had a copy of the document and public
5 disclosure of the same would result in commercial disadvantage to landlord).

6
7 Finally, and in yet another attack against Stephens Media on a collateral matter,
8 Defendants allege that Stephens Media has a “long history of refusal to even engage with
9 Defendants on disputed discovery.” *See* Opp. at 10-11. This contention is, in a word, false. If
10 Defendants truly believe they have a legitimate discovery dispute with Stephens Media, they are
11 free to file a motion to compel or seek similar relief from the Court. Should such a motion be
12 forthcoming, Stephens Media welcomes the opportunity to detail the parties’ respective
13 behavior on the discovery front. That Defendants have failed to file such a motion to date is
14 most telling.

15
16 **III. CONCLUSION**

17
18 For the reasons set forth above, Stephens Media respectfully requests that this Court grant
19 the instant Motion to Strike Defendants Request to Unseal Exhibit A to Pulgram Declaration and
20 Related Filings (#85) and Supporting Declaration of Clifford C. Webb (#86).

21 Dated this 11th day of April, 2011.

22 Respectfully submitted,

23 CAMPBELL & WILLIAMS

24 By /s/ J. Colby Williams

25 DONALD J. CAMPBELL, ESQ. (#1216)

26 J. COLBY WILLIAMS, ESQ. (#5549)

27 Attorneys for Counterdefendant

28 Stephens Media, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing was served on the 11th day of April, 2011 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

/s/ J. Colby Williams
An employee of Campbell & Williams

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Williams Declaration

1 CAMPBELL & WILLIAMS
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10 Attorneys for Counterdefendant
11 Stephens Media, LLC

12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF NEVADA**

14 RIGHTHAVEN LLC, a Nevada limited-
15 liability company,

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

16 Plaintiff,

17 v.

18 DEMOCRATIC UNDERGROUND, LLC, a
19 District of Columbia limited-liability
20 company; and DAVID ALLEN, an
21 individual,

**DECLARATION OF J. COLBY
WILLIAMS IN SUPPORT OF MOTION
TO STRIKE**

22 Defendants.

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

26 Counterclaimant,

27 v.

28 RIGHTHAVEN LLC, a Nevada limited-
liability company; and STEPHENS MEDIA
LLC, a Nevada limited-liability company,

Counterdefendants.



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1 I, J. COLBY WILLIAMS, declare under penalty of perjury as follows:

2 1. I am a resident of Clark County, Nevada. I am over the age of eighteen and am
3 competent to make this Declaration. This Declaration is based upon my personal knowledge
4 unless otherwise so stated, and if called upon to testify, I would testify as set forth herein.
5

6 2. I am a licensed attorney in the State of Nevada, Bar Number 5549 and am a
7 partner in the law firm CAMPBELL & WILLIAMS. I am one of the attorneys representing
8 Counterdefendant Stephens Media, LLC in Case No. 2:10-cv-01356-RLH-GWF.

9 3. I make this Declaration in support of Stephens Media, LLC's Reply in Support of
10 Motion to Strike Defendants Request to Unseal Exhibit A to Pulgram Declaration and Related
11 Filings (#85) and Supporting Declaration of Clifford C. Webb (#86) or, in the alternative,
12 Response Thereto.
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14 4. Attached hereto as Exhibit 1 is a true and correct copy of an e-mail chain
15 exchanged between me and counsel for Defendants wherein we were negotiating the language of
16 a Stipulated Protective Order ("SPO") to govern the production of documents in this action. In
17 particular, I sought to include a 20-day time limit in which a party contesting a confidentiality
18 designation must file a motion with the Court. Otherwise, the documents would maintain their
19 confidential status. The purpose of a time limit was to ensure that disputes regarding the
20 confidentiality of designated documents would not languish indefinitely. Defendants objected to
21 the inclusion of any time limit for making such a motion.
22

23 5. With respect to Defendants' complaint that Stephens Media has yet to justify its
24 confidential designation of Exhibit A (*i.e.*, the Strategic Alliance Agreement ("SAA") executed
25 between Stephens Media and Righthaven, LLC), Stephens Media will gladly do so when
26 Defendants comply with the SPO by first filing an appropriate motion with the Court.
27
28



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1 6. Meanwhile, I am aware that the terms of the SAA contain confidential commercial
2 information. Specifically, Righthaven—which is a party to this action, a party to the SAA, and
3 has joined in Stephens Media’s confidentiality designations of the SAA—has made clear that
4 public disclosure of the SAA would impair Righthaven’s ability to negotiate similar agreements
5 with other clients and would provide invaluable insight to competing copyright enforcement
6 entities regarding the way Righthaven structures client contracts.
7

8 7. Declarant further says naught.

9 Las Vegas, Nevada
10 April 11, 2011



J. Colby Williams



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EXHIBIT 1

EXHIBIT 1

Colby Williams

From: Jennifer Johnson [jjjohnson@fenwick.com]
Sent: Thursday, February 10, 2011 11:15 AM
To: Colby Williams; shawn@manganolaw.com
Cc: Laurence Pulgram; kurt@eff.org; Clifford Webb
Subject: RE: Righthaven LLC v. Democratic Underground Protective Order
Attachments: LIT-#1332210-v3-Proposed_Protective_Order.docx

Shawn and Colby,

We will agree to keep Paragraphs 4 and 5(d). Additionally, we agree to a modified version of the language proposed by Stephens Media, as we just discussed in our meet and confer call, which eliminates the 20 day time period in which to file a motion:

“In the event of a motion, the documents or information whose designation is objected to shall continue to be treated as so designated until the motion is decided.”

The new protective order is attached. You have our consent to file the version attached.

Thanks,
Jennifer



Jennifer J. Johnson
Fenwick & West LLP
Associate, Litigation Group
☎ (415) 875-2391
☎ (415) 281-1350
✉ jjjohnson@fenwick.com

From: Colby Williams [mailto:jew@campbellandwilliams.com]
Sent: Thursday, February 10, 2011 9:07 AM
To: Jennifer Johnson
Cc: Laurence Pulgram; kurt@eff.org; Clifford Webb; shawn@manganolaw.com
Subject: RE: Righthaven LLC v. Democratic Underground Protective Order

Jennifer,

Your proposed edits to the SPO are fine although we agree that Paragraphs 4 and 5(d) should not be deleted. Additionally, (unless I missed it) it appears that the first draft did not address how designated documents are to be treated during the pendency of a challenge to said designation. We would suggest something along the following to be inserted at the end of Paragraph 20:

“In the event of a timely motion, the documents or information whose designation is objected to shall continue to be treated as so designated until the motion is decided. In the event no motion is filed within twenty (20) days, the designated material in question shall remain confidential or highly confidential.”

Talk to you soon.

Regards,
Colby

From: Jennifer Johnson [mailto:jjjohnson@fenwick.com]
Sent: Wednesday, February 09, 2011 10:04 AM
To: Colby Williams
Cc: Laurence Pulgram; kurt@eff.org; Clifford Webb; shawn@manganolaw.com
Subject: RE: Righthaven LLC v. Democratic Underground Protective Order

Thank you.

From: Colby Williams [mailto:jcw@campbellandwilliams.com]
Sent: Wednesday, February 09, 2011 6:12 AM
To: Jennifer Johnson
Cc: Laurence Pulgram; kurt@eff.org; Clifford Webb; shawn@manganolaw.com
Subject: Re: Righthaven LLC v. Democratic Underground Protective Order

Once I get my oppositions in another matter filed this evening, I'll take a look and let you know prior to tomorrow's call.

Sent from my Verizon Wireless BlackBerry

----- Original Message -----

From: Jennifer Johnson <jjjohnson@fenwick.com>
To: Colby Williams
Cc: Laurence Pulgram <LPulgram@Fenwick.com>; 'Kurt Opsahl' <kurt@eff.org>; Clifford Webb <cwebb@fenwick.com>; 'shawn@manganolaw.com' <shawn@manganolaw.com>
Sent: Tue Feb 08 21:47:01 2011
Subject: RE: Righthaven LLC v. Democratic Underground Protective Order

Colby,

Do you have any additional proposed modifications?

Thanks,

Jennifer

From: shawn@manganolaw.com [mailto:shawn@manganolaw.com]
Sent: Tuesday, February 08, 2011 3:36 PM
To: Jennifer Johnson
Cc: Laurence Pulgram; 'Kurt Opsahl'; Clifford Webb; Colby Williams
Subject: RE: Righthaven LLC v. Democratic Underground Protective Order

Jennifer:

Sorry. I was referring to paragraph 4.

S

Shawn A. Mangano, Esq.

Shawn A. Mangano, Ltd.

9960 West Cheyenne Avenue, Suite 170

Las Vegas, Nevada 89129

(702) 304-0432 - telephone

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Licensed in California, Nevada and Illinois

----- Original Message -----

Subject: RE: Righthaven LLC v. Democratic Underground Protective Order
From: Jennifer Johnson <jjjohnson@fenwick.com>
Date: Tue, February 08, 2011 3:26 pm
To: "shawn@manganolaw.com" <shawn@manganolaw.com>
Cc: Laurence Pulgram <LPulgram@Fenwick.com>, 'Kurt Opsahl'
<kurt@eff.org>, Clifford Webb <cwebb@fenwick.com>, Colby Williams
<jcw@campbellandwilliams.com>

Shawn,

Thank you. Please clarify which paragraph you are referring to in point one below.

Regards,

Jennifer

From: shawn@manganolaw.com [mailto:shawn@manganolaw.com]
Sent: Tuesday, February 08, 2011 3:22 PM

To: Jennifer Johnson
Cc: Laurence Pulgram; 'Kurt Opsahl'; Clifford Webb; Colby Williams
Subject: RE: Righthaven LLC v. Democratic Underground Protective Order

Jennifer:

I have reviewed the draft protective order. I have two modifications that I disagree with, which are as follows:

1. The deletion of paragraph is unacceptable; and
2. The deletion of 5(d) is unacceptable.

Regards,

S

Shawn A. Mangano, Esq.

Shawn A. Mangano, Ltd.

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----- Original Message -----

Subject: Righthaven LLC v. Democratic Underground Protective Order

From: "Jennifer Johnson" <jjjohnson@fenwick.com <<mailto:jjjohnson@fenwick.com>> >

Date: Tue, February 08, 2011 2:31 pm

To: "Colby Williams" <jcw@campbellandwilliams.com <<mailto:jcw@campbellandwilliams.com>> >, <shawn@manganolaw.com <<mailto:shawn@manganolaw.com>> >

Cc: "Laurence Pulgram" <LPulgram@Fenwick.com <<mailto:LPulgram@Fenwick.com>> >, "Kurt Opsahl" <kurt@eff.org <<mailto:kurt@eff.org>> >, "Clifford Webb" <cwebb@fenwick.com <<mailto:cwebb@fenwick.com>> >

Gentlemen,

I have yet to receive comments to the protective order since your promise to provide comments last week. Please send us your comments by tomorrow evening so that we may review them and resolve any disagreements during our meet and confer calls on Thursday.

Regards,

Jennifer

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Jennifer J. Johnson

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