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15 DEMOCRATIC UNDERGROUND, LLC, and
Defendant DAVID ALLEN

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

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

v.

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

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

v.

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

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

**DEMOCRATIC
UNDERGROUND'S REPLY
TO RIGHTHAVEN'S
RESPONSE TO ORDER TO
SHOW CAUSE RE
SANCTIONS**

INTRODUCTION

1
2 As this Court noted “Righthaven failed to disclose Stephens Media as an interested party
3 in any of its approximately 200 cases filed in this District,” despite the requirements of Local
4 Rule 7.1–1. *Righthaven LLC v. Democratic Underground, LLC*, 2011 WL 2378186, *9 (D. Nev.
5 2011). Since there could hardly be a more direct pecuniary interest than a contractual right to a
6 percentage of the recovery, the Court ordered Righthaven to explain “this flagrant
7 misrepresentation.” *Id.*

8 Instead, Righthaven chooses to ignore all of its Certificates of Interested Parties except the
9 one filed in this litigation (Dkt. 5), and fails to explain what, if anything, could be a “direct,
10 pecuniary interest” in a lawsuit, if half the recovery is not. Rather than accept responsibility,
11 Righthaven presents three convoluted arguments that it hopes will get it off the hook. As
12 explained in detail below, each is wrong.

13 First, Righthaven claims that it is “*understandable* how Local Rule 7.1-1 could have
14 *arguably* been *reasonably* construed to not require the disclosure of Stephens Media’s interest.”
15 OSC Response (Dkt. 127) at 2 (emphasis added). Its lack of confidence in this position is readily
16 apparent—even Righthaven hesitates to say that it was *actually* a reasonable construction, or even
17 *arguably* one, but rather hopes it is *understandable* how it *could be* arguable. In any event,
18 Righthaven’s claim is nonsense: there is no good faith argument in support of such a
19 misinterpretation. A “direct, pecuniary interest” is a well-known and comprehensible term
20 recently construed by the Supreme Court, among others, and the facts here are not an edge case
21 that a lawyer might “reasonably” misconstrue.

22 Second, Righthaven tries to lay the blame solely on two of its former in-house counsel,
23 even though Righthaven’s CEO Steven Gibson, who negotiated and signed the Strategic Alliance
24 Agreement, was counsel of record when the certification was filed. Mr. Gibson presents himself
25 as a lawyer with nearly 20 years of experience, and who specializes in drafting intellectual
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1 property contracts.¹ He certainly can be expected to know that a 50/50 interest (less costs) in the
2 recovery is a direct, pecuniary interest and to take responsibility for his employees' actions.

3 Third, and most brazenly, Righthaven incorrectly asserts that it is beyond the sanction
4 power of this Court. To the contrary, this Court has substantial power under the Local Rules, the
5 Federal Rules of Civil Procedure and its inherent power to address misrepresentations to the
6 Court.

7 Local Rule 7.1-1 is designed to enable the Court to determine whether recusal is
8 appropriate, and it is true, of course, that once Democratic Underground countersued Stephens
9 Media, at least its non-pecuniary interest in *this* action was known. However, there are additional
10 interests at stake. Righthaven's misrepresentation was part of a concerted effort to avoid
11 admitting Stephens Media's role in this litigation, which allowed the Counterdefendants to
12 pretend that there was no basis for the counterclaim. Moreover, the misrepresentations in the
13 other actions—where Stephens Media was not made a party by counterclaim—not only concealed
14 the actually interested parties in those cases, but allowed Righthaven to continue to litigate
15 hundreds of cases for months over a right that it did not have, raising defense costs and resulting
16 in settlements that may never have happened if the truth had been known.

17 ARGUMENT

18 **I. RIGHTHAVEN'S PURPORTED INTERPRETATION OF "DIRECT PECUNIARY 19 INTEREST" IS NEITHER REASONABLE NOR CREDIBLE, AND 20 CONTRAVENES SUPREME COURT PRECEDENT**

21 Righthaven contends that it understood Stephens Media's interest to be "indirect" because
22 of a supposed "two-step payment process": the funds first go to Righthaven, and then a
23 percentage is distributed to Stephens Media.² Essentially, Righthaven is attempting to re-write a
24 simple provision ("Within one (1) week after receipt of the Recovery, Righthaven shall pay to
25 Stephens Media a the [sic] percentage of the Recovery...") in a more convoluted way, as if the

26 ¹ See Dickinson Wright, Bio of Steven A. Gibson, available at <http://www.dickinson-wright.com/ourpeople/pages/person.aspx?person=96835d9d-f7d2-430e-a836-92977532ec50>.

27 ² Righthaven also argues that the pecuniary interest was "contingent" and was only "assuming any case resulted in
28 a recovery." OSC Response at 2-3. This argument is meritless. If the possibility that a party might lose
obviated the disclosure requirement, LR 7.1-1 would become meaningless.

1 sharing of proceeds was not directly mandated by the contract. Strategic Alliance Agreement
2 (Dkt. 79-1) (“SAA”) § 5. In doing so, Righthaven also ignores Section 8 of the SAA which
3 contemplates that Stephens Media may directly receive a Recovery; Section 9.4 which
4 contemplates that Stephens Media might independently settle infringement claims, and Section
5 10.2, which expressly discusses what happens when a “Recovery Instrument [is] in Stephens
6 Media’s name.” The SAA thus specifically contemplated and addressed the possibility of a “one-
7 step” payment to Stephens Media. It is hard to imagine a more direct pecuniary interest by a
8 party not appearing in its own name and therefore required to make disclosure of its interest.

9 Righthaven attempts to excuse its non-disclosure by claiming that “[t]here is an absence of
10 case law or other decisional authority that defines ‘direct, pecuniary interest’ under Local Rule
11 7.1-1 *or otherwise*.” OSC Response at 6 (emphasis added). This is simply incorrect. To be sure,
12 the District of Nevada has not needed to expand upon this fairly self-explanatory term. However,
13 other courts have, including a recent decision by the United States Supreme Court.

14 In *Caperton v. AT Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009), the Supreme Court
15 considered whether a West Virginia Supreme Court Justice needed to recuse himself in a case
16 involving a campaign contributor. The Court turned to the venerable decision in *Tumey v. Ohio*,
17 273 U.S. 510 (1927), the “early and leading case on the subject,” to explain a “direct pecuniary
18 interest.” *Caperton* 129 S.Ct. at 2259. In *Tumey*, the *Caperton* Court explained, the mayor of a
19 village had the authority to sit as a judge, and received a salary supplement for doing so. *Id.* at
20 2260. However, the funds for that compensation came from the fines assessed in a case. Since
21 fines were not assessed upon acquittal, the mayor-judge received a salary supplement only if he
22 convicted the defendant.

23 Even under Righthaven’s “two-step” characterization, Stephens Media still has an interest
24 that is *more* direct than the “direct pecuniary interest” described by the Supreme Court. In *Tumey*
25 the mayor-judge did not even receive a percentage, it was just that his supplemental salary
26 depended on having at least some funds available. Here, not only is the fund to pay Stephens
27 Media dependent on a recovery, it is mandated as a percentage of the recovery.

1 To illustrate how untenable Righthaven's argument is, consider a hypothetical. Imagine
 2 that a plaintiff's contract provided payment of 50% of the recovery, less costs, to a company
 3 owned by a judge or his family (instead of to Stephens Media). Under Righthaven's theory, if the
 4 money went first to plaintiff before going to the judge's company, it would not need to be
 5 disclosed, because it would be "indirect." Yet this would be the paradigmatic case for recusal.
 6 No lawyer could seriously think that this interest need not be disclosed, whether they just passed
 7 the bar or if they had nearly 20 years of experience.

8 There is no reasonable construction of existing law that would interpret LR 7.1-1 to
 9 exclude from disclosure a 50/50 split (less costs) in any recovery. Righthaven offers no argument
 10 for extending, modifying, or reversing existing law or for establishing new law. Its failure to
 11 disclose Stephens Media's interest was inexcusable.

12 **II. RIGHTHAVEN CANNOT AVOID RESPONSIBILITY BY BLAMING MR.
 13 COONS AND MR. CHU**

14 Steven Gibson, Righthaven's CEO, was also Righthaven's counsel of record from the
 15 very beginning of this litigation. *See* Complaint (Dkt. 1). Surprisingly, Righthaven neglects to
 16 mention Mr. Gibson, choosing instead to focus attention solely on Charles Coons, its former
 17 Assistant General Counsel and Joseph Chu, a former in-house counsel. Righthaven then takes the
 18 position that it would be unfair to sanction Mr. Coons and Mr. Chu, arguing they should "be
 19 provided with notice and an opportunity to respond." OSC Response at 8. In other words,
 20 Righthaven is claiming the Court cannot now hold any attorney responsible for Righthaven's
 21 misrepresentation.³

22 This, too, is nonsense. Righthaven has offered no reason why Mr. Gibson is not both
 23 responsible and subject to this Court's sanction power. While Mr. Gibson is not presently
 24 counsel of record, (Righthaven moved to substitute Mr. Mangano in for Mr. Gibson in November
 25 2010 (Dkt. 35)), the Certificate of Interested Parties was filed under Mr. Gibson's watch (Dkt.

26 _____
 27 ³ Mr. Gibson has had actual notice of the Court's order to show cause. The following week, Mr. Gibson was
 28 interviewed on *Face-To-Face with Jon Ralston* (KSNV-Channel 3 Las Vegas, June 22, 2011, 7:30 p.m.,
 available at <http://www.lasvegassun.com/videos/2011/jun/22/5268/>). Mr. Gibson called Righthaven's
 misrepresentation a minor technical issue, and showed no remorse.

1 5).⁴ Righthaven also fails to mention that Righthaven put Mr. Gibson's name on numerous
 2 Certificates of Interested Parties in other cases.⁵ As the signatory to the SAA, Mr. Gibson
 3 certainly knew that Stephens Media had a direct pecuniary interest in the outcome of this
 4 litigation. Indeed, Mr. Gibson was the architect of the entire champertous scheme to get around
 5 *Silvers* and profit from litigating Stephens Media's copyrights in exchange for a cut of the
 6 proceeds. Remarkably, although Mr. Gibson submitted a declaration purporting to explain the
 7 SAA and to support Righthaven's standing in this action, he has supplied no declaration
 8 suggesting that he actually considered Stephens Media's interest to be "indirect" or not subject to
 9 disclosure.

10 Moreover, as CEO of Righthaven and its senior lawyer, Mr. Gibson was the supervisor of
 11 both Mr. Coons and Mr. Chu.⁶ Pursuant to Nevada Rule of Professional Conduct 5.1, Mr. Gibson
 12 was responsible for ensuring that the lawyers he supervised conformed to the Rules of
 13 Professional Conduct, including the duty of candor to the Court. *See Nev. R. Prof'l Conduct 3.3.*
 14 Regardless of whether or not Mr. Coons or Mr. Chu misunderstood Local Rule 7.1-1 or simply
 15 did not know of the terms of the deal Mr. Gibson signed, he remained responsible for ensuring
 16 that the Certificate of Interested Parties was candid when first filed and for correcting any errors
 17 thereafter.

18 Finally, Local Rule 7.1-1 imposes not only a duty of disclosure at the outset of litigation,
 19 but also an ongoing and express duty to supplement the Certificate of Interested Parties. LR. 7.1-
 20 1(c). Pointing fingers at former in-house counsel does nothing to change Righthaven's
 21 continuing duty to ensure that the Certificate of Interested Parties is correct. *See also Nev. R.*

22 _____
 23 ⁴ This Court granted this motion on June 27, 2011 (Dkt. 123).

24 ⁵ *See e.g. Righthaven v. Majorwager*, Case 2:10-cv-00484-GMN-LRL (Dkt. 7), *Righthaven v. Industrial Wind*
 25 *Action*, 2:10-cv-00601-RLH -PAL (Dkt 8), *Righthaven v. Malik*, 2:10-cv-00636-RLH-RJJ (Dkt. 5); *Righthaven*
 26 *v. Ecological Internet*, 2:10-cv-00691-GMN-PAL (Dkt. 5); *Righthaven v. Valentine*, 2:10-cv-01157-JCM-GWF
 27 (Dkt. 6), etc.

28 ⁶ Pursuant to Righthaven's Operating Agreement (Dkt. 107-2) ("RHOA"), Mr. Gibson has "supervising authority
 over and may exercise general executive power concerning the supervision, direction and control of the day-to-
 day Business and affairs of the Company." RHOA, §§ 6.3, 6.3.1. In addition, Net Sortie Systems LLC, Mr.
 Gibson's shell company, is the Manager of Righthaven, with complete authority over Righthaven. *Id.* § 5.1 (Mr.
 Gibson is also the Manager of Net Sortie, *see* Dkt. 47-6). The Operating Agreement provides for a right to rely
 upon the Manager. *Id.* §5.11.

1 Prof. Conduct 3.3 (imposing a duty to correct a false statement of material fact or law). The
 2 breach of that duty, in this case and the hundreds of others, was inexcusable where Stephens
 3 Media's interest has been an issue brought front and center to counsel's attention since the filing
 4 of the counterclaim in September 2010 and litigation over the SAA and Stephens Media's status
 5 as real party in interest ever since.

6 **III. THIS COURT'S HAS AUTHORITY TO SANCTION RIGHTHAVEN UNDER**
 7 **RULE 11**

8 Righthaven takes the position that it, as a company, is beyond the sanction power of the
 9 Court, because, in Righthaven's view, LR IA 4-1 limits the Court's sanction power to attorneys,
 10 not represented parties. OSC Response at 8. However, "[t]he Court draws its authority to impose
 11 sanctions from several sources," including Rule 11 and its inherent power. *Kwok v. Recontrust*
 12 *Company, N.A.*, No. 2:09-cv-2298-RLH-LRL, 2010 WL 4810704, *2 (D. Nev. Nov. 19, 2010).

13 Rule 11 allows sanctions against parties, and can be triggered by presenting any "paper"
 14 to the Court without an adequate factual and legal basis.⁷ Fed.R.Civ.Proc. 11(c)(1) ("the court
 15 may impose an appropriate sanction on any attorney, law firm, or party"). Thus, failing to
 16 disclose an interested party in a Certificate of Interested Parties is both a violation of LR IA 7.1-1
 17 and, if done without a proper factual or legal basis, a violation of Rule 11.

18 Nevertheless, in its Response to the OSC, Righthaven argues that it cannot be sanctioned
 19 for "misunderstanding" the applicable rule, asserting its purported good faith and citing
 20 *Zambrano v. Tustin*, 885 F.2d 1473 (9th Cir. 1989). *Zambrano* describes standards for the court's
 21 inherent sanction power and its power to sanction for violations of local rules.⁸ Nothing in
 22 *Zambrano* supports a claim of good faith here.

24 ⁷ Specifically, Rule 11(b)(3) requires that Righthaven's "factual contentions have evidentiary support" and its
 25 "legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or
 reversing existing law or for establishing new law."

26 ⁸ Righthaven now claims that the Court's inherent power is limited by *Zambrano*. Previously it argued "'This
 27 inherent power is deeply-rooted in the judiciary, and extends to a full range of litigation abuses.' *Fink v. Gomez*,
 239 F.3d 989, 991 (9th Cir. 2001). This includes the power to impose sanctions 'on counsel who willfully abuse
 28 the judicial processes.' *U.S. v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983) (internal quotation marks omitted)."
Righthaven v. Malik, Opposition to Motion to Dismiss (Dkt. 11) at 6.

1 Moreover, as explained above, Righthaven’s Certificate of Interested Parties is also a
 2 “paper” subject to Rule 11. When Righthaven itself moved for this Court to issue sanctions
 3 pursuant to Rule 11 in the *Righthaven v. Malik* case, it had a much broader view of the sanction
 4 power:

5 The current version of the rule “was intended to be a standard ‘more stringent than
 6 the original good faith formula’ so ‘that a greater range of circumstances will
 7 trigger its violation.’” *Golden Eagle Dist. Corp. v. Burroughs Corp.*, 801 F.2d
 1531, 1536 [(9th Cir. 1996)] (quoting Advisory Committee Note, 97 F.R.D. at
 198-99).

8 *Righthaven v. Dr. Shezad Malik Law Firm*, Case No. Case 2:10-cv-00636-RLH-RJJ,
 9 Righthaven’s Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11 (Dkt. 13), at 5.
 10 Righthaven also stated that “the subjective good faith of a party does not provide protection from
 11 the imposition of sanctions.” *Id.* at 5-6 (citing *G.C. and K.B. Investments, Inc. v. Wilson*, 326
 12 F.3d 1096, 1109 (9th Cir. 2003)). Finally, Righthaven argued that “[t]he Ninth Circuit has held
 13 that sanctions are appropriate when a party’s frivolous filing is based upon a gross
 14 misconception of the applicable law” and that “the courts have clearly recognized that a party’s
 15 blatant misstatement of applicable law, or the sheer ignorance of controlling precedent, may well
 16 amount to sanctionable conduct under Rule 11.” *Id.* at 13-14.

17 Accordingly, under Righthaven’s own interpretation of Rule 11, its failure to provide the
 18 disclosure required by Rule 7.1-1 is sanctionable conduct, even assuming, contrary to the
 19 evidence, that it were the result of counsel’s good faith ignorance or gross miscalculation of the
 20 meaning of Rule 7.1-1. Given Righthaven’s stated position on Rule 11, this Court is empowered
 21 to prohibit Righthaven from arguing for a narrower construction now. *See generally New*
 22 *Hampshire v. Maine*, 532 US 742 (2001) (describing doctrine of judicial estoppel, which allows a
 23 court to prohibit parties from flipping legal positions from one proceeding to the next, according
 24 to the exigencies of the moment); *see also Wagner v. Prof’l Eng’rs in Cal. Gov’t*, 354 F.3d 1036,
 25 1044 (9th Cir. 2004) (“Judicial estoppel is an equitable doctrine that is intended to protect the
 26 integrity of the judicial process by preventing a litigant from playing fast and loose with the
 27 courts.”).

1 **IV. THE CERTIFICATE OF INTERESTED PARTIES WAS PART OF A CAMPAIGN**
 2 **TO SHIELD STEPHENS MEDIA FROM LITIGATION.**

3 From the very beginning, Righthaven did everything it could to foster the impression that
 4 Stephens Media had nothing to do with the case and conceal Stephens Media's role.⁹ While
 5 Righthaven acknowledged that the original source of the work was Stephens Media, it failed to
 6 disclose Stephens Media's close connections to control over the lawsuit, its copyright interest in
 7 the work, or its pecuniary interest in the lawsuit. Righthaven presented an "Assignment" to the
 8 Court that, because it failed to disclose the SAA, concealed all these facts and pretended that
 9 ownership was vested in Righthaven. Indeed, in hundreds of cases, the Complaint, Assignment
 10 and other initial case documents, including the Certificate of Interested Parties, were designed to
 11 leave the reader with the impression that Righthaven purchased the copyright outright.

12 Even before the litigation campaign began, Righthaven and Stephens Media undertook to
 13 disguise Stephens Media's connection through the creation of a holding company, SI Content
 14 Monitor LLC, to invest in Righthaven. While SI Content Monitor LLC was ostensibly a separate
 15 entity, the SAA required that Stephens Media ensure that SI Content Monitor and Stephens Media
 16 would both be controlled by "common owners with no material variation in said ownership."
 17 SAA § 2.¹⁰ On this basis, Righthaven identified SI Content Monitor LLC in its Certificate of
 18 Interested Parties, without disclosing that the company was merely an entity holding ownership
 19 interest in Righthaven for the benefit of the same people who control Stephens Media. Moreover,
 20 Righthaven disclosed SI Content Monitor despite the fact that it had no right to any share of the
 21 proceeds of this case—it only owned an ownership interest in Righthaven, not the proceeds—yet
 22 it still concealed Stephens Media's direct interest in the very proceeds at issue in every litigation
 23 it filed.

24 ⁹ Democratic Underground recognizes that this Court is "only focus[ing] on the most factually brazen" of
 25 Righthaven's "multiple inaccurate and likely dishonest statements to the Court." *Democratic Underground*,
 26 2011 WL 2378186 at *9. However, Democratic Underground respectfully submits that the broader context of
 Righthaven's behavior is appropriate for the Court's analysis.

27 ¹⁰ Righthaven's Operating Agreement even provided that, should SI Content Monitor experience a change in
 28 control such that it was no longer controlled by "members of the family of Warren A. Stephens and trusts for the
 benefit of such individuals" it would forfeit its interest in Righthaven to Mr. Gibson's own shell company, Net
 Sortie Systems LLC. RHOA, § 15.5.

1 The pleading Righthaven filed with this Court, including the Complaint in this case, are
 2 filled with subterfuge. Righthaven claims its “holds” the various exclusive rights in the Works,
 3 when it knew the ability to exercise those rights was retained exclusively by Stephens Media. *See*
 4 Complaint ¶¶ 35-38; SAA § 7.2. Righthaven claimed it suffered ongoing harm from the alleged
 5 infringement, when it knew that it had no right to exploit the work whatsoever. *See id.* at ¶ 45
 6 and 46.

7 The Assignment was artfully drafted to obscure the truth. It speaks vaguely of
 8 unidentified “monetary commitments and commitment to services provided” rather than
 9 disclosing that Stephens Media got 50% of the proceeds. Moreover, the “Copyright Assignment”
 10 characterized itself as a transfer of “all copyrights *requisite* to have Righthaven recognized as the
 11 copyright owner,” obscuring what rights were transferred—which turned out to be only the right
 12 to sue.

13 The purpose of this design is obvious. In litigation, Righthaven could and did trot out a
 14 copy of the one-page Assignment, assert a presumption of ownership based on its fraudulently
 15 obtained copyright registration, and yet keep the true nature of the transaction secret. And
 16 Righthaven was not shy about executing this plan, aggressively using the Assignment to misdirect
 17 defendants away from Stephens Media, and leading “the district judges of this district to believe
 18 that it was the true owner of the copyright in the relevant news articles.” *Democratic*
 19 *Underground*, 2011 WL 2378186 at *6. For example, in *Righthaven v. Malik*, Righthaven
 20 vigorously argued that the Assignment provided all the information necessary to show that it, not
 21 Stephens Media, owned the copyright, and that no further analysis was necessary. *See e.g.*
 22 *Righthaven v. Malik*, Righthaven Opposition to Motion to Dismiss (Dkt. 11).

23 Righthaven now claims that Stephens Media’s deep involvement was sufficiently clear all
 24 along. OSC Response at 3-4 & 7. Yet Righthaven was previously content to allow Stephens
 25 Media to emphatically and repeatedly deny *any* involvement. When Righthaven and Stephens
 26 Media filed motion papers with this Court seeking to dismiss *Democratic Underground*’s
 27 counterclaim, Righthaven stood idly by as Stephens Media falsely asserted “Stephens Media’s
 28 involvement with Righthaven. . . is limited to its role as the assignor of the subject copyright.”

1 Stephens Media Motion to Dismiss (Dkt. 38) at 2:16-18. Indeed, Stephens Media’s Motion to
 2 Dismiss is replete with assertions designed to give the false impression it was an innocent
 3 bystander dragged into this lawsuit simply because it was a prominent media company “despite
 4 its utter disconnection with the pertinent factual and legal issues at issue herein.” *Id.* at 2:14-16.

5 More disturbingly, Righthaven saw no need to clarify or correct matters even when
 6 Stephens Media began using Righthaven’s inaccurate Certificate of Interested Parties itself as a
 7 basis for dismissal. Stephens Media Reply in Support of Motion to Dismiss (Dkt. 56) at 10:20-22
 8 (“Stephens Media has never been identified or disclosed as a party who has a direct pecuniary
 9 interest in the outcome of any Righthaven case. And for good reason . . .”). At a minimum, this
 10 should have indicated to Righthaven the importance of making sure there was a good legal and
 11 factual basis for its Certificate of Interest.

12 When this litigation moved into discovery, Righthaven failed to identify the SAA in its
 13 original initial disclosures (Dkt. 63-1) produced in December 2010. In its first supplemental
 14 initial disclosures (Dkt. 63-2), Righthaven still did not disclose the SAA, and instead went on the
 15 offensive, threatening to conduct spurious discovery on Kurt Opsahl, one of Democratic
 16 Underground’s outside counsel, on topics like “Electronic Frontier Foundation’s (‘EFF’)”
 17 prosecution of claims against Stephens Media LLC despite their lack of merit” and “EFF’s
 18 attempts to unnecessarily and without justification bring Stephens Media, LLC in this action for
 19 self-promotion and publicity purposes.”

20 In a court hearing on December 28, 2010, Righthaven’s outside counsel, Shawn Mangano
 21 told Judge James Mahan that, while he was “sure” that Stephens Media’s continued publication of
 22 the news article at issue was “covered in their license agreement with the RJ and the assignment,
 23 he was “not privy to that information as to how.” *Righthaven v. Jama (Center for Intercultural*
 24 *Organizing)*, Case No. 2:10-cv-01322-JCM–LRL, Transcript of Dec. 28, 2010 Hearing, (Dkt 27)
 25 at 34. Judge Mahan also asked if Righthaven had “licensed the rights to others.” Mr. Mangano
 26 responded “I don’t know as I stand here right now.” *Id.* at 24. Taking Mr. Mangano’s response
 27 as true, this exchange strongly suggests that, as of December 28, Mr. Gibson had not shared the
 28

1 SAA with his company’s outside counsel, though it also suggests that outside counsel was on
2 notice to seek it out thereafter.¹¹

3 Nevertheless, Righthaven claims that it “did not intend hide [sic] Stephens Media’s
4 association with this action.” Response to OSC at 2, n.1. To back up this questionable assertion,
5 Righthaven notes that “[t]he SAA was produced during discovery” (*id.*) using the passive voice to
6 obfuscate the fact that Righthaven did not produce it—Stephens Media did so, belatedly, in
7 response to discovery requests. Decl. of Clifford Webb (Dkt. 96) at ¶ 10. Indeed, Righthaven
8 consistently and emphatically refused to produce this information. *See generally id.* It refused to
9 provide the SAA pursuant to DU’s Requests for Production and refused to answer Interrogatories
10 about the “momentary commitments” referenced in the Assignment.¹²

11 Shortly after Stephens Media produced the SAA, Democratic Underground identified the
12 problem with Righthaven’s Certificate of Interested Parties. Democratic Underground’s
13 Supplemental Memorandum (Dkt. 72-1), filed March 4, 2011, put Righthaven on even more
14 specific notice of the deficiency of its Certificate. Dkt. 72-1, at 6, n.4. Still, for four months,
15 Righthaven did nothing to rectify the Certificate of Interested Parties in this and the hundreds of
16 other cases. Instead, it put all of its efforts into convincing this Court not to look at the SAA or
17 the Supplemental Memorandum and towards keeping the documents from the public view. *See*
18 Righthaven’s Motion to Reconsider (Dkt. 78); Righthaven’s Joinder in Stephens Media’s Motion
19 for Leave to File (Dkt. 84); Righthaven’s Response to Request to Unseal and Application for
20 OSC re Contempt (Dkt. 88); Righthaven’s Joinder in Stephens Media’s Motion to Strike (Dkt.
21 89); and Righthaven’s Joinder in Stephens Media’s Reply (Dkt. 92).

22
23
24 ¹¹ The Strategic Alliance Agreement provides that Stephens Media retains an exclusive license in the works and
25 prohibits Righthaven from licensing the rights to others. SAA, § 7.2. If Mr. Mangano had read the SAA, he
would have been able to answer Judge Mahan’s questions.

26 ¹² *See* Webb Decl. ¶¶ 6, 27, Exhibits E and CC. After meeting and conferring was unsuccessful, Democratic
27 Underground moved to compel compliance with its document discovery. DU Motion to Compel (Dkt. 95). The
28 motion was held mooted by Righthaven’s dismissal for lack of standing. Order (Dkt. 117). If Stephens Media
had not produced the SAA, the SAA would have remained secret until Democratic Underground won a motion
to compel.

1 In sum, Righthaven not only misrepresented the interested parties, it took a series of steps
2 to hide the role of Stephens Media in its litigation operation. The Court can and should take this
3 additional misconduct into consideration.

4 **CONCLUSION**

5 Righthaven’s failure to fully disclose its relationship with Stephens Media has prolonged
6 this litigation and hundreds of other cases, placed unnecessary burdens on the Court and the
7 defendants and tarnished the integrity of the justice system. To address the harm that
8 Righthaven’s litigation tactics have caused, and to deter such conduct in the future:

9 District judges have an arsenal of sanctions they can impose, including both
10 monetary and nonmonetary sanctions such as: striking the offending paper; issuing
11 an admonition, reprimand, or censure to counsel; requiring participation in CLE
courses, seminars, or other educational programs; referring the matter to
disciplinary authorities, and disqualifying counsel.

12 *Kwok v. Recontrust*, 2010 WL 4810704 at *2. Democratic Underground leaves it to this Court’s
13 sound discretion to determine what sanction would be appropriate.

14 Dated: July 7, 2011

ELECTRONIC FRONTIER FOUNDATION

17 BY: /s/ Kurt Opsahl
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