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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

DAVID COPPEDGE, an individual;

Plaintiff,

vs.

JET PROPULSION LABORATORY, form unknown; **CALIFORNIA INSTITUTE OF TECHNOLOGY**, form unknown; **GREGORY CHIN**, an Individual; **CLARK A. BURGESS**, an Individual; **KEVIN KLENK**, an Individual; and **Does 1** through **25**, inclusive,

Defendants.

Case No. BC435600

The Honorable Ernest M. Hiroshige, Dept. 54

PLAINTIFF DAVID COPPEDGE'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE NO. 5 FOR AN ORDER EXCLUDING OR LIMITING THE TESTIMONY OF PLAINTIFF'S EXPERT DAVID K. DEWOLF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Declaration of William J. Becker, Jr. and Exhibits filed concurrently herewith]

FSC:	February 24, 2012
HEARING TIME:	9:00 a.m.
DEPT:	54

Trial Date: March 7, 2011

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COMES NOW PLAINTIFF DAVID COPPEDGE ("Coppedge") and hereby opposes Defendant California Institute of Technology's/Jet Propulsion Laboratory's ("JPL's) Motion in Limine No. 5 for an order excluding or limiting the testimony of plaintiff's expert David K. Dewolf.

This Opposition is based on the ground that JPL's motion lacks merit, is improperly presented for the purpose of suppressing admissible evidence and would create confusion if granted.

DATED: December 13, 2011

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William J Becker Jr, Esq

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Will the jury in this case understand how David Coppedge's discussions of origins would be viewed as religious by JPL without the aid of an expert who can explain the controversy? Coppedge seeks to offer an expert who can explain how his discussion of intelligent design could stoke uninformed negative reactions at JPL and why JPL went too far in siding with the hostile attitudes of its employees.

II. LEGAL STANDARD

Evid. Code § 801 prescribes two specific preconditions to the admissibility of expert opinion testimony. The testimony must be of assistance to the trier of fact and must be reliable. Evid. Code, § 801. The opinion of the expert will assist the factfinder if the subject of inquiry is "sufficiently beyond common experience." *Id.* "The 'reliable matter' upon which an expert's opinion must be based varies with each particular subject." *People v. Bowker* (1988) 203 Cal.App.3d 385, 390.

III. ARGUMENT

A. Expert Testimony Is Not Limited To Subjects Beyond Common Experience, But *Sufficiently* Beyond Common Experience *That The Opinion Of An Expert Would Assist The Trier Of Fact.*

JPL argues that expert testimony is not needed because neither intelligent design nor the reactions to it are beyond common experience. Even if that were true – and it is not, but nice try – "[Section 801] does not flatly limit expert opinion testimony to subjects 'beyond common experience.' *People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896. "[R]ather, it limits such testimony to such subjects '*sufficiently* beyond common experience *that the opinion of an expert would assist the trier of fact.*'" *Id.*; italics Accordingly, the admissibility of expert opinion is a question of degree. *Id.* "The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would 'assist' the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.'" *Id.*

B. Intelligent Design And The Societal Phenomenon Of Impassioned Antipathy It Arouses Lies Demonstrably Far Beyond The Range Of Common Experience.

What is intelligent design, and why would Coppedge be accused by his co-workers of *harassing* them and *pushing his religious views* on them by bringing up the topic and casually loaning them DVDs explaining it? Or as David Dewolf, Plaintiff's expert on the societal phenomenon, asks:

- Why would someone tell another person that he/she is barred from discussing intelligent design at the risk of being terminated from employment?
- Why would someone tell another person that "intelligent design is religion" and order that individual to stop "pushing your religion" by discussing intelligent design?

Are the answers to such questions so universally grappled with that an expert armed with historical, sociological and legal sophistication would add nothing to jurors' insight on the issue? If, as JPL contends, neither intelligent design nor the reactions to it are beyond common experience and that jurors are fully capable of deciding the issue based on their own experience, why does JPL fail to provide the court with argument to support its conclusory assertion? If JPL is correct, where does such a common experience originate – popular entertainment? School? Colleges and universities? The dinner table? Church? The office?

The truth is that excessive disdain for intelligent design is an esoteric phenomenon occurring largely within academia and scientific institutions. Examples of discrimination occur largely in the halls of academia – in colleges and universities ostracizing professors, denying tenure, refusing employment and chilling their academic freedom. It is also occurring with scientific institutions. Scientists are denied peer review, research funding and credentials for taking intelligent design seriously. But these actions are taken outside of the public eye. Is one to believe that this phenomenon is *commonly experienced* by jurors?

The war on intelligent design and what the theory holds are topics so far beyond the range of common experience that public schools do not teach it. *See Kitzmiller v. Dover Area School Dist.* (M.D. Pa. 2005) 400 F.Supp.2d 707 (policy of teaching intelligent design violates Establishment Clause). If schools don't teach it, then students are picking it up there. How about offices? Surely, not at JPL – it's forbidden there.

Indeed, the war on intelligent design and what the theory holds is so far beyond the range of common experience that when JPL's attorneys in their Motion in Limine # 2 referred to the very documentary that explains the controversy – "Expelled: No Intelligence Allowed" – they

described it as a "comedic film." (See JPL Motion in Limine #2.) Evidently, what is known by the film's core audience (intelligent design advocates) to be a serious documentary exposing the lack of intellectual freedom in this country is beyond the experience of JPL's attorneys.

The theory of intelligent design and the excessive level of disdain it invokes, a disdain Greg Chin found himself incapable of suppressing in assailing Coppedge, are topics so far beyond the range of common experience even *JPL's own witnesses* – people supporting space missions intended to explore the origin of life and the universe – confess to knowing little or nothing about it:

Exh. No.[1]	WITNESS	KNOWLEDGE OF INTELLIGENT DESIGN	SUPPORTING EVIDENCE
1	Clark Burgess	Borrowed intelligent design DVDs from Coppedge, but still has many questions.	Burgess Dep. Tr., 35:5-11; 165:14-166:5.
2	Greg Chin	Equates intelligent design with "Creationism" and rejects it as hostile to Darwinian evolution. He calls intelligent design "religion." He has never read anything about it nor watched DVDs – even DVDs Coppedge loaned to him – about the subject. Chin was even unaware of Coppedge's prominent role in the intelligent design movement as the host of a website devoted to it and as a board member of the production company producing documentaries on it.	Chin Dep. Tr., 134:14-135:19; 137:19-139:4; 150:3-10; 160:18-161:18; 163:14-164:15; 179:11-182:1;.311:1-25; .
3	Kevin Klenk	Characterizes his understanding of intelligent design as "rudimentary," and he confesses to having no interest in learning about it. He is unaware of any controversy surrounding it.	Klenk Dep. Tr., 149:3-152:5; 154:19-155:5;" 377:15-378:23; 379:15-380:20; 381:5-382:3; 420:12-17.
4	Margaret Weisenfelder	Doesn't understand intelligent design. She equates intelligent design with "Creationism" and believes it is religious dogma. She never studied intelligent design and has no desire to. She is unaware of any controversy over intelligent design. She watched "Unlocking the Mystery of Life," but remembers none of the content.	Weisenfelder Dep. Tr., 30:3-31:5; 32:25-36:15; 113:25-115:12.
5	Carmen Vetter	Doesn't understand intelligent design.	Vetter Dep.Tr., 108:4-113:16; 178:15-20.
6	Scott Edgington	Dismisses intelligent design as religion and refused to even watch the DVD Coppedge	Edgington Dep.Tr., 15:6-18:1; 19:7-25:20.

[1] All exhibits are attached to the Declaration of William J. Becker, Jr., filed concurrently herewith.

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		loaned to him – "The Privileged Planet" – which features several JPL scientists. He is vaguely aware of a court case concerning intelligent design and has read some news articles. He equates intelligent design with "Creationism." He has read no books or other literature on the subject and is unfamiliar with any of the leading players in the intelligent design movement. He nevertheless concludes that intelligent design is an untestable theory.	
7	Jhertaune Huntley	Knows nothing about intelligent design, and did next to nothing to learn about it. She "googled" the term and found a website featuring actor Kirk Cameron in which religion was discussed. She did not talk to anyone versed in intelligent design, and didn't ask Coppedge about it or ask for a copy of his DVDs to watch. Most of what she believes is based on Chin's statements. She did not care to watch the DVDs to find out what intelligent design is.	Huntley Dep.Tr., 96:7-25; 164:11-25; 165:11-15; 166:4-167:9; 168:7-18; 179:17-180:21; 181:9-182: 22; 258:20-259:7; 341:19-342:15; 348:9-349:2; 405:23-406:14.
8	Nancy Aguilera	Has heard of intelligent design, but doesn't know what it is.	Aguilera Dep. Tr., 40:4-11.
9	Dianne Conner	Watched a DVD, believes it was about "divine intervention," but contradictorily states that it did not have religious overtones. She equates intelligent design with Creationism.	Conner Dep.Tr., 97:7-100:2.
10	Bob Mitchell	Dismisses intelligent design as religion and believes that handing out DVDs on intelligent design is "pushing religion." He sees no difference between intelligent design and Creationism, but admits he never studied it and knows little about it. Mitchell states there is a general belief, including among scientists, in Cassini that intelligent design is a religious argument.	Mitchell Dep.Tr., 9:25-13:3; 28:23-25; 66:3-67:20; 68:15-72:19; 85:24-86:4.

Public schools, colleges and universities won't teach it. Academic and scientific institutions inhibit and forbid research on it. JPL's Cassini mission employees don't know anything about it, or erroneously think they do. JPL won't let it be discussed (at least not by its supporters). And JPL's attorneys in this case lack sufficient familiarity with it to know what a key document detailing the controversy is about. If anything can be said to be far beyond the range of common experience of the average juror, it is experience with intelligent design theory and the irrational hostility it seems to invite.

A. Expert Testimony Assists The Jury To Decide Whether Coppedge's Content Was Religious And Whether JPL's Reactions Were Related To A Clash of Religious Ideas.

- Hypothetical #1: Employee tries to loan out a DVD to his co-workers. Some of the co-workers believe the DVD is offensive. Why? Some believe it promotes witchcraft and is anti-religion. The DVD? Harry Potter. However, after reporting Employee on charges of harassment, the co-workers dissemble and deny they were offended.

- Hypothetical #2: Same basic facts, except that Employee tries to loan out a book perceived to be offensive. Why offensive? Some feel its use of stereotypes and epithets is racist. The book? Huckleberry Finn.

- Hypothetical #3: A variant of Hypothetical #2 where the book is Charles Darwin's "On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life." Why offensive? Because it encourages racism, eugenics and/or is anti-Creationist.

If the employee in these hypothetical situations were to be charged with harassment and disciplined, would a jury have enough information to know why? If the witnesses who charged the employee in these situations deny they were offended, how is the employee expected to show a jury they are dissembling?

These hypothetical situations show how evidence of discrimination based upon the objections of co-workers to particular subject matter may not be made apparent by mere reference to the subject matter. Harry Potter and Huck Finn seem inoffensive, so why would a co-worker overreact by claiming harassment? How much do jurors understand about Darwin's book? Are they aware of its full title (and that it is traditionally shortened due to its racist implications and association with eugenics)? Jurors may intuit that there is some disagreement over whether intelligent design is a religious argument, but not know what the disagreement involves or why it attracts such intense negative reactions by some people. And particularly when some witnesses dissemble by claiming not to have been offended by the subject matter, something more is needed to explain the objector's *animus* – the reason for not just expressing mere disagreement but a hostility that yields no reservation for placing an individual's employment standing at risk.

Origins – of the universe and of biological life – were the content of Coppedge's conversations and video materials. Theories of origin come from both purely secular science (*see, e.g.*, Stephen J. Hawking, *A Brief History of Time* (1986), pp. 171-174 (1986) ("Hawking")) and from purely religious texts and beliefs. Genesis 1:1 et seq. The search for theories of origin produces

either a clash or an overlap of science and theology. Studies of astrophysics and quantum mechanics lead to implications about origins and about God. Dr. Hawking observed: "[I]f the universe is completely self-contained, with no singularities or boundaries, and completely described by a unified theory, that has profound implications for the role of God as Creator." Hawking, *ibid.*, at p. 174.

The search for a unifying theory of all physical laws leads directly to questions of origins and even theology. When a unifying theory is someday found, Dr. Hawking declares, "[t]hen we shall all, philosophers, scientists, and just ordinary people, be able to take part in the discussion of the question of why it is that we and the universe exist." Hawking, *ibid.* at p. 175. Unification of science and theology could then appear. Dr. Hawking declares: "If we find the answer to that, it would be the ultimate triumph of human reason – for then we would know the mind of God." *Id.*

A jury is unlikely to know about the work of Dr. Hawking and other scientists who seek the unifying theory that uses purely material forces to scientifically describe origins. Likewise, a jury is unlikely to know about the challenges to Dr. Hawking's views that intelligent design theories of origin present. *See* David Berlinski, *The Devil's Delusion* (2008), pp. 70-71, 100-104, 106-107 (expressly addressing Hawking's views).

So a jury needs to know why Chin's accusing Coppedge of "pushing religion" by discussing intelligent design makes sense. A jury will not likely already know that critics of certain scientific theories of origins are publicly called "religious" or "fundamentalist" or "Bible-beaters" or "creationists." Jurors may know something about Biblical Creationism, and have some vague notion that a controversy akin to the Scopes trial is at work. Jurors may even intuit that JPL's employees showed disdain for views they perceived to be some kind of religious expression. But jurors will not understand or intuit what factors gave rise to levels of religious animus necessitating outward displays of anger (Chin), reports of "harassment" (Weisenfelder) and management's ratification of those actions (e.g., Mitchell's belief that Coppedge was pushing religion by handing out DVDs on intelligent design). This understanding lies outside the common experience of jurors, and therefore calls for expert testimony. *See, e.g., People v. McDonald, supra*, 37 Cal.3d at pp. 367-68 (jurors' personal experience and intuition may be limited, and expert opinion may assist the jury where certain factors may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most.)

B. The California Supreme Court and Other Courts Recognize The Need for Context Facts Underlying Religious Speech and Content Controversies

Were Coppedge's conversations and videos about science, about religion, or potentially about both? To answer this question, the jury needs to know something about the context, the kinds of terminology used, and what positions are taken by participants in the debate. To understand whether Coppedge's views concerned science or religion requires the same kind of analysis as deciding whether a viewpoint is a sincerely held bona fide religious view. A jury would need to learn about the overlap of science and religion in the study of origins. That kind of information requires an expert.

Where the content of a religious view or practice is at issue, the California Supreme Court has recognized that religious viewpoints need to be understood in their factual and philosophical context. In *People v. Woody* (1964) 61 Cal.2d 716, the Court drew upon extensive expert testimony and background fact materials in the record to describe the religious views of Native Americans who use peyote as a central element of their faith. *Id.*, at pp. 720-721. In *Woody*, there was no expectation that a jury, the courts, or readers of the published opinions would know about the sacramental role of peyote in the Native American Church. The *Woody* court thus accepted the background and history of the Church and information about peyote's role from lay and expert testimony and presumably treatises as well.

Likewise here, the jury cannot be expected to understand the interplay between science and theology, and between JPL's presumed view of origins versus a view informed by intelligent design theories. The tension between the two views of origins figures prominently, however, in this case. Expert testimony is routinely received in courts where religious concept questions arise. The crèche (nativity scene) – among the most recognizable icons of Christian Christmas observance – nevertheless was the legitimate subject of expert witness testimony in *Conrad v. City and County of Denver* (Colo. 1982) 656 P.2d 662, 666 ("witnesses included two ministers, who testified as experts on the origin of the Christmas celebration, expressed their opinions that the crèche represents Christianity").

Other precedents recognize the necessity of expert testimony about whether a viewpoint is religious, and whether it is bona fide. In *Konikov v. Orange County* (M.D.Fla. 2003) 290 F.Supp.2d 1315, 1319, the district court held that two Jewish rabbis could testify as experts about

the history and significance of certain observances and rituals because their testimony conveyed "specialized knowledge" to "assist the trier of fact."

In *Theriault v. Carlson* (5th Cir. 1974) 495 F.2d 390, a key issue was whether the defendant's religious views were sham or were bona fide. Expert testimony was crucial to understanding those views, including their history and context. The Fifth Circuit *Theriault* panel thought the evidence should have been admitted at trial. "The Government's attempt to present this proof through expert witnesses was rejected by the district court ...We find the unwillingness of the district court to hear evidence in this regard inexplicable ..." *Id.*, at p. 394.

The question of whether a plaintiff's views are just "personal views" or expressions of "religious views" can be addressed with expert testimony. Thus in *Montgomery v. County of Clinton* (W.D.Mich. 1990) 743 F.Supp. 1253, 1258, the court accepted expert testimony from Jewish rabbis concerning the plaintiff's religious views about defiling a human body by autopsy. Such information was not commonly known: "The average person knows very little of technical rabbinic argument" concerning autopsies. *Id.* (quoting an expert's testimony). The district court judge in *Montgomery* apparently recognized that he needed more context than his own general understanding – the experts supplied that understanding to the court.

C. <u>Expert Witnesses May Testify As To Ultimate Issues In A Case</u>.

JPL's concern for whether DeWolf will testify as to ultimate issues in the case is misplaced and contrary to California law. "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." Evid. Code, § 805; *see People v. McDonald, supra*, at 371 ("California has abandoned the 'ultimate issue' rule ... : "in this state we have followed the modern tendency and have refused to hold that expert opinion is inadmissible merely because it coincides with an ultimate issue of fact.")

"An expert may generally base his opinion on any matter known to him, including hearsay not otherwise admissible, which may reasonably be relied upon for that purpose." *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 294 (internal punctuation omitted). "That the opinion expressed may have included ultimate facts to be decided by the court does not alone make such evidence improper...." *Id.* (expert testified regarding relative percentages of responsibility among subcontractors for defects and damages caused thereby).

DeWolf will *not* purloin what belongs exclusively to the jury. That is a fantasy JPL has concocted to blind jurors to the extreme levels of hostility that drove Weisenfelder, Chin, Vetter and others to accuse Coppedge of "harassment." The jury will determine whether JPL unlawfully discriminated against Coppedge and then retaliated against him, and DeWolf will have nothing to say of it.

D. DeWolf's Opinions Are Relevant To The Issues In This Case.

JPL objects to DeWolf's reliance upon historical references to instances of discrimination. It argues that historical precedents of discrimination cannot explain what transpired in this case. But JPL is simply wrong as to the issue of intelligent design. Coppedge agrees that historical examples of religious discrimination are irrelevant. But what does the average juror understand about intelligent design? A cultural conflict exists over whether intelligent design is religious dogma. How would the jury know that unless an expert schooled in the debate were to explain it? Even if intelligent design was thought to be religious dogma, what explains such hostility to it that a coworker would accuse someone of harassment simply for loaning out a DVD?

JPL contends that similar examples of discrimination would aid nothing to a juror's understanding of the issues in this case. That is precisely the line taken by people who know absolutely nothing about the subject. Indeed, JPL's argument leaves much to be desired in explaining why it feels an expert could not assist the jury under these circumstances. This argument is particularly premature inasmuch as JPL has not deposed DeWolf and does not know what his trial testimony will likely be.[2]

E. Expert Opinion Testimony Is Not Being Offered For The Purpose Of Proving A Witness's Character.

Evidence of an individual's state of mind, including intent, plan, motive and design, is admissible to explain his acts or conduct. Evid. Code § 1250. Evidence relating to a witness's credibility, including the character of his testimony and the existence or nonexistence of a bias, interest, or other motive, is also admissible. Evid. Code § 780.

A person's character or character trait is an emotional, mental, or personality fact constituting a disposition or propensity to engage in a certain type of conduct. Evid. Code §§1100-

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[2] JPL will be taking DeWolf's deposition on December 14, 2011, the date this opposition brief is required to be served and filed. Accordingly, DeWolf's opinions are not fully known at this time and Plaintiff therefore reserves the right to respond to JPL's reply brief to be filed and served one week after DeWolf's deposition, and which is expected to take into account DeWolf's testimony.

1109, 780-791. JPL does not specify any particular "emotional, mental, or personality fact" it anticipates DeWolf will testify about. It is unlikely that DeWolf will try to testify that Chin had a propensity to fly off the handle and therefore accused Coppedge of pushing his religion out of such a propensity, or that Weisenfelder is known to lie and is therefore lying about whether she found the DVD's religious content to be offensive. Indeed, it is unlikely that DeWolf will have any basis for knowing much about their personalities – or would rely on such information to form the basis of his opinions.

IV. CONCLUSION

To quote Marshall McLuhan, a point of view can be a dangerous luxury when substituted for insight and understanding. JPL wants to deprive jurors of such insight and understanding, to obscure the hostile motives of its employees toward Coppedge. This is the proper case for expert testimony concerning a theory unknown to most people and misunderstood by many.

Expert testimony in this case is necessary to place the adverse employment actions taken against Coppedge in proper context. JPL would have the jury believe that Coppedge was simply *too persistent* in broaching the topic of intelligent design with co-workers and therefore imposed his views in a manner justifying punishment, including a demotion and termination. JPL wants jurors to remain uninformed about the real reasons for the severe actions it took. When JPL ordered Coppedge to keep his "personal beliefs" to himself and specifically tied that order to his loaning out of DVDs, when Weisenfelder took the time and trouble to race to Chin's office to claim "harassment" after viewing a DVD, when Chin shouted repeatedly *stop pushing your religion, intelligent design is religion*, when HR's investigator refused to take into account the ideological motives of Coppedge's accusers, when Coppedge's attempts to enlighten his supervisors, Klenk and Burgess, concerning the nature of the DVDs were ignored … something more was at work. JPL knows it, and is worried that the story will finally be told of how intelligent design proponents have been ordered to *the back of the bus*! *Keep your personal beliefs to yourself … unless others bring up the subject of intelligent design first.* That was the unfair order Coppedge was given. DeWolf will explain what it means.

DATED: December 13, 2011

THE BECKER LAW FIRM

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