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 6 CALIFORNIA SCIENCE CENTER FOUNDATION and
 JEFFREY RUDOLPH in his official capacity as President
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11 Attorneys for Plaintiff,
 12 AMERICAN FREEDOM ALLIANCE

13 SUPERIOR COURT, STATE OF CALIFORNIA
 14 COUNTY OF LOS ANGELES
 15 CENTRAL DIVISION

17 AMERICAN FREEDOM ALLIANCE, a
 18 nonprofit corporation,

19 Plaintiff,

20 v.

21 CALIFORNIA SCIENCE CENTER, a legal
 22 entity of the State of California; CALIFORNIA
 SCIENCE CENTER FOUNDATION, a
 23 nonprofit corporation; JEFFREY RUDOLPH, an
 individual; and DOES 1 through 50, inclusive,

24 Defendants.

CASE NO. BC 423687
 [Hon. Terry A. Green, Dept. 14]

**JOINT STATEMENT REGARDING
 DISCOVERY DISPUTE RELATING TO
 CALIFORNIA SCIENCE CENTER
 FOUNDATION'S MOTION TO COMPEL
 FURTHER PRODUCTION OF
 DOCUMENTS FROM PLAINTIFF
 AMERICAN FREEDOM ALLIANCE**

[Notice of Motion and Motion and Declaration of
 James L. Zelenay filed concurrently herewith]

DATE OF FILING OF
 AMENDED COMPLAINT: November 19, 2009

Hearing Date: June 24, 2010
 Hearing Time: 8:45 a.m.
 Hearing Location: Dept. 14

Defendant California Science Center Foundation (the “Foundation”) and Plaintiff American Freedom Alliance (“AFA”) hereby submit this Joint Statement Regarding Defendant California Science Center Foundation’s Motion to Compel Further Production of Documents From Plaintiff American Freedom Alliance. The Parties submit this Joint Statement in lieu of Separate Statements, as ordered by the Court.

I. DISCOVERY REQUESTS RELATING TO AFA COUNSEL'S COMMUNICATIONS WITH THE DISCOVERY INSTITUTE AND ITS COUNSEL

The first item of dispute between the parties subject to the instant Motion to Compel is whether the AFA, in response to the Foundation’s First Set of Requests for Production, must produce documents reflecting communications that AFA’s counsel has had with the Discovery Institute and its counsel. The Foundation claims that these are unprotected communications with a third party witness. The AFA claims that these are privileged communications with an unretained consultant.

This dispute applies globally to the Foundation’s First Set of Requests for Production of Documents. The following examples of requests from the Foundation’s First Set of Requests suffice to inform the Court of the dispute.

The Foundation's Request For Production No. 1

All DOCUMENTS, including but not limited to, all COMMUNICATIONS, REGARDING the CSC EVENT. (“CSC EVENT” shall mean and refer to the event titled “We Are Born of Stars IMAX Screening” that was scheduled for the evening of Sunday, October 25, 2009, at the California Science Center in Los Angeles by American Freedom Alliance.)

AFA's Response To Request For Production No. 1

Plaintiff incorporates by reference the foregoing General Objections. Plaintiff further objects to this request to the extent it seeks information subject to any privilege or immunity, including without limitation the attorney-client privilege and/or the doctrine of work product immunity. Plaintiff further objects to this request on the grounds that it is overly broad, not

1 limited in scope, unduly burdensome, and seeks documents beyond the scope of permissible
2 discovery and not relevant to the subject matter of this litigation or likely to lead to the
3 discovery of admissible evidence. Code of Civil Procedure § 2031.030(c)(1) requires that
4 each item requested be specifically described or that each category of item be reasonably
5 particularized. Plaintiff further objects to this request on the grounds that it is duplicative of
6 other requests and therefore unnecessarily burdensome.

7 Subject to these objections and without waiving them, Responding Party will comply.
8

9 **The Foundation's Claim Why Further Response Is Required To No. 1**

10 The Foundation has learned that the AFA has withheld from production to the Foundation
11 communications that the AFA's counsel has had with the third party Discovery Institute (and
12 the Discovery Institute's counsel). The Foundation became aware of this fact as a result of
13 AFA's alleged inadvertent production of some of these communications, which AFA then
14 requested that the Foundation return or destroy.

15 The Discovery Institute is *the* critical third party witness in this case. Indeed, the
16 Foundation cancelled the event that the AFA was intending to hold at the California Science
17 Center (leading to this suit) because of unapproved press releases and publicity materials that
18 were issued about the event in violation of the contract between the Foundation and the AFA.
19 The AFA has since disclaimed any responsibility for the press releases and publicity
20 materials because it claims that they were issued by an "independent" third party – the
21 Discovery Institute.

22 Now, the AFA is trying to claim that its counsel's written communications to and from
23 members of the Discovery Institute (and its counsel) are privileged or protected by work
24 product because the Discovery Institute is serving as AFA's "unretained consultant" on this
25 case.

26 The Foundation contends that these communications must be produced. Any attempt by
27 the AFA to claim that communications with the Discovery Institute, which – again – is *the*
28 critical third party witness in this case, are protected by the privilege is simply an attempt to

1 shield unprotected communications with a third party from disclosure. (See *Jasper Constr.,*
2 *Inc. v. Foothill Junior College Dist. of Santa Clara County* (1960) 91 Cal.App.3d 1, 17
3 [stating that “[a] litigant cannot silence a witness by having him reveal his knowledge to the
4 litigant’s attorney”].) The Foundation further contends that AFA has not met its burden in
5 demonstrating that these communications to and from members of the Discovery Institute are
6 privileged or protected by work product. (Evid. Code, §§ 912, 952 [communications with
7 third parties presumptively not privileged or protected by work product doctrine].)

8 In the end, AFA is trying to have it both ways. While the Discovery Institute is a distant
9 third party according to AFA when it comes to the press releases and the Foundation’s
10 reasons for cancelling the event, it is a critical consultant for AFA in its litigation against the
11 Foundation. This is improper and the AFA must produce these communications. At the
12 least, the Foundation requests in camera review of these communications. (See *OXY Res.*
13 *Cal. LLC v. Super. Ct.* (2004) 115 Cal.App.4th 874, 896 [courts may conduct in camera
14 review of communications to determine whether attorney-client privilege has been waived].)

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16 **AFA’s Response To The Foundation’s Claim Regarding No. 1**

17 Defendants are not entitled to Plaintiff’s attorney work product. This lawsuit arises
18 from the cancellation of Plaintiff’s fundraising event by Defendants to have been held at
19 Defendants’ IMAX Theater on October 25, 2009. The event was to have featured the
20 screening of a film exploring one aspect of the theory of intelligent design. Defendants
21 cancelled the event only after being lobbied by officials of the Smithsonian Institution, of
22 which the California Science Center is affiliated, and other activists opposed to intelligent
23 design theory.

24 Defendants seek disclosure of attorney work product involving e-mail
25 communications between Plaintiff’s counsel and his consultants at the Discovery Institute on
26 the ground that the Discovery Institute itself (which Plaintiff presumes broadly comprises all
27 officers, employees and agents, including Plaintiff’s consultants) is the “critical witness” in
28 the case. Accepting Defendants’ contention, *arguendo*, the Discovery Institute may therefore

1 be characterized as a “consultant” on the one hand and as a potential “witness” on the other in
2 this case.

3 Consultants: Work product of an attorney's employees or agents (investigators,
4 researchers, etc.) is treated as the “work product” of the attorney. *See Rodriguez v.*
5 *McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647–648. The identities and opinions
6 of experts retained by counsel *solely* as a consultant—to help evaluate the case or to prepare
7 for trial, and *not* as a trial witness—are entitled to qualified “work product” protection. And,
8 so are “derivative” materials created by such consultants to explain or interpret their findings
9 to the attorney (e.g., diagrams, reports and communications to the attorney). *Williamson v.*
10 *Sup.Ct. (Shell Oil Co.)* (1978) 21 C3d 829, 834; Weil & Brown, *Cal. Practice Guide: Civil*
11 *Procedure Before Trial* (The Rutter Group 2010) ¶ 8:246. Protecting such information
12 encourages parties to seek expert advice in evaluating the case. They need not worry about
13 having to disclose unfavorable opinions expressed by the expert; or even the *identity* of such
14 expert (to prevent opposing counsel subpoenaing the expert to testify). Such protection also
15 *encourages experts to serve as consultants*, knowing that doing so will not subject them to
16 subpoenas, depositions, etc. *Williamson v. Sup.Ct. (Shell Oil Co.)*, *supra*; Weil & Brown,
17 *supra*, ¶ 8:247.

18 Witnesses: The “work product” of experts consulted by the attorney and who will *not*
19 testify at trial is likewise treated as the attorney's “work product.” *Scotsman Mfg. v. Sup.Ct.*
20 (1966) 242 Cal.App.2d 527, 530. At this stage of the litigation, there is no basis for believing
21 that Plaintiff's consultants will be required to testify at trial. Notes or recorded statements
22 taken by counsel would be *absolutely* protected because they would reveal counsel's
23 “impressions, conclusions, etc.” within the meaning of *Code of Civil Procedure* §
24 2018.030(a). Weil & Brown, *supra*, ¶ 8:238.3. the testimony which each witness is expected
25 to give at trial is “work product.” Even a description of the “nature” of the witness' testimony
26 (e.g., eyewitness, expert, reputation, etc.) is subject to qualified work product protection. *City*
27 *of Long Beach v. Sup.Ct. (Henderson)* (1976) 64 Cal.App.3d 65, 80. Many witness
28 statements are an “amalgam” of the witness' recorded statement and comments by the

1 interviewing attorney. In such cases, that part of the statement consisting of the *attorney's*
2 *own comments* is absolutely protected under CCP § 2018.030(a) (as a writing reflecting the
3 attorney's "impressions, conclusions, opinions," etc.). And, where the attorney's comments
4 are inextricably intertwined with the witness' statement, the *entire* statement is absolutely
5 protected. *Rodriguez v. McDonnell Douglas Corp.*, *supra*, 87 CA3d at 647–648; Weil &
6 Brown, *supra*, ¶ 8:245.

7 A bare showing of "good cause" is not enough to compel production of materials
8 constituting attorney work product. A court will order disclosure of such materials only if the
9 party seeking discovery can demonstrate *injustice or unfair prejudice*, a much heavier
10 burden. *Code of Civil Procedure* § 2018.030(b), Weil & Brown, *supra*, ¶ 8:245.3a. An
11 attorney's memorandum or notes of an interview with a witness may be treated differently. If
12 the attorney's memo or notes are an "*amalgam*" of the witness' statements *coupled with* the
13 attorney's *impressions* and conclusions, the notes are *absolutely* protected as writings
14 reflecting the opinions and conclusions of the attorney. Weil & Brown, *supra*, ¶ 8:245.5. As
15 with other qualified work product, the court could order disclosure if denial would "unfairly
16 prejudice" the party seeking discovery or otherwise result in an "injustice." However, such
17 disclosure will be ordered only under *exceptional* circumstances. *Id.* at 248. For example, the
18 consultant is the *only* expert qualified on the particular subject; or one side has consulted with
19 *all* the experts in the vicinity ("cornering the expert market"). *See Kenney v. Sup. Ct.*
20 (*Casillas*) (1967) 255 Cal.App.2d 106, 113; Weil & Brown, *supra*, ¶¶ 248-49.

21 Plaintiff's consultants have been identified only through inadvertent production of
22 certain communications. Plaintiff is not obligated to identify its consultants, but in this case,
23 because the Discovery Institute is the only organization qualified on the subject of intelligent
24 design, the revelation should be no surprise. As consultants concerning intelligent design, the
25 movement opposing intelligent design, the suppression of free speech relating to intelligent
26 design by the Smithsonian and other, the Discovery Institute is uniquely qualified to consult
27 with Plaintiff's counsel in this case.

28 Defendants are not entitled to counsel's recorded communications with his

1 consultants, even, and especially if, they are potential witnesses in the case. However, only
2 the Defendants believe that the Discovery Institute is likely to be witness. Defendants have
3 made no showing as to why the organization would be a witness in the case. It is difficult to
4 arrive at an understanding through the implications and innuendo contained in their
5 argument.

6 Finally, Defendants have not demonstrated *injustice or unfair prejudice*. The mere
7 fact that counsel has communicated with the Discovery Institute and that Defendants are not
8 privy to those communications does not present a recognizable act of injustice or unfair
9 prejudice. Presumably, Defendants are in communication with their own consultants and
10 potential witnesses, including Smithsonian officials, who are potential witnesses in the case.
11 Failing to satisfy the burden of showing injustice or unfair prejudice – not merely “good
12 cause” – Defendants’ motion should be denied.

14 **The Foundation’s Request For Production No. 12**

15 All DOCUMENTS REGARDING YOUR relationship with the Discovery Institute.

17 **AFA’s Response To Request For Production No. 12**

18 Plaintiff incorporates by reference the foregoing General Objections. Plaintiff further
19 objects to this request to the extent it seeks information subject to any privilege or immunity,
20 including without limitation the attorney-client privilege and/or the doctrine of work product
21 immunity. Plaintiff further objects to this request on the grounds that it is overly broad, not
22 limited in scope, unduly burdensome, and seeks documents beyond the scope of permissible
23 discovery and not relevant to the subject matter of this litigation or likely to lead to the
24 discovery of admissible evidence. Code of Civil Procedure § 2031.030(c)(1) requires that
25 each item requested be specifically described or that each category of item be reasonably
26 particularized. Plaintiff further objects to this request on the grounds that it is duplicative of
27 other requests and therefore unnecessarily burdensome.

28 Subject to these objections and without waiving them, Responding Party will comply.

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2 **The Foundation's Claim Why Further Response Is Required To No. 12**

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4 The Foundation has learned that the AFA has withheld from production communications
5 that its counsel has had with the Discovery Institute (and the Discovery Institute's counsel).
6 The Foundation became aware of this fact as a result of AFA's alleged inadvertent production
7 of some of these communications, which AFA then requested that the Foundation return or
8 destroy.

9 The Discovery Institute is *the* critical third party witness in this case. Indeed, the
10 Foundation cancelled the event that the AFA was intending to hold at the California Science
11 Center (leading to this suit) because of unapproved press releases and publicity materials that
12 were issued about the event in violation of the contract between the Foundation and the AFA.
13 The AFA has since disclaimed any responsibility for the press releases and publicity
14 materials because it claims that they were issued by an "independent" third party – the
15 Discovery Institute.

16 Now, the AFA is trying to claim that its counsel's written communications to and from
17 members of the Discovery Institute (and its counsel) are privileged or protected by work
18 product because the Discovery Institute is serving as AFA's "unretained consultant" on this
19 case.

20 The Foundation contends that these communications must be produced. Any attempt by
21 the AFA to claim that communications with the Discovery Institute, which – again – is *the*
22 critical third party witness in this case, are protected by the privilege is simply an attempt to
23 shield unprotected communications with a third party from disclosure. (See *Jasper Constr., Inc. v. Foothill Junior College Dist. of Santa Clara County* (1960) 91 Cal.App.3d 1, 17
24 [stating that "[a] litigant cannot silence a witness by having him reveal his knowledge to the
25 litigant's attorney"].) The Foundation further contends that AFA has not met its burden in
26 demonstrating that these communications to and from members of the Discovery Institute are
27 privileged or protected by work product. (Evid. Code, §§ 912, 952 [communications with
28 third parties presumptively not privileged or protected by work product doctrine].)

1 In the end, AFA is trying to have it both ways. While the Discovery Institute is a distant
2 third party according to AFA when it comes to the press releases and the Foundation's
3 reasons for cancelling the event, it is a critical consultant for AFA in its litigation against the
4 Foundation. This is improper and the AFA must produce these communications. At the
5 least, the Foundation requests in camera review of these communications. (See *OXY Res.*
6 *Cal. LLC v. Super. Ct.* (2004) 115 Cal.App.4th 874, 896 [courts may conduct in camera
7 review of communications to determine whether attorney-client privilege has been waived].)

9 **AFA's Response To The Foundation's Claim Regarding No. 12**

10 Defendants are not entitled to Plaintiff's attorney work product. This lawsuit arises
11 from the cancellation of Plaintiff's fundraising event by Defendants to have been held at
12 Defendants' IMAX Theater on October 25, 2009. The event was to have featured the
13 screening of a film exploring one aspect of the theory of intelligent design. Defendants
14 cancelled the event only after being lobbied by officials of the Smithsonian Institution, of
15 which the California Science Center is affiliated, and other activists opposed to intelligent
16 design theory.

17 Defendants seek disclosure of attorney work product involving e-mail
18 communications between Plaintiff's counsel and his consultants at the Discovery Institute on
19 the ground that the Discovery Institute itself (which Plaintiff presumes broadly comprises all
20 officers, employees and agents, including Plaintiff's consultants) is the "critical witness" in
21 the case. Accepting Defendants' contention, *arguendo*, the Discovery Institute may therefore
22 be characterized as a "consultant" on the one hand and as a potential "witness" on the other in
23 this case.

24 Consultants: Work product of an attorney's employees or agents (investigators,
25 researchers, etc.) is treated as the "work product" of the attorney. *See Rodriguez v.*
26 *McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647–648. The identities and opinions
27 of experts retained by counsel *solely* as a consultant—to help evaluate the case or to prepare
28 for trial, and *not* as a trial witness—are entitled to qualified "work product" protection. And,

1 so are “derivative” materials created by such consultants to explain or interpret their findings
2 to the attorney (e.g., diagrams, reports and communications to the attorney). *Williamson v.*
3 *Sup. Ct. (Shell Oil Co.)* (1978) 21 C3d 829, 834; Weil & Brown, *Cal. Practice Guide: Civil*
4 *Procedure Before Trial* (The Rutter Group 2010) ¶ 8:246. Protecting such information
5 encourages parties to seek expert advice in evaluating the case. They need not worry about
6 having to disclose unfavorable opinions expressed by the expert; or even the *identity* of such
7 expert (to prevent opposing counsel subpoenaing the expert to testify). Such protection also
8 *encourages experts to serve as consultants*, knowing that doing so will not subject them to
9 subpoenas, depositions, etc. *Williamson v. Sup.Ct. (Shell Oil Co.)*, *supra*; Weil & Brown,
10 *supra*, ¶ 8:247.

11 Witnesses: The “work product” of experts consulted by the attorney and who will *not*
12 testify at trial is likewise treated as the attorney’s “work product.” *Scotsman Mfg. v. Sup.Ct.*
13 (1966) 242 Cal.App.2d 527, 530. At this stage of the litigation, there is no basis for believing
14 that Plaintiff’s consultants will be required to testify at trial. Notes or recorded statements
15 taken by counsel would be *absolutely* protected because they would reveal counsel’s
16 “impressions, conclusions, etc.” within the meaning of *Code of Civil Procedure* §
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19 (e.g., eyewitness, expert, reputation, etc.) is subject to qualified work product protection. *City*
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22 interviewing attorney. In such cases, that part of the statement consisting of the *attorney’s*
23 *own comments* is absolutely protected under CCP § 2018.030(a) (as a writing reflecting the
24 attorney’s “impressions, conclusions, opinions,” etc.). And, where the attorney’s comments
25 are inextricably intertwined with the witness’ statement, the *entire* statement is absolutely
26 protected. *Rodriguez v. McDonnell Douglas Corp.*, *supra*, 87 CA3d at 647–648; Weil &
27 Brown, *supra*, ¶ 8:245.

28 A bare showing of “good cause” is not enough to compel production of materials

1 constituting attorney work product. A court will order disclosure of such materials only if the
2 party seeking discovery can demonstrate *injustice or unfair prejudice*, a much heavier
3 burden. *Code of Civil Procedure* § 2018.030(b), Weil & Brown, *supra*, ¶ 8:245.3a. An
4 attorney's memorandum or notes of an interview with a witness may be treated differently. If
5 the attorney's memo or notes are an “*amalgam*” of the witness' statements *coupled with* the
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7 reflecting the opinions and conclusions of the attorney. Weil & Brown, *supra*, ¶ 8:245.5. As
8 with other qualified work product, the court could order disclosure if denial would “unfairly
9 prejudice” the party seeking discovery or otherwise result in an “injustice.” However, such
10 disclosure will be ordered only under *exceptional* circumstances. *Id.* at 248. For example, the
11 consultant is the *only* expert qualified on the particular subject; or one side has consulted with
12 *all* the experts in the vicinity (“cornering the expert market”). See *Kenney v. Sup. Ct.*
13 (*Casillas*) (1967) 255 Cal.App.2d 106, 113; Weil & Brown, *supra*, ¶¶ 248-49.

14 Plaintiff's consultants have been identified only through inadvertent production of
15 certain communications. Plaintiff is not obligated to identify its consultants, but in this case,
16 because the Discovery Institute is the only organization qualified on the subject of intelligent
17 design, the revelation should be no surprise. As consultants concerning intelligent design, the
18 movement opposing intelligent design, the suppression of free speech relating to intelligent
19 design by the Smithsonian and other, the Discovery Institute is uniquely qualified to consult
20 with Plaintiff's counsel in this case.

21 Defendants are not entitled to counsel's recorded communications with his
22 consultants, even, and especially if, they are potential witnesses in the case. However, only
23 the Defendants believe that the Discovery Institute is likely to be witness. Defendants have
24 made no showing as to why the organization would be a witness in the case. It is difficult to
25 arrive at an understanding through the implications and innuendo contained in their
26 argument.

27 Finally, Defendants have not demonstrated *injustice or unfair prejudice*. The mere
28 fact that counsel has communicated with the Discovery Institute and that Defendants are not

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privy to those communications does not present a recognizable act of injustice or unfair
prejudice. Presumably, Defendants are in communication with their own consultants and
potential witnesses, including Smithsonian officials, who are potential witnesses in the case.
Failing to satisfy the burden of showing injustice or unfair prejudice – not merely “good
cause” – Defendants’ motion should be denied.
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15 **The Foundation's Request For Production No. 15**

16 All DOCUMENTS REGARDING any COMMUNICATIONS with the Discovery
17 Institute, or any employee, affiliate, member, officer, director, fellow, or contributor thereof,
18 REGARDING publicity or press releases REGARDING the CSC EVENT. (“CSC EVENT”
19 shall mean and refer to the event titled “We Are Born of Stars IMAX Screening” that was
20 scheduled for the evening of Sunday, October 25, 2009, at the California Science Center in
21 Los Angeles by American Freedom Alliance.)
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25 **AFA's Response To Request For Production No. 15**

26 Plaintiff incorporates by reference the foregoing General Objections. Plaintiff further
27 objects to this request to the extent it seeks information subject to any privilege or immunity,
28 including without limitation the attorney-client privilege and/or the doctrine of work product
immunity. Plaintiff further objects to this request on the grounds that it is overly broad, not
limited in scope, unduly burdensome, and seeks documents beyond the scope of permissible
discovery and not relevant to the subject matter of this litigation or likely to lead to the
discovery of admissible evidence. Code of Civil Procedure § 2031.030(c)(1) requires that
each item requested be specifically described or that each category of item be reasonably
particularized. Plaintiff further objects to this request on the grounds that it is duplicative of
other requests and therefore unnecessarily burdensome.

29 Subject to these objections and without waiving them, Responding Party will comply.
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The Foundation's Claim Why Further Response Is Required To No. 15

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3 The Foundation has learned that the AFA has withheld from production to the Foundation
4 communications that its counsel has had with the Discovery Institute (and the Discovery
5 Institute's counsel). The Foundation became aware of this fact as a result of AFA's alleged
6 inadvertent production of some of these communications, which AFA then requested that the
7 Foundation return or destroy.

8 The Discovery Institute is *the* critical third party witness in this case. Indeed, the
9 Foundation cancelled the event that the AFA was intending to hold at the California Science
10 Center (leading to this suit) because of unapproved press releases and publicity materials that
11 were issued about the event in violation of the contract between the Foundation and the AFA.
12 The AFA has since disclaimed any responsibility for the press releases and publicity
13 materials because it claims that they were issued by an "independent" third party – the
14 Discovery Institute.

15 Now, the AFA is trying to claim that its counsel's written communications to and from
16 members of the Discovery Institute (and its counsel) are privileged or protected by work
17 product because the Discovery Institute is serving as AFA's "unretained consultant" on this
18 case.

19 The Foundation contends that these communications must be produced. Any attempt by
20 the AFA to claim that communications with the Discovery Institute, which – again – is *the*
21 critical third party witness in this case, are protected by the privilege is simply an attempt to
22 shield unprotected communications with a third party from disclosure. (See *Jasper Constr., Inc. v. Foothill Junior College Dist. of Santa Clara County* (1960) 91 Cal.App.3d 1, 17
23 [stating that "[a] litigant cannot silence a witness by having him reveal his knowledge to the
24 litigant's attorney"].) The Foundation further contends that AFA has not met its burden in
25 demonstrating that these communications to and from members of the Discovery Institute are
26 privileged or protected by work product. (Evid. Code, §§ 912, 952 [communications with
27 third parties presumptively not privileged or protected by work product doctrine].)

28 In the end, AFA is trying to have it both ways. While the Discovery Institute is a distant

1 third party according to AFA when it comes to the press releases and the Foundation's
2 reasons for cancelling the event, it is a critical consultant for AFA in its litigation against the
3 Foundation. This is improper and the AFA must produce these communications. At the
4 least, the Foundation requests in camera review of these communications. (See *OXY Res.*
5 *Cal. LLC v. Super. Ct.* (2004) 115 Cal.App.4th 874, 896 [courts may conduct in camera
6 review of communications to determine whether attorney-client privilege has been waived].)
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AFA's Response To The Foundation's Claim Regarding No. 15

9 Defendants are not entitled to Plaintiff's attorney work product. This lawsuit arises
10 from the cancellation of Plaintiff's fundraising event by Defendants to have been held at
11 Defendants' IMAX Theater on October 25, 2009. The event was to have featured the
12 screening of a film exploring one aspect of the theory of intelligent design. Defendants
13 cancelled the event only after being lobbied by officials of the Smithsonian Institution, of
14 which the California Science Center is affiliated, and other activists opposed to intelligent
15 design theory.

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17 communications between Plaintiff's counsel and his consultants at the Discovery Institute on
18 the ground that the Discovery Institute itself (which Plaintiff presumes broadly comprises all
19 officers, employees and agents, including Plaintiff's consultants) is the "critical witness" in
20 the case. Accepting Defendants' contention, *arguendo*, the Discovery Institute may therefore
21 be characterized as a "consultant" on the one hand and as a potential "witness" on the other in
22 this case.

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24 researchers, etc.) is treated as the "work product" of the attorney. *See Rodriguez v.*
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26 of experts retained by counsel *solely* as a consultant—to help evaluate the case or to prepare
27 for trial, and *not* as a trial witness—are entitled to qualified "work product" protection. And,
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8 subpoenas, depositions, etc. *Williamson v. Sup.Ct. (Shell Oil Co.)*, *supra*; Weil & Brown,
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11 testify at trial is likewise treated as the attorney’s “work product.” *Scotsman Mfg. v. Sup.Ct.*
12 (1966) 242 Cal.App.2d 527, 530. At this stage of the litigation, there is no basis for believing
13 that Plaintiff’s consultants will be required to testify at trial. Notes or recorded statements
14 taken by counsel would be *absolutely* protected because they would reveal counsel’s
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17 to give at trial is “work product.” Even a description of the “nature” of the witness’ testimony
18 (e.g., eyewitness, expert, reputation, etc.) is subject to qualified work product protection. *City*
19 *of Long Beach v. Sup.Ct. (Henderson)* (1976) 64 Cal.App.3d 65, 80. Many witness
20 statements are an “amalgam” of the witness’ recorded statement and comments by the
21 interviewing attorney. In such cases, that part of the statement consisting of the *attorney’s*
22 *own comments* is absolutely protected under CCP § 2018.030(a) (as a writing reflecting the
23 attorney’s “impressions, conclusions, opinions,” etc.). And, where the attorney’s comments
24 are inextricably intertwined with the witness’ statement, the *entire* statement is absolutely
25 protected. *Rodriguez v. McDonnell Douglas Corp.*, *supra*, 87 CA3d at 647–648; Weil &
26 Brown, *supra*, ¶ 8:245.

27 A bare showing of “good cause” is not enough to compel production of materials
28 constituting attorney work product. A court will order disclosure of such materials only if the

1 party seeking discovery can demonstrate *injustice or unfair prejudice*, a much heavier
2 burden. *Code of Civil Procedure* § 2018.030(b), Weil & Brown, *supra*, ¶ 8:245.3a. An
3 attorney's memorandum or notes of an interview with a witness may be treated differently. If
4 the attorney's memo or notes are an “*amalgam*” of the witness' statements *coupled with* the
5 attorney's *impressions* and conclusions, the notes are *absolutely* protected as writings
6 reflecting the opinions and conclusions of the attorney. Weil & Brown, *supra*, ¶ 8:245.5. As
7 with other qualified work product, the court could order disclosure if denial would “unfairly
8 prejudice” the party seeking discovery or otherwise result in an “injustice.” However, such
9 disclosure will be ordered only under *exceptional* circumstances. *Id.* at 248. For example, the
10 consultant is the *only* expert qualified on the particular subject; or one side has consulted with
11 *all* the experts in the vicinity (“cornering the expert market”). *See Kenney v. Sup.Ct.*
12 (*Casillas*) (1967) 255 Cal.App.2d 106, 113; Weil & Brown, *supra*, ¶¶ 248-49.

13 Plaintiff's consultants have been identified only through inadvertent production of
14 certain communications. Plaintiff is not obligated to identify its consultants, but in this case,
15 because the Discovery Institute is the only organization qualified on the subject of intelligent
16 design, the revelation should be no surprise. As consultants concerning intelligent design, the
17 movement opposing intelligent design, the suppression of free speech relating to intelligent
18 design by the Smithsonian and other, the Discovery Institute is uniquely qualified to consult
19 with Plaintiff's counsel in this case.

20 Defendants are not entitled to counsel's recorded communications with his
21 consultants, even, and especially if, they are potential witnesses in the case. However, only
22 the Defendants believe that the Discovery Institute is likely to be witness. Defendants have
23 made no showing as to why the organization would be a witness in the case. It is difficult to
24 arrive at an understanding through the implications and innuendo contained in their
25 argument.

26 Finally, Defendants have not demonstrated *injustice or unfair prejudice*. The mere
27 fact that counsel has communicated with the Discovery Institute and that Defendants are not
28 privy to those communications does not present a recognizable act of injustice or unfair

1 prejudice. Presumably, Defendants are in communication with their own consultants and
2 potential witnesses, including Smithsonian officials, who are potential witnesses in the case.
3 Failing to satisfy the burden of showing injustice or unfair prejudice – not merely “good
4 cause” – Defendants’ motion should be denied.

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6 **II. DISCOVERY REQUESTS RELATING TO AFA’S FINANCIAL HISTORY**

7

8 The second area of dispute subject to the instant Motion to Compel relates to
9 document requests propounded by the Foundation seeking information from the AFA
10 regarding its financial history, including the revenue it received from events during the last
11 three years, the charitable donations it received during the last three years, its annual
12 operating budget, and its operating expenses. The Foundation contends that it is entitled to
13 this information as it is relevant to AFA’s claim for damages. AFA contends that these
14 requests are unduly burdensome and seek information not relevant to this action. The
15 requests at issue are Request Nos. 57-58 and 61-62 from the Foundation’s First Set of
16 Requests for Production.

17 **The Foundation’s Request For Production No. 57**

18

19 All DOCUMENTS, including all COMMUNICATIONS, REGARDING the revenue
20 American Freedom Alliance has earned from lectures and film screenings during the years
21 2007, 2008, and 2009.

22 **AFA’s Response To Request For Production No. 57**

23

24 Plaintiff incorporates by reference the foregoing General Objections. Plaintiff further
25 objects to this request to the extent it seeks information subject to any privilege or immunity,
26 including without limitation the attorney-client privilege and/or the doctrine of work product
27 immunity. Plaintiff further objects to this request on the grounds that it is overly broad, not
28 limited in scope, unduly burdensome, and seeks documents beyond the scope of permissible

1 discovery and not relevant to the subject matter of this litigation or likely to lead to the
2 discovery of admissible evidence. Code of Civil Procedure § 2031.030(c)(1) requires that
3 each item requested be specifically described or that each category of item be reasonably
4 particularized. Plaintiff further objects to this request on the grounds that it is duplicative of
5 other requests and therefore unnecessarily burdensome.

6 On the basis of these objections and without waiving them, Responding Party cannot
7 comply.

9 **The Foundation's Claim Why Further Response Is Required To No. 57**

10 The Foundation contends that it is entitled to this information as it is directly relevant to
11 AFA's claim for damages, which the Foundation understands to be the lost profits, revenues,
12 and charitable donations that the AFA claims it would have made if the Foundation had not
13 cancelled the event that the AFA was intending to hold at the California Science Center on
14 October 25, 2009. The Foundation asserts that if the AFA is going to contend that it would
15 have made a certain dollar amount at the event, it is relevant whether the AFA made similar
16 revenues and donations in the past from lectures and film screenings. Further, the
17 Foundation contends that it is entitled to information regarding AFA's budget and operating
18 expenses because AFA also appears to contend that the revenues, profits, and donations from
19 the event were going to sustain its budget and expenditures. The case law clearly supports
20 the Foundation in seeking this information. (*Kids' Universe v. In2Labs* (2002) 95
21 Cal.App.4th 870, 883 ["the past volume of business" of an entity is directly relevant to a
22 claim of lost profits or revenues, citing *Grupe v. Glick* (1945) 26 Cal.2d 680, 692-93]; see
23 also *Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal. App. 4th 281, 287-88
24 [plaintiff's past volume of business and financial history relevant to damage calculation];
25 *Heiner v. Kmart Corp.* (2007) 84 Cal. App. 4th 335, 347 [past profitability may be relevant to
26 claim of damages]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2009)
27 78 Cal. App. 4th 847, 890 ["The extent of damages may be measured by 'the past volume of
28 business . . .']]; *Maggio, Inc. v. United Farm Workers* (1991) 227 Cal. App. 3d 847, 870

1 ["The ultimate test" of whether plaintiff can prove damages is "whether there has been
2 operating experience sufficient to permit a reasonable estimate of provable income and
3 expense".) It was only after seeing the Foundation's motion that the AFA agreed to produce
4 these documents, and the Foundation requests an order requiring AFA to comply.
5
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7 **AFA's Response To The Foundation's Claim Regarding No. 57**

8 To prove damages based on lost profit from cancellation of the fundraising event,
9 Plaintiff is not obligated to produce all records of a history of profit from charitable
10 fundraising events, because it can claim lost profit from factors related to the circumstances
11 of this case and from evidence other than documentary evidence of its financial history.
12 Plaintiff has agreed to produce relevant documentation of profit from past events on the
13 condition that the evidence be subject to a privacy agreement and under seal with the Court.
14

15 **The Foundation's Request For Production No. 58**

16 All DOCUMENTS, including all COMMUNICATIONS, REGARDING the charitable
17 donations American Freedom Alliance has received during the years 2007, 2008, and 2009.
18

19 **AFA's Response To Request For Production No. 58**

20 Plaintiff incorporates by reference the foregoing General Objections. Plaintiff further
21 objects to this request to the extent it seeks information subject to any privilege or immunity,
22 including without limitation the attorney-client privilege and/or the doctrine of work product
23 immunity. Plaintiff further objects to this request on the grounds that it is overly broad, not
24 limited in scope, unduly burdensome, and seeks documents beyond the scope of permissible
25 discovery and not relevant to the subject matter of this litigation or likely to lead to the
26 discovery of admissible evidence. Code of Civil Procedure § 2031.030(c)(1) requires that
27 each item requested be specifically described or that each category of item be reasonably
28 particularized. Plaintiff further objects to this request on the grounds that it is duplicative of
other requests and therefore unnecessarily burdensome.

1 On the basis of these objections and without waiving them, Responding Party cannot
2 comply.
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The Foundation's Claim Why Further Response Is Required To No. 58

5 The Foundation contends that it is entitled to this information as it is directly relevant to
6 AFA's claim for damages, which the Foundation understands to be the lost profits, revenues,
7 and charitable donations that the AFA claims it would have made if the Foundation had not
8 cancelled the event that the AFA was intending to hold at the California Science Center on
9 October 25, 2009. The Foundation asserts that if the AFA is going to contend that it would
10 have made a certain dollar amount at the event in charitable donations, it is relevant whether
11 the AFA collected similar donations in the past. Further, the Foundation contends that it is
12 entitled to information regarding AFA's budget and operating expenses because AFA also
13 appears to contend that the revenues, profits, and donations from the event were going to
14 sustain its budget and expenditures. The case law clearly supports the Foundation in seeking
15 this information. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 883 ["the past
16 volume of business" of an entity is directly relevant to a claim of lost profits or revenues,
17 citing *Grupe v. Glick* (1945) 26 Cal.2d 680, 692-93]; see also *Parlour Enterprises, Inc. v.*
18 *Kirin Group, Inc.* (2007) 152 Cal. App. 4th 281, 287-88 [plaintiff's past volume of business
19 and financial history relevant to damage calculation]; *Heiner v. Kmart Corp.* (2007) 84 Cal.
20 App. 4th 335, 347 [past profitability may be relevant to claim of damages]; *Shade Foods, Inc.*
21 *v. Innovative Products Sales & Marketing, Inc.* (2009) 78 Cal. App. 4th 847, 890 ["The
22 extent of damages may be measured by 'the past volume of business']"; *Maggio, Inc. v.*
23 *United Farm Workers* (1991) 227 Cal. App. 3d 847, 870 ["The ultimate test" of whether
24 plaintiff can prove damages is "whether there has been operating experience sufficient to
25 permit a reasonable estimate of provable income and expense"].) It was only after seeing the
26 Foundation's motion that the AFA agreed to produce these documents, and the Foundation
27 requests an order requiring AFA to comply.
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2 **AFA's Response To The Foundation's Claim Regarding No. 58**
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4 To prove damages based on lost profit from cancellation of the fundraising event,
5 Plaintiff is not obligated to produce all records of a history of profit from charitable
6 fundraising events, because it can claim lost profit from factors related to the circumstances
7 of this case and from evidence other than documentary evidence of its financial history.
8 Plaintiff has agreed to produce relevant documentation of profit from past events on the
9 condition that the evidence be subject to a privacy agreement and under seal with the Court.
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12 **The Foundation's Request For Production No. 61**
13

14 All DOCUMENTS REGARDING the claim that "AFA has an annual operating budget of
15 \$350,000," as claimed in paragraph 27 of the Declaration Of Adrian (Avi) Davis In Support
16 Of Application And Order To Show Cause And Temporary Restraining Order, filed October
17 14, 2009.
18
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20 **AFA's Response To Request For Production No. 61**
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22 Plaintiff incorporates by reference the foregoing General Objections. Plaintiff further
23 objects to this request to the extent it seeks information subject to any privilege or immunity,
24 including without limitation the attorney-client privilege and/or the doctrine of work product
25 immunity. Plaintiff further objects to this request on the grounds that it is overly broad, not
26 limited in scope, unduly burdensome, and seeks documents beyond the scope of permissible
27 discovery and not relevant to the subject matter of this litigation or likely to lead to the
28 discovery of admissible evidence. Code of Civil Procedure § 2031.030(c)(1) requires that
each item requested be specifically described or that each category of item be reasonably
particularized. Plaintiff further objects to this request on the grounds that it is duplicative of
other requests and therefore unnecessarily burdensome.

On the basis of these objections and without waiving them, Responding Party cannot
comply.

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The Foundation's Claim Why Further Response Is Required To No. 61

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The Foundation contends that it is entitled to this information as it is directly relevant to AFA's claim for damages, which the Foundation understands to be the lost profits, revenues, and charitable donations that the AFA claims it would have made if the Foundation had not cancelled the event that the AFA was intending to hold at the California Science Center on October 25, 2009. The Foundation contends that it is entitled to information regarding AFA's budget and operating expenses because AFA appears to contend that the revenues, profits, and donations from the event were going to sustain its budget and expenditures. The case law clearly supports the Foundation in seeking this information. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 883 ["the past volume of business" of an entity is directly relevant to a claim of lost profits or revenues, citing *Grupe v. Glick* (1945) 26 Cal.2d 680, 692-93]; see also *Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal. App. 4th 281, 287-88 [plaintiff's past volume of business and financial history relevant to damage calculation]; *Heiner v. Kmart Corp.* (2007) 84 Cal. App. 4th 335, 347 [past profitability may be relevant to claim of damages]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2009) 78 Cal. App. 4th 847, 890 ["The extent of damages may be measured by 'the past volume of business']]; *Maggio, Inc. v. United Farm Workers* (1991) 227 Cal. App. 3d 847, 870 ["The ultimate test" of whether plaintiff can prove damages is "whether there has been operating experience sufficient to permit a reasonable estimate of provable income and expense"].) It was only after seeing the Foundation's motion that the AFA agreed to produce these documents, and the Foundation requests an order requiring AFA to comply.

AFA's Response To The Foundation's Claim Regarding No. 61

To prove damages based on lost profit from cancellation of the fundraising event, Plaintiff is not obligated to produce all records of a history of profit from charitable fundraising events, because it can claim lost profit from factors related to the circumstances of this case and from evidence other than documentary evidence of its financial history.

1 Plaintiff has agreed to produce relevant documentation of profit from past events on the
2 condition that the evidence be subject to a privacy agreement and under seal with the Court.
3

4 **The Foundation's Request For Production No. 62**

5 All DOCUMENTS REGARDING the amount of American Freedom Alliance's operating
6 expenses in 2007, 2008, and 2009 that was paid for by "revenues from events," as referred to
7 in paragraph 27 of the Declaration Of Adrian (Avi) Davis In Support Of Application And
8 Order To Show Cause And Temporary Restraining Order, filed October 14, 2009.
9

10 **AFA's Response To Request For Production No. 62**

11 Plaintiff incorporates by reference the foregoing General Objections. Plaintiff further
12 objects to this request to the extent it seeks information subject to any privilege or immunity,
13 including without limitation the attorney-client privilege and/or the doctrine of work product
14 immunity. Plaintiff further objects to this request on the grounds that it is overly broad, not
15 limited in scope, unduly burdensome, and seeks documents beyond the scope of permissible
16 discovery and not relevant to the subject matter of this litigation or likely to lead to the
17 discovery of admissible evidence. Code of Civil Procedure § 2031.030(c)(1) requires that
18 each item requested be specifically described or that each category of item be reasonably
19 particularized. Plaintiff further objects to this request on the grounds that it is duplicative of
20 other requests and therefore unnecessarily burdensome.

21 On the basis of these objections and without waiving them, Responding Party cannot
22 comply.
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24 **The Foundation's Claim Why Further Response Is Required To No. 62**

25 The Foundation contends that it is entitled to this information as it is directly relevant to
26 AFA's claim for damages, which the Foundation understands to be the lost profits, revenues,
27 and charitable donations that the AFA claims it would have made if the Foundation had not
28 cancelled the event that the AFA was intending to hold at the California Science Center on

October 25, 2009. The Foundation contends that it is entitled to information regarding AFA's budget and operating expenses because AFA appears to contend that the revenues, profits, and donations from the event were going to sustain its budget and expenditures. The case law clearly supports the Foundation in seeking this information. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 883 ["the past volume of business" of an entity is directly relevant to a claim of lost profits or revenues, citing *Grupe v. Glick* (1945) 26 Cal.2d 680, 692-93]; see also *Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal. App. 4th 281, 287-88 [plaintiff's past volume of business and financial history relevant to damage calculation]; *Heiner v. Kmart Corp.* (2007) 84 Cal. App. 4th 335, 347 [past profitability may be relevant to claim of damages]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2009) 78 Cal. App. 4th 847, 890 ["The extent of damages may be measured by 'the past volume of business . . .']]; *Maggio, Inc. v. United Farm Workers* (1991) 227 Cal. App. 3d 847, 870 ["The ultimate test" of whether plaintiff can prove damages is "whether there has been operating experience sufficient to permit a reasonable estimate of provable income and expense"].) It was only after seeing the Foundation's motion that the AFA agreed to produce these documents.

AFA's Response To The Foundation's Claim Regarding No. 62

To prove damages based on lost profit from cancellation of the fundraising event, Plaintiff is not obligated to produce all records of a history of profit from charitable fundraising events, because it can claim lost profit from factors related to the circumstances of this case and from evidence other than documentary evidence of its financial history. Plaintiff has agreed to produce relevant documentation of profit from past events on the condition that the evidence be subject to a privacy agreement and under seal with the Court.

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DATED: May 6, 2010

GIBSON, DUNN & CRUTCHER LLP

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HIS OFFICIAL CAPACITY AS PRESIDENT
OF THE CALIFORNIA SCIENCE CENTER
FOUNDATION

DATED: May 6, 2010

THE BECKER LAW FIRM

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