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SUPERIOR COURT, STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DIVISION

AMERICAN FREEDOM ALLIANCE, a nonprofit corporation,

Plaintiff,

v.

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

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

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.

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

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

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

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

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

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

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 [stating that "[a] litigant cannot silence a witness by having him reveal his knowledge to the litigant's attorney"].) The Foundation further contends that AFA has not met its burden in demonstrating that these communications to and from members of the Discovery Institute are privileged or protected by work product. (Evid. Code, §§ 912, 952 [communications with third parties presumptively not privileged or protected by work product doctrine].)

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

AFA's Response To The Foundation's Claim Regarding No. 1

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

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

be characterized as a "consultant" on the one hand and as a potential "witness" on the other in this case.

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

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

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

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

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

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

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

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

The Foundation's Request For Production No. 12

All DOCUMENTS REGARDING YOUR relationship with the Discovery Institute.

AFA's Response To Request For Production No. 12

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 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.

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

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

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

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

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

The Foundation contends that these communications must be produced. Any attempt by the AFA to claim that communications with the Discovery Institute, which – again – is ***the*** critical third party witness in this case, are protected by the privilege is simply an attempt to 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 [stating that "[a] litigant cannot silence a witness by having him reveal his knowledge to the litigant's attorney"].) The Foundation further contends that AFA has not met its burden in demonstrating that these communications to and from members of the Discovery Institute are privileged or protected by work product. (Evid. Code, §§ 912, 952 [communications with third parties presumptively not privileged or protected by work product doctrine].)

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

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

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

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

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

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

Witnesses: The "work product" of experts consulted by the attorney and who will *not* testify at trial is likewise treated as the attorney's "work product." *Scotsman Mfg. v. Sup.Ct.* (1966) 242 Cal.App.2d 527, 530. At this stage of the litigation, there is no basis for believing that Plaintiff's consultants will be required to testify at trial. Notes or recorded statements taken by counsel would be *absolutely* protected because they would reveal counsel's "impressions, conclusions, etc." within the meaning of *Code of Civil Procedure* § 2018.030(a). Weil & Brown, *supra*, ¶ 8:238.3. the testimony which each witness is expected to give at trial is "work product." Even a description of the "nature" of the witness' testimony (e.g., eyewitness, expert, reputation, etc.) is subject to qualified work product protection. *City of Long Beach v. Sup.Ct. (Henderson)* (1976) 64 Cal.App.3d 65, 80. Many witness statements are an "amalgam" of the witness' recorded statement and comments by the interviewing attorney. In such cases, that part of the statement consisting of the *attorney's own comments* is absolutely protected under CCP § 2018.030(a) (as a writing reflecting the attorney's "impressions, conclusions, opinions," etc.). And, where the attorney's comments are inextricably intertwined with the witness' statement, the *entire* statement is absolutely protected. *Rodriguez v. McDonnell Douglas Corp.*, *supra*, 87 CA3d at 647–648; Weil & Brown, *supra*, ¶ 8:245.

A bare showing of "good cause" is not enough to compel production of materials

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

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

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

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

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.

The Foundation's Request For Production No. 15

All DOCUMENTS REGARDING any COMMUNICATIONS with the Discovery Institute, or any employee, affiliate, member, officer, director, fellow, or contributor thereof, REGARDING publicity or press releases 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. 15

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 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.

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

The Foundation's Claim Why Further Response Is Required To No. 15

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

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

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

The Foundation contends that these communications must be produced. Any attempt by the AFA to claim that communications with the Discovery Institute, which – again – is ***the*** critical third party witness in this case, are protected by the privilege is simply an attempt to 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 [stating that "[a] litigant cannot silence a witness by having him reveal his knowledge to the litigant's attorney"].) The Foundation further contends that AFA has not met its burden in demonstrating that these communications to and from members of the Discovery Institute are privileged or protected by work product. (Evid. Code, §§ 912, 952 [communications with third parties presumptively not privileged or protected by work product doctrine].)

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

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

AFA's Response To The Foundation's Claim Regarding No. 15

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

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

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

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

Witnesses: The "work product" of experts consulted by the attorney and who will *not* testify at trial is likewise treated as the attorney's "work product." *Scotsman Mfg. v. Sup.Ct.* (1966) 242 Cal.App.2d 527, 530. At this stage of the litigation, there is no basis for believing that Plaintiff's consultants will be required to testify at trial. Notes or recorded statements taken by counsel would be *absolutely* protected because they would reveal counsel's "impressions, conclusions, etc." within the meaning of *Code of Civil Procedure* § 2018.030(a). Weil & Brown, *supra*, ¶ 8:238.3. the testimony which each witness is expected to give at trial is "work product." Even a description of the "nature" of the witness' testimony (e.g., eyewitness, expert, reputation, etc.) is subject to qualified work product protection. *City of Long Beach v. Sup.Ct. (Henderson)* (1976) 64 Cal.App.3d 65, 80. Many witness statements are an "amalgam" of the witness' recorded statement and comments by the interviewing attorney. In such cases, that part of the statement consisting of the *attorney's own comments* is absolutely protected under CCP § 2018.030(a) (as a writing reflecting the attorney's "impressions, conclusions, opinions," etc.). And, where the attorney's comments are inextricably intertwined with the witness' statement, the *entire* statement is absolutely protected. *Rodriguez v. McDonnell Douglas Corp.*, *supra*, 87 CA3d at 647–648; Weil & Brown, *supra*, ¶ 8:245.

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

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

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

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

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

II. DISCOVERY REQUESTS RELATING TO AFA'S FINANICAL HISTORY

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

The Foundation's Request For Production No. 57

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

AFA's Response To Request For Production No. 57

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 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.

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

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

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 asserts that if the AFA is going to contend that it would have made a certain dollar amount at the event, it is relevant whether the AFA made similar revenues and donations in the past from lectures and film screenings. Further, the Foundation contends that it is entitled to information regarding AFA's budget and operating expenses because AFA also 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. 57

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.

The Foundation's Request For Production No. 58

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

AFA's Response To Request For Production No. 58

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 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.

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

The Foundation's Claim Why Further Response Is Required To No. 58

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 asserts that if the AFA is going to contend that it would have made a certain dollar amount at the event in charitable donations, it is relevant whether the AFA collected similar donations in the past. Further, the Foundation contends that it is entitled to information regarding AFA's budget and operating expenses because AFA also 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. 58

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.

The Foundation's Request For Production No. 61

All DOCUMENTS REGARDING the claim that "AFA has an annual operating budget of $350,000," as claimed in paragraph 27 of the Declaration Of Adrian (Avi) Davis In Support Of Application And Order To Show Cause And Temporary Restraining Order, filed October 14, 2009.

AFA's Response To Request For Production No. 61

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 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.

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

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

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.

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.

The Foundation's Request For Production No. 62

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

AFA's Response To Request For Production No. 62

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 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.

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

The Foundation's Claim Why Further Response Is Required To No. 62

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.

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.

DATED: May 6, 2010

GIBSON, DUNN & CRUTCHER LLP

By: _____
James L. Zelenay, Jr.,
Attorney for Defendants,
CALIFORNIA SCIENCE CENTER FOUNDATION & JEFFREY RUDOLPH, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE CALIFORNIA SCIENCE CENTER FOUNDATION

DATED: May 6, 2010

THE BECKER LAW FIRM

By: /s/ William J. Becker
William J. Becker, Jr.
Attorneys for Plaintiff,
AMERICAN FREEDOM ALLIANCE