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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JEANNE E. CALDWELL, Plaintiff, v. ROY L. CALDWELL, PH.D., in his official capacity as Director of the University Of California Museum Of Paleontology; DAVID LINDBERG, in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; and MICHAEL D. PIBURN, in his official capacity as Program Director for the National Science Foundation, Defendants.	CASE NO. C05-04166 PJH **MOTION FOR ADMINISTRATIVE RELIEF REGARDING CLARIFICATION OF COURT'S MARCH 13, 2006 ORDER GRANTING THE U.C. DEFENDANTS' MOTION TO DISMISS AND MOTION TO STRIKE; DECLARATION OF LARRY CALDWELL** [Local Rule 7-11] Date: November 20, 2006 (No Hearing) (Opposition due by 11-17-06) Judge: Hon. Phyllis J. Hamilton

Plaintiff, Jeanne E. Caldwell, respectfully moves this court for administrative relief under Local Rule 7-11 with regard to clarification of this court's Order dated March 13, 2006, in which this court, *inter alia*, granted the defendants Roy L. Caldwell and David Lindberg's (jointly referred to as the "UC Defendants") Motion to Dismiss pursuant to F.R.C.P. section 12(b)(6).

At oral argument, Larry Caldwell, one of the attorneys for plaintiff, made an oral motion for leave to file an amended complaint to include the additional allegations that the Understanding Evolution website is aimed at the general public as well as at K-12 teachers, and that defendants have expressly invited members of the general public to visit and use the website, in the event the court decided to grant defendants' motion to dismiss (the "Additional Allegations")..

The court's March 13, 2006 Order does not indicate a ruling on plaintiff's oral motion for leave to amend the complaint as against the UC defendants, and does not state whether plaintiff is barred from filing an Amended Complaint against the UC defendants to include the Additional Allegations, although that outcome is arguably implied by the fact that the Order does not expressly grant plaintiff leave to amend the complaint to allege additional facts regarding the standing issue, though, in plaintiff's counsel's experience, such express leave to amend is typically included in an Order granting a motion to dismiss an initial complaint.

Plaintiff respectfully requests revision of the court's March 13, 2006 to clarify whether the court's granting of the UC defendants' 12(b)(6) motion to dismiss "with prejudice" and without expressly granting plaintiff the right to file and amended complaint is intended to mean that the court has denied plaintiff's oral motion to amend the complaint as indicated above, or whether the court's 01-13-06 Order is intended to leave open the question of whether plaintiff

has permission to file an amended complaint to include the Additional Allegation described above.

Time is of the essence in receiving a ruling on this issue since, if the court is of the opinion that plaintiff's planned amendment of the Complaint to include the Additional Allegations will not change the court's ruling on the standing issue, then plaintiff will proceed directly to appeal as against the federal defendant as well as against the UC defendants on the standing issue, while if the court's ruling is intended to leave open the option for plaintiff to file an Amended Complaint to include the Additional Allegations above, then plaintiff will file an Amended Complaint as against the federal defendant that includes the Additional Allegations, as well as other additional allegations aimed at addressing other purported legal deficiencies raised in the federal defendant's 12(b)(6) motion to dismiss which is set for hearing on March 22nd, and in the UC defendants' Rule 12(b)(6) motion to dismiss.

III. Conclusion

For the foregoing reasons, plaintiff respectfully requests this court to grant administrative relief pursuant to Local Rule 7-11 as follows:

That the court issue a written clarification of its March 13, 2006 Order that includes, in the alternative, the following: (1) a ruling on plaintiff's oral motion to amend the Complaint that was made during the oral argument on the UC Defendants' motion to dismiss, and/or (2) an express statement of whether the March 13, 2006 Order is intended to grant plaintiff leave to file an Amended Complaint to include the Additional Allegations as against the UC Defendants, or whether the March 13, 2006 Order is intended to deny plaintiff leave to file an Amended Complaint to include the Additional Allegations, or whether the March 13, 2006 is intended to

leave open the question of whether plaintiff has leave to filed an Amended Complaint to include the Additional Allegations as against the UC Defendants.

Dated: March 14, 2006 QUALITY SCIENCE EDUCATION FOR ALL

By:_____/ss/ Larry Caldwell_____
Larry Caldwell, Attorney for Plaintiff

DECLARATION OF LARRY CALDWELL

I, Larry Caldwell, declare as follows:

I am an attorney licensed to practice in the State of California and before this court since 1979. I have personal knowledge of each of the following facts. If called upon to do so, I could and would provide competent testimony regarding such facts.

1. As this court will recall, the oral argument on the UC Defendants' Motion to Dismiss pursuant to F.R.C.P. (12)(b)(6) was held on February 8, 2006. I appeared at the oral argument as one of three defense attorneys who spoke on behalf of plaintiff in opposition to the UC Defendants' Motion to Dismiss.

2. During my portion of the oral argument, I made an oral motion for leave to file an amended complaint to include the Additional Allegations referenced in the preceding Motion for Administrative Relief, in the event this court decided to grant the UC Defendants' Motion to Dismiss. As the court may recall, during my oral argument, I expressly brought to the court's attention the additional facts that in September of 2005 , just prior to the filing of this action, the subject "Understanding Evolution" website was revised to include a portal aimed the general public and inviting the general public to use the website --a fact that was conceded in the UC

Defendants' opening Memorandum of Points and Authorities in support of the UC Defendants' Motion to Dismiss, at page 4, lines 4-8.

3. More recently, the federal government defendant, Michael D. Piburn, has filed a Motion to Dismiss under Rule 12(b)(6). As Plaintiff previously notified this court on March 9, 2006, plaintiff intends to exercise her right under F.R.C.P. Rule 15(a) to file an Amended Compliant intended to respond to the purported pleading deficiencies raised in the federal defendant's Motion to Dismiss, which include lack of standing arguments that mirror the standing arguments in the UC Defendants' Motion to Dismiss. Of relevance to this Court's March 13th Order on the UC Defendants' Motion to Dismiss, the allegations plaintiff would add to her Amended Complaint as against the federal defendant would include the Additional Allegations in support of her standing argument. However, if the Court is of the opinion, as suggested in the March 13th Order, that the Additional Allegation would still not satisfy plaintiff's burden of alleging legal standing, then it would appear to be futile for plaintiff to file the Amended Complaint as against the federal defendant, and instead, plaintiff would be inclined to enter into a stipulation and proposed order to go directly to appeal as against the federal defendant as well as the UC Defendants on the standing issue.

4. Given the impending hearing date on the federal defendants' Motion to Dismiss, which is set for hearing on March 22, 2006, I am of the opinion that time is of the essence in receiving ruling from this court on the accompanying Motion for Administrative Relief, since the court's clarification of the March 13th Order will either give plaintiff the "green light" to file an Amended Complaint including the Additional Allegations as against all defendants, or will give plaintiff a clear indication that filing an Amended Complaint containing the Additional Allegations would be futile --and a waste of judicial resources for this court to have to rule on the

federal defendants' likely follow-up motion to dismiss the Amended Complaint-- if this court is of the opinion that an Amended Complaint containing the Additional Allegations still would not meet plaintiff's burden of pleading legal standing.

I declare, under penalty of perjury under the laws of the State of California and the United States of America, that the foregoing is true and correct, is of my own personal knowledge, and indicate such below by my signature executed on this 14th day of March, 2006, in the County of Placer, State of California.

____/ss/ Larry Caldwell_____

Larry Caldwell, Declarant