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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 JEANNE E. CALDWELL,)
14)
15 Plaintiff,)
16)
17 v.)
18 ROY L. CALDWELL, PH.D, in his official)
19 capacity as Director of the University of)
20 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,)
21 Defendants.)

No. C 05-01466 PJH
E-FILING CASE

**REPLY SUPPORTING FEDERAL
DEFENDANTS' MOTION TO DISMISS
FOR LACK OF JURISDICTION AND
FAILURE TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED**

Date: Wednesday, March 22, 2006
Time: 9:00am
Ctrm: 3, 17th Floor

INTRODUCTION

22 Plaintiff Jeanne Caldwell has not filed any arguments or authorities in support of her
23 opposition to the federal defendants' (NSF's) motion to dismiss. Instead, Caldwell has filed a
24 conclusory statement of opposition,¹ and has noted that she plans to move for leave to amend her
25 complaint before the hearing on the federal defendants' motion. Since then, the Court has
26 granted the UC defendants' motion to dismiss, without leave to amend. The Court should grant
27 the federal defendants' motion and vacate the scheduled hearing because the Court's March 13
28 Order resolves the federal defendants' standing argument as well.

¹ This filing was one day late.

1 **I. THE MARCH 13 ORDER RESOLVES THE NSF’S STANDING ARGUMENT.**

2 In its March 13 Order granting the UC defendants’ motion to dismiss, the Court
3 concluded that Caldwell lacked standing to raise her Establishment Clause claim. In particular,
4 the Court held that Caldwell lacked federal taxpayer standing, and could not show an injury in
5 fact. Order at 8, 10. Thus, the March 13 Order establishes that Caldwell lacks standing with
6 respect to the NSF, as well as the UC defendants.

7 **II. CALDWELL’S PROPOSED AMENDMENT WOULD BE FUTILE.**

8 Yesterday, Caldwell filed a Motion for Administrative Relief asking the Court to clarify
9 whether it would allow her to amend her complaint to raise two additional allegations: (1) that
10 the “Understanding Evolution” website is addressed to the general public as well as K-12
11 teachers, and (2) that defendants have expressly invited members of the general public to visit
12 and use the website. Caldwell’s Motion for Admin. Relief at 2. As an initial matter, the March
13 13 Order makes clear that dismissal is “with prejudice.” Order at 13-14. Thus, it is self-evident
14 that Caldwell does not have leave to amend, and the Order requires no further clarification.

15 In any event, the Court should not grant leave to amend because amendment would be
16 futile. *In re: Vantive Corp. Securities Litigation*, 283 F.3d 1079, 1097 (9th Cir. 2002) (noting that
17 the district court need not grant leave to amend where amendment would be futile). The Court’s
18 denial of leave to amend is reviewed for abuse of discretion. *Id.* The Ninth Circuit has held that
19 a district court does not abuse its discretion in denying leave to amend where plaintiffs cannot
20 “point to facts which might be added to save their complaint.” *In re: VeriFone Securities*
21 *Litigation*, 11 F.3d 865, 872 (9th Cir. 1993).

22 Caldwell does not allege additional facts that could save her complaint. Her allegations
23 that the “Understanding Evolution” website is directed to the general public, and expressly
24 invites members of the general public to view it, does not overcome her lack of standing. As the
25 Court noted in the March 13 Order, Caldwell cannot show an injury-in-fact from the
26 “observation of conduct with which [she] disagrees.” Order at 11. Moreover, the
27 “Understanding Evolution” website does not impede Caldwell’s use of the internet, or intrude
28 into her ability to view other content on the internet that is less disagreeable to her. Order at 12

1 (noting the unique nature of the internet and dismissing Caldwell’s analogy to cases involving
2 religious displays in public parks).

3 Any invitation that the “Understanding Evolution” website may make to the general
4 public to view its contents is contained in the website itself; thus, for Caldwell to accept the
5 website’s invitation, she would necessarily have to have already chosen to view the website. It is
6 unclear by what logic the added allegations that Caldwell seeks to add to her complaint would
7 grant her standing when she did not have it before.

8 **III. THE COURT SHOULD VACATE THE HEARING AND ENTER JUDGMENT.**

9 As Caldwell observes in her Motion for Administrative Relief, if the Court does not
10 permit her to amend, then no further proceedings are necessary. Caldwell’s Motion for Admin.
11 Relief at 3. The Court has already decided that dismissal with prejudice is appropriate, and
12 Caldwell has failed to allege additional facts that warrant reconsideration of that decision.
13 Further hearing of the matter is unnecessary, and the Court may enter judgment in favor all
14 defendants.

15 Respectfully submitted,

16 KEVIN V. RYAN
17 United States Attorney

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19 Dated: March 15, 2006

20 _____
21 OWEN P. MARTIKAN
22 Assistant United States Attorney