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JEFFREY RUDOLPH in his official capacity as President
of the California Science Center Foundation

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]

DEFENDANT CALIFORNIA SCIENCE CENTER FOUNDATION'S NOTICE OF MOTION AND MOTION TO COMPEL FURTHER PRODUCTION OF DOCUMENTS FROM PLAINTIFF AMERICAN FREEDOM ALLIANCE

[Declaration of James L. Zelenay, Jr., Joint Statement, and Appendix of Non-California Authorities filed concurrently herewith]

DATE OF FILING OF AMENDED COMPLAINT: November 19, 2009

TRIAL DATE: February 14, 2011

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

NOTICE OF MOTION TO COMPEL

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 24, 2010 at 8:45 a.m., or as soon thereafter as this matter may be heard in Department 14 of the above-entitled Court, the Honorable Terry A. Green presiding, Defendant California Science Center Foundation (the "Foundation"), will and hereby does move to compel the further production of documents in response to its First Set of Requests for Production from Plaintiff American Freedom Alliance ("AFA" or "Plaintiff"). This Motion is brought pursuant to section 2031.310 of the California Code of Civil Procedure.

Through this Motion, the Foundation seeks to compel the production of two categories of documents. First, the Foundation seeks to compel the production of communications that counsel for Plaintiff AFA has had with third party the Discovery Institute and its counsel. The AFA has withheld these documents from production on the claim that they are protected from disclosure by the attorney-client privilege or work product doctrine because the Discovery Institute is purportedly serving as AFA counsel's "unretained consultant" on issues of intelligent design. The Foundation, meanwhile, contends that AFA is using the attorney-client privilege and work product protection to improperly shield unprivileged communications with a critical third party witness in this case and that these communications must be produced.

Second, the Foundation moves to compel the production of documents in response to Document Request Nos. 57-58 and 61-62 of the Foundation's First Set of Requests for Production. These requests seek information regarding AFA's 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, which the Foundation understands to be the lost profits, revenues, and charitable donations that AFA claims it would have made if the Foundation had not cancelled the event that AFA was intending to hold at the California Science Center on October 25, 2009. The Foundation asserts that if AFA is going to contend that it would have made a certain dollar amount at the event, it is relevant whether AFA made similar revenues and 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. AFA, meanwhile, contends that these request are unduly burdensome and seek information not relevant to this action.

Pursuant to sections 2016.040 and 2031.310(b)(2) of the California Code of Civil Procedure, as well as this Court's Order of January 26, 2010, the parties met and conferred about these matters, including in person, and were unable to resolve them informally.[1]

This Motion to Compel is based on this Notice of Motion and Motion to Compel, the attached Memorandum of Points and Authorities in support thereof, the accompanying Declaration of James L. Zelenay, Jr., the Joint Statement, the Appendix of Non-California Authorities, all records and pleadings on file with the Court in this matter, all matters of which the Court may take judicial notice, and all further evidence and argument that may be presented in Reply to any Opposition on this Motion or at the hearing on this Motion.

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

[1] After the AFA received and viewed a draft of the Foundation's Motion to Compel, the AFA agreed to produce the documents that are the subject of the second category at issue – *i.e.*, its financial history records. As AFA is yet to actually produce these documents, the Foundation has continued to include it in this Motion to Compel. The AFA received a draft of the Foundation's Motion pursuant to an agreement of the parties (based upon the Foundation's counsel's misunderstanding of the court's requirement of a joint statement), whereby the Foundation provided its Motion to AFA on a certain date, AFA provided the Foundation its opposing portion by a certain date, and the Foundation provided the AFA its reply portion by a certain date, extended by two days by agreement of AFA's counsel. The parties have since resolved this misunderstanding.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Through this Motion, the Foundation seeks to compel further responses to its First Set of Requests for Production of documents propounded upon AFA. AFA asserts that the attorney-client privilege and the work product doctrine permit it to withhold certain communications its attorney made in the presence of a third party, the Discovery Institute, or that its attorney made directly with the Discovery Institute. AFA has attempted to justify this assertion by claiming that the members of the Discovery Institute are serving as "unretained consultants," educating its counsel on the concept of "intelligent design." This bare and general assertion fails to satisfy AFA's burden of showing that the third party Discovery Institute's participation in these communications with counsel was privileged and was necessary to accomplish the purposes of AFA's consultation with counsel.

Further, members of the Discovery Institute may be among the key fact witnesses in this litigation. Indeed, the outcome of certain issues may hinge on the nature of the relationship between AFA and the Discovery Institute, a relationship that AFA has dismissed as an arm's length and independent relationship until now – surprisingly asserting evidentiary privileges over communications between its counsel and the Discovery Institute. Because AFA cannot meet its burden of showing that these communications with this third party are privileged, and because it is seeking to silence a fact witness through a supposed "unretained" consulting relationship with the Discovery Institute, the Foundation seeks to compel AFA to produce all communications between itself or its attorney and the Discovery Institute.

Second, AFA has also refused to produce key documents concerning its financial history, including records of its ticket sales and profits from its past events.[2] Such records are critical to AFA's ability to prove, and the Foundation's opportunity to challenge, AFA's claim that it suffered monetary damages as a result of the Foundation's cancellation of its event at the California Science

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[2] As set forth in the notice above, after AFA received and viewed a copy of this Motion, it finally agreed to produce these financial history documents (after refusing to do so throughout extensive meet and confer sessions). Given that the AFA is still yet to actually produce these documents, the Foundation continues to move for their production.

Center. California case law makes clear that evidence of past profits from similar events is relevant in evaluating the profits lost or damages suffered as a result of another party's alleged breach of contract, and each of the requests at issue target an element of damages thus far claimed by AFA in this action. The Foundation therefore also seeks to compel AFA to produce these documents.

II. THE LEGAL STANDARD

Under California law, a party that makes a demand for an inspection of documents may move for an order compelling further responses when it believes that an objection in the responding party's response is "without merit." (Code Civ. Proc., § 2031.310, subd. (a)(3).) The party seeking to compel further responses must "set forth specific facts showing good cause justifying the discovery sought by the demand." (*Id.* § 2031.310, subd. (b)(1).)

AFA has failed to meet its burden of refuting the presumption that disclosure of a communication to a third party waives the attorney-client privilege and work product doctrine protections. (See infra Section IV.) Further, the requested documents concerning AFA's financial history are directly relevant to AFA's claim for damages for the alleged breach of contract, and they should be produced.

III. FACTUAL BACKGROUND

AFA's relationship with the Discovery Institute is a key issue in the litigation. The Foundation asserts that it was justified in cancelling the event that AFA had intended to hold at the California Science Center because AFA breached the provision of its contract with the Foundation that required all event publicity to first be approved by the Foundation. (First Amended Complaint ("FAC") ¶ 22.) In response, AFA contends that it should not have been held responsible for breaching the contract, and that the Foundation was wrong in cancelling the event, because the misleading and false promotional materials that the Foundation claims were the cause for its cancellation were issued by an alleged "independent" third party – ***the Discovery Institute***. (FAC ¶ 32.) Further, AFA has consistently claimed that none of its representatives authorized the Discovery Institute to promote the event, let alone release unauthorized publicity. (Declaration of Adrian (Avi) Davis in Support of Application to Show Cause and Temporary Restraining Order, filed Oct. 14, 2009, ("Davis Decl.") ¶ 13.) AFA has also asserted that it had no control, approval, input, or

knowledge of the Discovery Institute's publicity activities. (Davis Decl. ¶ 18; *see also* Declaration of James Zelenay, Jr. ("Zelenay Decl.") Ex. E.)

Discovery, however, has revealed a different story. Specifically, documents produced by the AFA, as well as documents produced by the Discovery Institute, show not only that AFA knew of the misleading publicity that the Discovery Institute was planning on issuing to stir controversy, but that it was actively engaged in promoting such publicity and helping it to occur.

For example, on September 28, 2009, a week before the event was to occur, Robert Crowther of the Discovery Institute sent an email to Peter Bylsma, an agent of AFA, stating that he wanted to make sure that "all contracts [were] in place" between AFA and the Foundation before the Discovery Institute began "aggressively promoting" AFA's event at the Science Center, because: "Once we let the jinni out of the bottle it's likely all hell will break loose . . . . Regardless, this will be a lot of fun." (Zelenay Decl. Ex. F.)

In response, Bylsma stated that he "appreciate[d]" Crowther's "question about possible complaints" and that he would discuss the issue with AFA President, Avi Davis. (Zelenay Decl. Ex. F.) Two days later, AFA's Bylsma informed John West of the Discovery Institute that "we [AFA] are locked in so we are ready to start publicizing the event." (Zelenay Decl. Ex. G.) In the same email, Bylsma talks about the publicity plan with the Discovery Institute. (Zelenay Decl. Ex. G.)

Similarly, on October 2, 2009, John West of the Discovery Institute sent an email to AFA's Bylsma explicitly stating that "[a] press release to the California wire and to Washington DC area media on the screening will also go out early next week from our PR firm." (Zelenay Decl. Ex. H.) This was the press release that led to the cancellation of the Event.

West further stated to AFA's Bylsma: "The national media might get interested because the California Science Center is the west coast affiliate museum of the Smithsonian." (Zelenay Decl. Ex. H.) This was one of the misleading statements in the press release directly leading to the cancellation.

In response, Bylsma of AFA, which has since claimed that it had no knowledge of Discovery Institute's press release, states: "John this is excellent and much appreciated! Please let me know if we get any hits too." (Zelenay Decl. Ex. H.)

And then, following the cancellation of the event by the Foundation due to the misleading press release being issued, the Discovery Institute and AFA continued to collaborate on publicity surrounding the cancellation, all the while AFA claiming that it had no knowledge or control over the Discovery Institute's activities. For instance, on October 8, 2009, after the event was cancelled, Peter Bylsma wrote to John West that he had "just spoke[n] with Avi [of the AFA] and it looks like we have some publicity opportunities out of this you and I should discuss." (Zelenay Decl. Ex. I.)

Thus, far from being a third party entirely removed from the proposed event that AFA had intended to hold at the California Science Center (as claimed by AFA), the Discovery Institute was clearly intimately involved with AFA and AFA was aware of, sponsored, and supported the Discovery Institute's misleading media blitz that led to the cancellation of the event. This directly violated AFA's contract with the Foundation, and provided the Foundation ample cause to cancel AFA's proposed event.

IV. THE COMMUNICATIONS BETWEEN AFA'S COUNSEL AND THE DISCOVERY INSTITUTE ARE NOT PRIVILEGED

Shortly before the commencement of this litigation and continuing after its filing, AFA's counsel has continued with AFA's trend and communicated at great lengths with the Discovery Institute. Specifically, on March 2, 2010, AFA's counsel provided the Foundation with a privilege log, indicating that it had intended to withhold from production a variety of communications that it had with or in the presence of the Discovery Institute. (Zelenay Decl. ¶¶ 10-11 & Ex. C.) Among others, AFA intended to withhold from production communications that its lawyer had with John West of the Discovery Institute, Casey Luskin of the Discovery Institute, and Pete Lepiscopo, an attorney for the Discovery Institute. (Zelenay Decl. ¶¶ 10-11 & Ex. C.) It is presumed that these documents reflect only those communications that were inadvertently produced by AFA's counsel, and that there are additional documents reflecting further communications between AFA's counsel and the Discovery Institute that have not been logged. These documents have been set aside and have not been reviewed by the Foundation. (Zelenay Decl. ¶ 9.)

When confronted about these claims of "privilege," AFA's counsel stated that the Discovery Institute – ***although being the critical third party witness in this case*** – is acting in the role of his

"unretained consultant" on issues of "intelligent design." (Zelenay Decl. ¶ 13.) Counsel for AFA would not elaborate further or indicate whether there was any sort of consultant agreement entered into between him and the Discovery Institute. (*Id.*) Later, counsel for AFA provided further history and information about his "unretained consultant" relationship with the Discovery Institute, but stood by his claim that as "unretained consultants," his communications with this critical third party witness were privileged. (*Id.*) They are not.

The law of California makes clear that communications with third parties are presumptively not privileged or protected by the work product doctrine. (Evid. Code, §§ 912, 952.) The only exceptions to this rule are in those narrow circumstances where the communication with the third person is necessary to further the interest of the client in the consultation or is necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted. (Evid. Code, §§ 912, 952.) Further, the burden in meeting this strict requirement is on the party claiming privilege, not the party moving to compel. (*Sony Computer Entertainment Am., Inc. v. Great Am. Ins. Co.* (2005) 229 F.R.D. 632, 634 [holding privilege waived because client failed to show presence of insurance broker was reasonably necessary to accomplish purpose in consulting counsel].) AFA has not – and cannot – meet this requirement.

California law is clear that a client cannot overcome the presumption that a third party's presence waives the privilege simply by making an unsupported assertion that the third party's presence was reasonably necessary to accomplish the purpose of the legal consultation. (*Id.*) Numerous other courts taking this lead have further held, for instance, that a general assertion that a third party is serving as a consultant – as AFA tries to assert here regarding the Discovery Institute – is simply insufficient to meet the burden of showing that the third party's presence did not waive the attorney-client privilege or the work product protections. (See, e.g., *Himmelfarb v. United States* (9th Cir. 1949) 175 F.2d 924, 939 [determining that presence of accountant was merely "convenient" rather than necessary and that attorney-client privilege was waived by accountant's presence].)

Courts addressing the issue look at the exact role the third party played and whether disclosure of the particular information to the third party was truly necessary for the attorney to effectively serve the client. For instance, a federal district court in California, applying a similar

"necessity" standard, stated that the privilege is waived when a communication is disclosed to a third party, unless conveyance to the third party is "***necessary*** to effectuate the client's consultation." (*United States v. Chevron Texaco Corp.* (N.D. Cal. 2002) 241 F. Supp. 2d 1065, 1072 [holding that communications between accounting firm and party's attorneys were not privileged because attorneys could have understood the tax law issues without consultant's assistance].) The *Chevron* court refused to expand the notion of a "necessary" third party beyond the context in which a third party is "interpreting the client's otherwise privileged communications or data in order to enable the attorney to understand those communications or that client data." (*Id.*) This can occur, for instance, in situations when the third party is essentially serving the function of a "foreign language translator" by interpreting information critical to the legal consultation. (*Id.*) It does ***not*** expand to situations where a third party "is enlisted merely to give his or her own advice about the client's situation." (*Id.*)

These guidelines come from the decision of *United States v. Kovel*, (2d Cir. 1961) 296 F.2d 918, which addressed the application of the attorney-client privilege to communications with third party consultants. In *Kovel*, the court rooted its strict construction of the third party waiver doctrine in the principle that nothing in the privilege "suggests that attorneys, simply by placing accountants, scientists or investigators on their payrolls and maintaining them in their offices, should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend to the latter when operating under their own steam." (*Id.* at 921.) This reasoning applies even more forcefully when the alleged consultant is not even retained, as is the case in the dispute at hand. Indeed, it seems that AFA is trying to argue that anyone that its counsel simply talks to about "intelligent design" or this case may – by that communication alone – become his "unretained consultant," causing the privilege to attach. This is clearly not the law. Something more is required – something that AFA has not shown.

For instance, AFA has shown nothing to adequately explain why its communications with its attorney in the presence of the "unretained" third party Discovery Institute were "reasonably necessary for . . . the accomplishment of the purpose" of its consultation. During meet and confer sessions about this topic, AFA's counsel simply stated that the members of the Discovery Institute are experts in the field of intelligent design. (Zelenay Decl. ¶ 13.) The merits of intelligent design,

however, are not at issue in this dispute. Furthermore, AFA has not demonstrated why the Discovery Institute's "expert" role made it necessary for it to participate in the particular communications at issue. AFA's attorney likely could have adequately rendered his legal advice to AFA without receiving a primer on intelligent design from the Discovery Institute.

Additionally, it is unclear why the Discovery Institute needed to be privy to any confidential communications or attorney work product for it to simply explain the theory of intelligent design to AFA's counsel. The Discovery Institute could have done so without receiving any confidential information from AFA or its attorney.

AFA must establish these key nexuses if it is to carry its burden of demonstrating that the Discovery Institute's presence did not destroy the privilege. As of now, neither the Court nor the Foundation have an idea of the context or the content of the communications at issue.

Ultimately, AFA's assertions that its attorney's communications with the Discovery Institute are protected by the attorney-client privilege and work product doctrine show that AFA is attempting to get the best of both worlds. 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. It appears that AFA's assertion of the privilege may be nothing other than an attempt to shield contacts with a critical third party fact witness. (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"].) Because AFA has not met its burden of showing that the presence of the Discovery Institute did not destroy the privilege, all communications between AFA and its counsel and the Discovery Institute should be produced. Alternatively, if the Court deems appropriate, those documents on the disc that AFA has identified as having been inadvertently produced – containing communications between Discovery Institute and AFA's counsel – should be subject to in camera review for a determination of the privilege. (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].)

V. EVIDENCE OF AFA'S FINANCIAL HISTORY AND THE PAST SUCCESSES OF ITS EVENTS IS DIRECTLY RELEVANT TO ITS CLAIM FOR DAMAGES.

AFA has also failed to yet produce documents in response to the Foundation's requests for documents relevant to AFA's claims of damages in this action. Specifically, the Foundation propounded the following document requests on AFA:

> REQUEST 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.
>
> REQUEST NO. 58: All DOCUMENTS, including all COMMUNICATIONS, REGARDING the charitable donations American Freedom Alliance has received during the years 2007, 2008, and 2009.
>
> REQUEST 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.
>
> REQUEST 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.

(Zelenay Decl. ¶ 6 & Ex. A.) The Foundation propounded these requests because it understands, based upon assertions that AFA has made in this case, that AFA is claiming as damages the lost profits/revenues/donations it would have made from the event at the Science Center had it proceeded. As a result, the Foundation believes it is entitled to information about the past success that the AFA has had with events and with donations, which is directly relevant to AFA's claim of damages. Further, AFA has also asserted that the event at the Science Center would have covered some of its operating expenses and budget. Likewise, the Foundation believes that it is entitled to this information as well.

In response to these discovery requests, AFA simply asserted objections and contended that the information was irrelevant, burdensome, and that it "cannot comply." (Zelenay Decl. ¶ 8 & Ex. B.) This is unacceptable.[3]

Section 2017.010 of California Code of Civil Procedure allows discovery of any matter that is relevant if the matter is admissible or reasonably calculated to lead to the discovery of admissible evidence. Evidence concerning AFA's past events and financial history is directly relevant to AFA's claims for monetary damages, as set forth above. Indeed, as California courts have made clear, "***the past volume of business***" of an entity is directly relevant to a claim of lost profits or revenues – exactly the type of damages AFA claims here. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 883 [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"].) AFA has no excuse for not producing this information.

VI. CONCLUSION

For the reasons set forth above, the Foundation respectfully requests that the Court order AFA to produce it and its counsel's communications with the Discovery Institute, as well as documents responsive to Document Requests Nos. 57-58 and 61-62.

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[3] As indicated above, after AFA received and viewed a copy of this Motion, it agreed to produce these financial history documents (after refusing to do so throughout extensive meet and confer sessions). Given that the AFA is still yet to actually produce these documents, the Foundation continues to move for their production.

DATED: May 6, 2010

GIBSON, DUNN & CRUTCHER LLP

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