

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TAMMY J. KITZMILLER, et al.	§	
	§	
Plaintiffs,	§	Case No. 3:05-MC-053-R
	§	
vs.	§	[related to Civil No. 4:04-CV-2688
	§	pending in the United States
DOVER AREA SCHOOL DISTRICT,	§	District Court for the Middle
And DOVER AREA SCHOOL DISTRICT	§	District of Pennsylvania]
BOARD OF DIRECTORS,	§	
	§	
Defendants.	§	

NON-PARTIES FOUNDATION FOR THOUGHT AND ETHICS AND JON A. BUELL'S REPLY TO PLAINTIFFS' RESPONSE AND BRIEF IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER AND/OR TO QUASH SUBPOENAS

TO THE HONORABLE COURT:

Non-Parties Foundation for Thought and Ethics ("FTE") and Jon A. Buell ("Buell") file this reply to Plaintiffs' Response and Brief in Opposition to Motion for Protective Order and/or to Quash Subpoenas ("Plaintiffs' Response"):

- 1. Plaintiffs' Response concedes that they did not comply with Federal Rule of Civil Procedure 45 in issuing the subpoenas.**

In their response, Plaintiffs admit that they "did not originally include a check along with the subpoena" at the time when they served the subpoenas upon Buell and FTE. Plaintiffs' Response at 7. "[T]he plain meaning of Rule 45 [(b)(1)] requires simultaneous tendering of witness fees and the reasonably estimated mileage allowed by law with service of a subpoena." *In re Dennis*, 330 F.3d 696, 704 (5th Cir. 2003) (quoting *CF&I Steel Corp. v. Mitsui & Co. (USA)*, 713 F.2d 494, 496 (9th Cir. 1983). Plaintiffs subsequent tender of a check to Buell's counsel after the filing of the motion to quash does not remedy this defect. Accordingly,

Plaintiffs' failure to tender a witness fee and mileage allowance at the time they served the subpoena upon Buell invalidates the subpoena. *Id.*; Fed. R. Civ. P. 45(b)(1).

2. Plaintiffs' Response fails to address FTE's and Buell's objections that the subpoenas are overly broad.

In their response, Plaintiffs do not address FTE's and Buell's objections that Plaintiffs' document requests, on their face, are overly broad. Without any limitation, the subpoenas broadly request:

All documents, including but not limited to any drafts, correspondence, notes, reports, memoranda (including those of telephone or oral conversations), e-mails, or letters relating or referring to the following texts: *Biology and Origins*, *Of Pandas and People*, and *The Design of Life: Discovering Signs of Intelligence in Biological Systems*, including but not limited to drafts of the texts themselves.

See Appendix in Support of Non-Parties Foundation for Thought and Ethics and Jon A. Buell's Motion for Protective Order and/or to Quash Subpoenas and Brief in Support filed on May 9, 2005 ("Appendix"), Exhibits A and B.

Fairly read, without any stated time limitation, the subpoenas request almost every document prepared, reviewed or received by FTE and Buell during the past twenty years. FTE has existed for twenty five years. See Appendix, Exhibit D, Buell Affidavit ("Buell Aff."), ¶ 3. FTE published *Biology and Origins* in 1987. See Buell Aff., ¶ 7. *Of Pandas and People* was first published in 1989 and republished in 2003 and 2004. See Buell Aff., ¶ 8. FTE is currently working on a new book, *The Design of Life: Discovering Signs of Intelligence in Biological Systems* ("*The Design of Life*"), which is draft form. See Buell Aff., ¶ 9. Almost everything FTE and/or Buell has done for the past twenty years refers or relates, directly or indirectly, to these three books, and would include FTE's confidential and proprietary information, including unpublished drafts, research materials and data, contracts, donor lists, and financial documents. See Buell Aff., ¶¶ 7-11. As such, because the subpoenas are facially overbroad, FTE's and

Buell's compliance would result in an undue burden and, therefore, the subpoenas should be quashed. *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004); *see also* Fed. R. Civ. P. 45(c)(3)(A)(iv).

3. Plaintiffs' Response mistakenly argues that FTE's and Buell's objections based upon trade secrets, confidential and proprietary information are moot.

FTE and Buell also object to Plaintiffs' subpoenas because they would require the disclosure of FTE's trade secrets or other confidential and proprietary information, including confidential research, development, or commercial information. *See* Fed. R. Civ. P. 45(c)(3)(A)(iii) and (B)(i); *see also* Fed. R. Civ. P. 26(c)(7). Contrary to Plaintiffs' assertions, these objections are not limited to only the draft of *The Design of Life* nor were they mooted by the Pennsylvania Court's ruling that the draft text should be produced pursuant to a strict protective order.

The Pennsylvania Court was only presented with Plaintiffs' request to Defendants to produce a draft of *The Design of Life* which was in the possession of one of Defendants' experts. The Court ruled that the draft was relevant because it had been mentioned by the expert in his expert report. The Court, however, did not order production of this draft text without any limitations. *See* Order dated May 13, 2005 attached as Exhibit I to Supplemental Appendix in Support of Non-Parties Foundation for Thought and Ethics and Jon A. Buell's Motion for Protective Order and/or to Quash Subpoenas and Brief in Support. Instead, implicitly recognizing the confidential nature of the draft, the Court ordered production under a strict protective order seeking to preserve the confidentiality of this document and limiting its disclosure for only purposes of this litigation. *Id.* at 3-4.

The Pennsylvania court's ruling directed at Defendants, not FTE, was limited to the draft materials of the text *The Design of Life*. The Pennsylvania Court was not presented with the

broad request made to FTE and Buell by the subpoenas at issue in this Texas proceeding. *See* Appendix, Exhibits A and B. In any event, as set forth in the Buell Affidavit, Buell and FTE continue to assert that the subpoenas requesting all documents relating or referring to FTE's three texts, which would include unpublished drafts, research materials and data, contracts, donor lists, and financial documents, impermissibly seek its trade secrets and other confidential research, development or commercial information. *See* 45(c)(3)(A)(iii) and (B)(i); *see also* Fed. R. Civ. P. 26(c)(7).

4. Plaintiffs' Response seeks to ignore FTE's and Buell's constitutional rights of academic freedom, freedom of speech and freedom of association.

In their response, Plaintiffs seek to brush aside FTE's and Buell's constitutional rights of academic freedom, freedom of speech and freedom of association. Courts recognize that a privilege based upon the First Amendment commensurate with the privilege afforded to journalists exists for academic scholars such as FTE and Buell engaged in scholarly research. *In re Cusumano*, 162 F.3d 708, 714 (1st Cir. 1998) (Academic researchers and commentators accorded protection from disclosure of pre-publication research); *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 561 (7th Cir. 1984) (Results of scientific research "may enjoy a qualified privilege and are not to be pried into unnecessarily . . ."); *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976) (Information given to third-party university researcher was protected from disclosure). In that regard, the First Circuit has observed:

Courts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information. Journalists are the personification of a free press, and to withhold such protection would invite a "chilling effect on speech," and thus destabilize the First Amendment. The same concerns suggest that courts ought to offer similar protection to academicians engaged in scholarly research. After all, scholars too are information gatherers and disseminators. If their research materials were freely subject to subpoena, their sources would likely refuse to confide in them. As with reporters, a drying-up of sources would sharply curtail the

information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers.

Cusumano, 162 F.3d at 714 (citations omitted).

Moreover, courts also specifically recognize that the First Amendment's protection of academic freedom includes the protection of non-parties from disclosure of their scholarly research. *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1274-77 (7th Cir. 1982); see also *Plough Inc. v. National Academy of Sciences*, 530 A.2d 1152 (D.C. App. 1987). In *Dow*, the Seventh Circuit recognized that a non-party's "interest in academic freedom may properly figure into the legal calculation of whether forced disclosure would be reasonable." *Id.* at 1276-77. The Court determined that subpoenas to university researchers seeking disclosure of their notes, reports, working papers and raw data relating to an on-going study were unenforceable since "there is little to justify an intrusion into university life which would risk substantially chilling the exercise of academic freedom." *Id.* at 1277.

In the present case, FTE and Buell's First Amendment rights are clearly implicated since Plaintiffs' broad document request seeks documents and information relating to FTE's and Buell's scholarly research regarding intelligent design, their advocacy of such ideas, and their association with others in promotion of intelligent design. Production of information and documents related to this exercise of First Amendment rights would have the effect of chilling those rights and dissuading FTE, Buell and those who associate with them from engaging in such protected speech. See *Buell Aff.*, ¶¶ 12-17. Accordingly, the Court must consider FTE's and Buell's First Amendment interests in evaluating whether the documents and information requested in the subpoenas must be produced.

5. Plaintiffs' attempt to minimize the undue burden and expense imposed by the subpoenas upon FTE and Buell is unpersuasive.

In arguing that FTE and Buell will not suffer any undue burden or expense in complying with the subpoenas, Plaintiffs completely ignore Jon Buell's testimony regarding the effort required to respond to the subpoenas and the resulting effect on FTE's ability to conduct its normal operations. *See* Buell Aff., ¶ 11. As Plaintiffs' Response seems to suggest, it is not as easy as handing over all the documents in FTE's possession to Plaintiffs' counsel or experts for their review. If production is ordered, FTE and Buell will need to go through all of the documents in its possession and cull out those documents responsive to the request, those documents not responsive, and those documents which are privileged and confidential (including donor lists and financial information). *Id.* In light of the current status of the documents, this will be a major undertaking with dire resulting consequences to FTE. *Id.* Accordingly, Buell's uncontroverted testimony demonstrates that the subpoenas would subject Buell and FTE to undue burden and unnecessary expense. Fed. R. Civ. P. 45(c)((3)(A)(iv). Such burden and/or expense greatly outweigh any likely benefit. Fed. R. Civ. P. 26(b)(2)(iii).

As set forth in a case cited by Plaintiffs in their response, in determining whether a subpoena presents undue burden on a non-party, courts are to consider seven factors: (1) the relevance of the information requested, (2) the need of the party for the documents, (3) the breadth of the document request, (4) the time period covered by the request, (5) the particularity with which the party describes the requested documents, (6) the burden imposed, and (7) the expense and inconvenience to the non-party. *Wiwa*, 392 F.3d at 818. An examination of these factors weigh heavily in FTE's and Buell's favor in demonstrating the undue burden caused by the subpoenas.

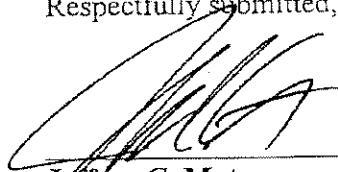
With regard to the first two factors, it is still unclear how all documents spanning a twenty year time period relating or referring to the three texts (two of which are not mentioned by the school district's policy, one published 18 years ago and the other yet to be published) are relevant to the issue presented by the Pennsylvania litigation – whether the school board's policy passed in 2004 is constitutional. Moreover, Plaintiffs have failed to articulate a specific need that they have for such documents. The Plaintiffs have the book mentioned by the school district's policy. It speaks for itself. The Pennsylvania Court can evaluate for itself whether the school board's policy referencing this book is an impermissible establishment of religion as alleged in Plaintiffs' Complaint.

With regard to the third, fourth and fifth factors, as discussed above, the document request is extremely broad, essentially seeking all of FTE's documents for the past twenty years, including unpublished drafts, research materials and data, contracts, donor lists, and financial documents. While Plaintiffs' Response seems to indicate some willingness to cut back on the documents requested and the subjects inquired of at Buell's deposition, as presently stated it is unclear precisely what documents Plaintiffs request and what subjects Plaintiffs seek to question Buell.

Finally, with regard to the sixth and seventh factors, as discussed above and set forth in detail in Buell's Affidavit, the burden and expense upon Jon Buell would be substantial. *See Buell Aff.*, ¶ 11. Taking into consideration this burden with the fact that the request also infringes upon FTE's and Buell's First Amendment rights further demonstrates the substantial burden the subpoenas place on Buell and FTE.

WHEREFORE, Non-Parties Foundation for Thought and Ethics and Jon A. Buell respectfully request that the Court enter a protective order and/or quash the subpoenas issued by Plaintiffs in accordance with Federal Rules of Civil Procedure 26(c) and 45(c) and grant such other and further relief to which they are justly entitled.

Respectfully submitted,



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*Attorneys for Non-Parties Foundation for
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the following attorneys of record in the above cause in accordance with Federal Rules of Civil Procedure, on this 3rd day of June, 2005.

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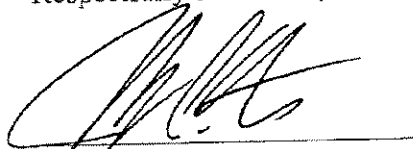
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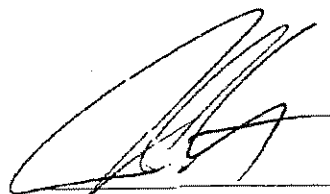
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Supplemental Appendix In Support of Non-Parties Foundation for Thought and Ethics and Jon A. Buell's Motion for Protective Order and/or to Quash Subpoenas and Brief in Support – Page 2

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TAMMY KITZMILLER, et al.	:	Case No. 04cv2688
Plaintiffs	:	
	:	
v.	:	Judge Jones
	:	
DOVER AREA SCHOOL DISTRICT and	:	
DOVER AREA SCHOOL DISTRICT	:	
BOARD OF DIRECTORS,	:	
Defendants.	:	

ORDER

May 13, 2005

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Pending before the Court is a Motion for a Protective Order (doc. 47) filed by Defendants, Dover Area School District and Dover Area School District Board of Directors (collectively "Defendants" or "DASD") on May 4, 2005. We also have before us a Motion for a Protective Order (doc. 52) filed by the non-party Foundation for Thought and Ethics ("FTE") on May 10, 2005.

On May 12, 2005, the Court held a hearing on the above-referenced Motions. During the said proceeding, which was limited to oral argument by counsel, the parties entered into an agreement with respect to a protective order, which the Court will adopt and reduce to writing at this juncture, and which shall apply to all draft materials of the text The Design of Life: Discovering Signs of



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Intelligence In Biological Systems (“The Design of Life”) requested by Plaintiffs’ subpoena. The agreement by the parties regarding the protective order, detailed hereinafter, disposes of a significant portion of Defendants’ Motion, specifically the portion concerning the draft of The Design of Life.

The remaining portion of Defendants’ Motion concerns communications between Defendants’ expert, William Dembski (“Dembski”), and individuals who have collaborated with him in connection with the production of the draft or his other efforts to promote the “Intelligent Design Theory,¹” including his communications with officers, employees, agents, and supporters of the FTE or other individuals with whom Dembski communicates in connection with his association with, and work for, the FTE. (See Defs.’ Mot. Prot. Order at 2). The parties have reserved all rights with respect to this ancillary matter. The parties shall initially attempt to reach an agreement concerning the afore-mentioned communications and only if no agreement can be reached should the parties jointly contact the Court to resolve the matter.

NOW, THEREFORE, IT IS ORDERED THAT:

¹ We note that there is a dispute by the parties as to the phrase “Intelligent Design Theory;” however, we need not reach that issue at this juncture.

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1. Defendants' Motion For a Protective Order (doc. 47) is denied to the extent that Plaintiffs' subpoena regarding draft materials of the text The Design of Life shall be responded to subject to the following provisions:
 - a. Plaintiffs' counsel shall not disclose the text of the draft to any person, except a legal or expert consultant assisting counsel in this case who has been shown a copy of this Order and acknowledged receipt of the Order in writing.
 - b. Prior to disclosure of the text of the draft to an authorized person, Plaintiffs' counsel shall provide five days telephone and e-mail notice to Defendants' counsel of the identity of the person to whom disclosure will be made.
 - c. No person who receives or reviews all or any portion of the text of the draft shall quote it, comment on it, or critique it, except in communications between themselves and Plaintiffs' counsel's consultants, or in testimony in this litigation.
 - d. Any deposition exhibits or transcripts quoting from or containing text of the draft shall be kept confidential and shall not be disclosed to any persons other than those participating in

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this litigation.

- e. Any court filings quoting from or containing text of the draft shall be filed under seal.
- f. These restrictions shall remain in place until the text is published by FTE (or its successor) even if such publication does not occur until after the entry of judgment in this action.
- g. A violation of this Order by any person shall result in the imposition of appropriate and, if necessary, severe sanctions by the Court.

- 2. Both parties reserve the right to re-visit the issue of communications between Dembski and individuals who have collaborated with him in connection with the production of the draft or other efforts to promote the "Intelligent Design Theory" if the parties are unable to reach an agreement in that regard.

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3. Non-Party Foundation for Thought and Ethics' Motion For a Protective Order (doc. 52) is denied.

s/ John E. Jones III
John E. Jones III
United States District Judge