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15 Attorneys for Plaintiff

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17  
18 **IN THE UNITED STATES DISTRICT COURT**  
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
20

21 JEANNE E. CALDWELL,  
22  
23 Plaintiff,

24 v.

25 ROY L. CALDWELL, PH.D., in his  
26 official capacity as Director of the  
27 University Of California Museum Of  
28 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

1 Plaintiff, Jeanne E. Caldwell, respectfully moves this court for administrative  
2 relief under Local Rule 7-11 with regard to clarification of this court's Order dated March 13,  
3 2006, in which this court, *inter alia*, granted the defendants Roy L. Caldwell and David  
4 Lindberg's (jointly referred to as the "UC Defendants") Motion to Dismiss pursuant to F.R.C.P.  
5 section 12(b)(6).

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

12 The court's March 13, 2006 Order does not indicate a ruling on plaintiff's oral motion for  
13 leave to amend the complaint as against the UC defendants, and does not state whether plaintiff  
14 is barred from filing an Amended Complaint against the UC defendants to include the Additional  
15 Allegations, although that outcome is arguably implied by the fact that the Order does not  
16 expressly grant plaintiff leave to amend the complaint to allege additional facts regarding the  
17 standing issue, though, in plaintiff's counsel's experience, such express leave to amend is  
18 typically included in an Order granting a motion to dismiss an initial complaint.  
19

20 Plaintiff respectfully requests revision of the court's March 13, 2006 to clarify whether  
21 the court's granting of the UC defendants' 12(b)(6) motion to dismiss "with prejudice" and  
22 without expressly granting plaintiff the right to file and amended complaint is intended to mean  
23 that the court has denied plaintiff's oral motion to amend the complaint as indicated above, or  
24 whether the court's 01-13-06 Order is intended to leave open the question of whether plaintiff  
25

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27

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

3 Time is of the essence in receiving a ruling on this issue since, if the court is of the  
4 opinion that plaintiff's planned amendment of the Complaint to include the Additional  
5 Allegations will not change the court's ruling on the standing issue, then plaintiff will proceed  
6 directly to appeal as against the federal defendant as well as against the UC defendants on the  
7 standing issue, while if the court's ruling is intended to leave open the option for plaintiff to file  
8 an Amended Complaint to include the Additional Allegations above, then plaintiff will file an  
9 Amended Complaint as against the federal defendant that includes the Additional Allegations, as  
10 well as other additional allegations aimed at addressing other purported legal deficiencies raised  
11 in the federal defendant's 12(b)(6) motion to dismiss which is set for hearing on March 22nd, and  
12 in the UC defendants' Rule 12(b)(6) motion to dismiss.  
13

### 14 **III. Conclusion**

15 For the foregoing reasons, plaintiff respectfully requests this court to grant administrative  
16 relief pursuant to Local Rule 7-11 as follows:  
17

18 That the court issue a written clarification of its March 13, 2006 Order that includes, in  
19 the alternative, the following: (1) a ruling on plaintiff's oral motion to amend the Complaint that  
20 was made during the oral argument on the UC Defendants' motion to dismiss, and/or (2) an  
21 express statement of whether the March 13, 2006 Order is intended to grant plaintiff leave to file  
22 an Amended Complaint to include the Additional Allegations as against the UC Defendants, or  
23 whether the March 13, 2006 Order is intended to deny plaintiff leave to file an Amended  
24 Complaint to include the Additional Allegations, or whether the March 13, 2006 is intended to  
25

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

3 Dated: March 14, 2006

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4  
5 By:           /ss/ Larry Caldwell            
6 Larry Caldwell, Attorney for Plaintiff

7  
8 **DECLARATION OF LARRY CALDWELL**

9 I, Larry Caldwell, declare as follows:

10 I am an attorney licensed to practice in the State of California and before this court since  
11 1979. I have personal knowledge of each of the following facts. If called upon to do so, I could  
12 and would provide competent testimony regarding such facts.

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

17  
18 2. During my portion of the oral argument, I made an oral motion for leave to file an  
19 amended complaint to include the Additional Allegations referenced in the preceding Motion for  
20 Administrative Relief, in the event this court decided to grant the UC Defendants' Motion to  
21 Dismiss. As the court may recall, during my oral argument, I expressly brought to the court's  
22 attention the additional facts that in September of 2005 , just prior to the filing of this action, the  
23 subject "Understanding Evolution" website was revised to include a portal aimed the general  
24 public and inviting the general public to use the website --a fact that was conceded in the UC  
25

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

3 3. More recently, the federal government defendant, Michael D. Piburn, has filed a  
4 Motion to Dismiss under Rule 12(b)(6). As Plaintiff previously notified this court on March 9,  
5 2006, plaintiff intends to exercise her right under F.R.C.P. Rule 15(a) to file an Amended  
6 Compliant intended to respond to the purported pleading deficiencies raised in the federal  
7 defendant's Motion to Dismiss, which include lack of standing arguments that mirror the  
8 standing arguments in the UC Defendants' Motion to Dismiss. Of relevance to this Court's  
9 March 13<sup>th</sup> Order on the UC Defendants' Motion to Dismiss, the allegations plaintiff would add  
10 to her Amended Complaint as against the federal defendant would include the Additional  
11 Allegations in support of her standing argument. However, if the Court is of the opinion, as  
12 suggested in the March 13<sup>th</sup> Order, that the Additional Allegation would still not satisfy  
13 plaintiff's burden of alleging legal standing, then it would appear to be futile for plaintiff to file  
14 the Amended Complaint as against the federal defendant, and instead, plaintiff would be inclined  
15 to enter into a stipulation and proposed order to go directly to appeal as against the federal  
16 defendant as well as the UC Defendants on the standing issue.

17  
18  
19 4. Given the impending hearing date on the federal defendants' Motion to Dismiss,  
20 which is set for hearing on March 22, 2006, I am of the opinion that time is of the essence in  
21 receiving ruling from this court on the accompanying Motion for Administrative Relief, since the  
22 court's clarification of the March 13<sup>th</sup> Order will either give plaintiff the "green light" to file an  
23 Amended Complaint including the Additional Allegations as against all defendants, or will give  
24 plaintiff a clear indication that filing an Amended Complaint containing the Additional  
25 Allegations would be futile --and a waste of judicial resources for this court to have to rule on the

26  
27 PLAINTIFF'S MOTION FOR ADMINISTRATIVE RELIEF

