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8 Attorneys for Defendant
SALK INSTITUTE FOR BIOLOGICAL STUDIES

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN DIEGO

12 KATHERINE A. JONES,
13 Plaintiff,
14 v.
15 SALK INSTITUTE FOR BIOLOGICAL
STUDIES; and DOES 1-50,
16 Defendants.

17 VICTORIA J. LUNDBLAD, Ph.D.,
18 Plaintiff,
19 v.
20 SALK INSTITUTE FOR BIOLOGICAL
STUDIES; and DOES 1-50,
21 Defendants.

22 BEVERLY M. EMERSON, Ph.D.,
23 Plaintiff,
24 v.
25 THE SALK INSTITUTE FOR
26 BIOLOGICAL STUDIES, SAN DIEGO,
CALIFORNIA; and DOES 1-50,
27 Defendants.
28

No. 37-2017-00025159-CU-OE-CTL

Consolidated with:

No. 37-2017-00025248-CU-OE-CTL &
No. 37-2017-00026375-CU-OE-CTL

**NOTICE OF EXHIBITS TO SALK
INSTITUTE FOR BIOLOGICAL STUDIES'
OBJECTIONS TO AND REQUEST TO
STRIKE PLAINTIFF BEVERLY M.
EMERSON'S IMPROPERLY FILED
PRIVILEGED MATERIAL**

Date: August 17, 2018
Time: 1:30 p.m.
Dept.: C-67
Judge: Hon. Eddie C. Sturgeon


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TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the meet and confer correspondence referred to in Salk Institute for Biological Studies’ Objections to, and Request to Strike, Plaintiff Beverly M. Emerson’s Improperly Filed Privileged Material are attached as **Exhibits A & B.**

Dated: August 3, 2018

COOLEY LLP
STEVEN M. STRAUSS (99153)
SUMMER J. WYNN (240005)
CATHERINE J. O’CONNOR (275817)
MARKIE B. JORGENSEN (317032)

By: 

Summer J. Wynn (240005)

Attorneys for Defendant
SALK INSTITUTE FOR BIOLOGICAL
STUDIES

182638501

EXHIBIT A



Summer J. Wynn
+1 858 550 6030
swynn@cooley.com

Via Email

July 28, 2018

Arleen Haeggquist
Haeggquist & Eck, LLP
225 Broadway, Suite 2050
San Diego, CA 92101
alreenh@haelaw.com

Re: *Emerson v. Salk Institute for Biological Studies*, Case No. 27-2017-00026375-CU-OE-CTL

Dear Alreen:

We write regarding Exhibit 129 to Plaintiff Emerson's Opposition to Salk's Motion for Summary Adjudication. This document is protected by both mediation confidentiality and the settlement privilege. See CAL. EVID. CODE §§ 1119, 1152. Salk objected on these exact grounds when Dr. Blackburn was questioned about identical communications sent to Plaintiffs Jones and Lundblad, during her July 10, 2018 deposition. (Tr. at 241:14-244:8, 252:5-254:16.) Salk also objected when you questioned Dr. Blackburn about this document. (Tr. at 414:21-418:5.) Nonetheless, and even though you filed numerous documents conditionally under seal, you filed Exhibit 129 publicly with your Opposition, and also quoted it extensively in other publicly filed documents, including the Opposition brief and Plaintiff Emerson's declaration.

Plaintiff Emerson cannot waive the privilege on behalf of Salk, and has no right to use privileged documents to oppose summary judgment. We request that you immediately withdraw Exhibit 129 from the public record, and submit revised versions of any documents that quote from it. You must also mark this document "Confidential" under the Protective Order and refrain from sharing or discussing it with any individuals who are not parties to the communication.

If you do not immediately withdraw the privileged communications from the public record, we will be forced to file a motion to strike and reserve the right to also seek sanctions for having to do so. We also reserve all other rights and appropriate remedies. Please contact me if you would like to discuss.

Sincerely,

A handwritten signature in blue ink, appearing to read "Summer J. Wynn".

Summer J. Wynn

182216553

EXHIBIT B



August 2, 2018

VIA: EMAIL

Steven M. Strauss
Summer J. Wynn
Catherine J. O'Connor
COOLEY LLP
4401 Eastgate Mall
San Diego, CA 92121-1909

Re: *Emerson v. The Salk Institute for Biological Studies, San Diego, California,*
Case No. 37-2017-00025159-CU-OE-CTL

Dear Summer,

We have considered your July 28, 2018 letter regarding Dr. Blackburn's June 30, 2017 email to Dr. Emerson, subject "From Elizabeth Blackburn," which was attached to Dr. Emerson's Opposition to Salk's Motion for Summary Adjudication as Exhibit 129. We respectfully disagree with Salk's claim that Exhibit 128 is protected by mediation confidentiality (Evidence Code §1119) or is an inadmissible settlement discussion (Evidence Code §1152).

First, Dr. Blackburn's email is not protected by mediation confidentiality because it was not "made" or "prepared for the purpose of, in the course of, or pursuant to, a mediation ..." Evid. Code §1119. The email at issue was sent on June 30, 2017, a few days before the parties' July 5, 2017 mediation. Though both Salk and Dr. Emerson were represented by counsel, Dr. Blackburn sent this email directly to Dr. Emerson via their Salk email addresses without the inclusion of counsel and without designating the communication as "confidential" or "privileged" (even though Salk designated other communications and documents sent at that time as either "confidential/privileged" or "confidential mediation privileged"). Salk has the burden of showing that Dr. Blackburn's June 30, 2017 email is protected by mediation confidentiality. *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137, 160 (2007). "To do so, the timing, context, and content of the communication all must be considered." *Ibid.* Communications "between the parties are not protected ... simply because the [communications] might have occurred temporally before a scheduled mediation." *Id.*, at 161. Essentially, Salk must show a link between the email and the mediation – that the email was "materially related to, and foster[ed], the mediation" such that the "writing or statement would not have existed but for a mediation communication, negotiation, or settlement discussion." *Id.*, at 160.

Nothing about the “context” or “content” of Dr. Blackburn’s email or deposition testimony indicates that her email was “prepared for the purpose of, in the course of, or pursuant to, a mediation.” Evid. Code §1119(b); *Wimsatt, supra*, 152 Cal. App. 4th at 160. In fact, Dr. Blackburn explicitly stated that she was writing to Dr. Emerson as a “scientist ... colleague ... and friend” in an effort to “step away from the legal process.” Dr. Blackburn does not mention the mediation or settlement and instead, just asks to “talk” to Dr. Emerson about their “differences” at her “earliest convenience,” indicating that the email would have existed regardless of the mediation. *Wismatt*, 152 Cal. App. 4th at 160. Further, the email is not protected by mediation confidentiality simply because it was sent a few days before the scheduled mediation. *Id.*, at 161. Aside from Salk’s objections during Dr. Blackburn’s deposition, Salk has not shown that Dr. Blackburn’s email was “materially related to, and foster[ed], the mediation.” *Id.*, at 160.

Second, Dr. Blackburn’s email is not an inadmissible settlement discussion because it cannot be “reasonably construed as a compromise offer of settlement to resolve” the claims at issue at that time. *Lofton v. Wells Fargo Home Mortgage*, 230 Cal. App. 4th 1050, 1069 (2014). Dr. Blackburn did not “furnish[] or offer[] or promise[] to furnish money or any other thing, act, or service” in compromise for the vague “differences” she refers to in the email. Evid. Code §1152(a). In fact, Dr. Blackburn did not promise to do anything except to “adjust my schedule to meet at your earliest convenience” and instead, threatened Dr. Emerson’s future at Salk if she moved forward with litigation. Further, outside of Dr. Blackburn’s email, there were no pending settlement negotiations besides the parties’ agreement to go to mediation. As such, the email cannot be seen as “statements made in negotiation” of an offer to compromise because there were no offers. Finally, even if the email could be construed as a settlement discussion, it related only to the claims that existed at that time and not to the retaliation and wrongful termination claims, which did not arise until months later. As such, the email is admissible to prove these entirely different claims. See *Hawran v. Hixon*, 209 Cal. App. 4th 256, 296-297 (2012) (discussions relating to settlement of threatened wrongful termination claim admissible to show a binding agreement was reached regarding terms of resignation “for purposes of a different, subsequent, breach of contract claim”); *Zhou v. Unisource Worldwide*, 157 Cal. App. 4th 1471, 1478-1479 (2007) (settlement letters relating to one car accident admissible to limit damages relating to a separate car accident); *Fieldson Associates, Inc. v. Whitecliff Laboratories, Inc.*, 276 Cal. App. 2d 770, 772 (1969) (settlement letters from breach of contract action admissible to defend against cross-complaint for lost profits based on breach of a different contract).

Steven M. Strauss
Summer J. Wynn
Catherine J. O'Connor
August 2, 2018
Page 3

If you would like to discuss or provide any additional authority or information, we are happy to consider it. However, at this time, we cannot agree to Salk's demand that we withdraw Exhibit 129 and submit revised versions of the documents that quote from it.

Sincerely,

A handwritten signature in blue ink that reads "Jenna Rangel". The signature is written in a cursive style with a large, looped initial "J".

JENNA RANGEL

Enclosure

cc: John Gomez, Esq.
Deborah Dixon, Esq.
Kelly McDaniel, Senior Paralegal

1 **PROOF OF SERVICE**

2 I am a citizen of the United States and a resident of the State of California. I am over the
3 age of 18 years, and not a party to the within action. My business address is Cooley LLP, 4401
4 Eastgate Mall, San Diego, California 92121. On August 3, 2018, I served the following
5 documents on the parties listed below in the manner(s) indicated:

6 **1. NOTICE OF EXHIBITS TO SALK INSTITUTE FOR BIOLOGICAL STUDIES’ OBJECTIONS TO**
7 **AND REQUEST TO STRIKE PLAINTIFF BEVERLY M. EMERSON’S IMPROPERLY FILED**
8 **PRIVILEGED MATERIAL**

9 (BY OVERNIGHT MAIL – CCP § 1013(c)) I am personally and readily familiar
10 with the business practice of Cooley LLP for collection and processing of
11 correspondence for overnight delivery, and I caused such document(s) described
12 herein to be deposited for delivery to a facility regularly maintained by Federal
13 Express for overnight delivery.

14 (BY ELECTRONIC MAIL – CCP § 1010.6(a)(6)) Based on a court order or an
15 agreement of the parties to accept service by e-mail or electronic transmission, I
16 caused such documents described herein to be sent to the persons at the e-mail
17 addresses listed below. I did not receive, within a reasonable time after the
18 transmission, any electronic message or other indication that the transmission was
19 unsuccessful.

20 John H. Gomez
john@gomeztrialattorneys.com
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Attorneys for Plaintiff
BEVERLY M. EMERSON, Ph.D.

21 Attorneys for Plaintiff
22 KATHERINE A. JONES and
VICTORIA J. LUNDBLAD, Ph.D.

23 I declare under penalty of perjury under the laws of the State of California that the above
24 is true and correct. Executed on August 3, 2018, at San Diego, California.

25 *Marisa Salas*
26 _____
27 Marisa Salas
28