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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Freelife International, Inc.,)

No. CV-07-2210-PHX-DGC

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Plaintiff,)

ORDER

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v.)

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American Educational Music Publications,)

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Inc., a Delaware company; David Lucas)

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Burge,)

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Defendants.)

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This case arises on Plaintiff’s Motion to Privately Disclose Attorneys’ Fees

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to Settlement Conference Judge and Motion for Expedited Consideration,¹ filed on

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January 25, 2010. (docket # 169) Plaintiff Freelife International, Inc. (“Freelife” or

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“Plaintiff”) requests “that the parties not be required to disclose an estimate of the costs

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and time to be expended for trial, including the parties’ past and future attorneys’ and

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experts’ fees, in their Settlement Conference Memoranda.” (*Id.* at 1) “Defendants have no

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objection to the mutual disclosure of attorney fee information. . . .” (docket # at 172 at 1)

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The Court will deny Plaintiff’s Motion but will enter a *sua sponte* protective order that all

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parties are prohibited from disclosing or otherwise publicizing the other party’s attorneys’

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¹ Fortuitously, the undersigned Magistrate Judge was provided the only notice of Plaintiff’s Motion by Judge Campbell’s Judicial Assistant. Plaintiff’s counsel did not provide a copy to the undersigned’s ECF mailbox, contrary to LRCiv 40.2(d), despite the undersigned’s issuance of the order about which Plaintiff objects.

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1 and experts' fees in this case in any extrajudicial fashion without prior authorization to do
2 so by the assigned District Judge, the Honorable David G. Campbell.

3 **BACKGROUND**

4 The docket reflects the Complaint was filed on October 15, 2007 in the
5 Maricopa County Superior Court and removed to this District Court nearly two and a half
6 years ago. This dispute arises out of a website – www.breathe.org (“Breathe website”) –
7 that Plaintiff claims Defendants created to publish numerous false and defamatory
8 statements about FreeLife’s business and its products. (docket # 21 at 2) Claims of
9 defamation (Count I), tortious interference with business relationships (Count II), and
10 breach of contract (Count III) were initially alleged in the Complaint. (*Id.* at 2-3) The
11 parties have vigorously prosecuted and defended the claims, defenses and counter-claim
12 by filing numerous dispositive motions and engaging in extensive discovery. On October
13 1, 2009, Judge Campbell granted in part and denied in part Plaintiff’s motion for partial
14 summary judgment on the breach of contract claim, granted Plaintiff’s motion for
15 summary judgment on Defendant Burge’s defamation counterclaim, and denied
16 Defendants’ motion for summary judgment on Plaintiff’s claims. (docket # 120) There
17 are numerous motions *in limine* pending for ruling. A jury trial is scheduled for April 6,
18 2010 before Judge Campbell. (docket # 158)

19 After two unsuccessful attempts at private mediation in 2008 and 2009
20 before a well-respected, retired Maricopa County Superior Court Judge, one or more of
21 the parties requested a settlement conference with a United States Magistrate Judge. On
22 December 22, 2009, the Judge Campbell referred this case by random assignment to the
23 undersigned Magistrate Judge for purposes of conducting a settlement conference.
24 (docket # 158)

25 After conferring with counsel about mutually agreeable dates and times and
26 considering that an out-of-district party will appear telephonically from India, this Court
27 entered a Settlement Conference Order on January 19, 2010, setting the settlement
28 conference for Thursday, February 4, 2010 at 10:00 a.m. (docket # 167) The Court

1 ordered, *inter alia*, that each party “provide the Court with the original of that party’s
2 Settlement Conference Memoranda, **at least, three (3) business days before the**
3 **Settlement Conference**”; the Settlement Conference Memoranda shall not be filed with
4 the Clerk but shall be exchanged between the parties; and the Settlement Conference
5 Memoranda shall include “[a]n estimate of the costs and time to be expended for further
6 discovery, pretrial and trial, including past and future attorneys’ and experts’ fees.” (*Id.* at
7 5) (emphasis in original).

8 Plaintiff FreeLife objects to the disclosure of its past and estimated future
9 attorneys’ and experts’ fees to the adverse parties because Plaintiff is “very sensitive to
10 the opposing party gaining access to confidential attorneys’ fees information” as
11 Defendants might publicize “this information . . . on the Breathe website in a further
12 effort to embarrass FreeLife.” (*Id.* at 2) For authority, Plaintiff cites a non-controlling
13 district court opinion “that requiring the production of attorneys’ fees information prior to
14 a fee application may be unwarranted[, citing] *Abels v. JBC Legal Group, P.C.*, 233
15 F.R.D. 645, 646 (N.D. Cal. 2006) (refusing to compel production of attorneys’ fees
16 records where case had not progressed to point where attorneys’ fees were at issue).”
17 (*Id.*) Instead of requesting a Rule 26(c) protective order that Defendants and their counsel
18 not disclose or publicize this confidential information to anyone outside the parties and
19 their counsel, Plaintiff “requests that the Court permit the parties to disclose their
20 estimates for past and future attorneys’ and experts’ fees directly and privately to the
21 Magistrate Judge during the Settlement Conference, rather than in the Settlement Con-
22 ference Memoranda [unless Plaintiff chooses to] disclose this information to Defendants
23 at the Settlement Conference if the circumstances warrant the disclosure.” (*Id.*) Although
24 Plaintiff does not raise the attorney-client privilege as a bar to attorneys’ fees disclosure,
25 the Court concludes that some discussion is relevant to the Motion.

26 Defendants’ Response points out that Plaintiff “has previously asserted that
27 [Defendant] Burge has an ‘obligation to indemnify FreeLife for the costs and fees
28 (including attorney’s fees) of this litigation,’ and has made demand ‘that FreeLife be

1 indemnified for all costs and fees incurred in this lawsuit[,]” citing Plaintiff’s counsel’s
2 March 31, 2008 letter to defense counsel. (docket # at 172 at 1) This letter asserts that
3 Defendant Burge “entered a contract with FreeLife” and “remind[s] [Defendant Burge] of
4 his obligation to indemnify FreeLife for the costs and fees (including attorney’s fees) of
5 this litigation and . . . serve[s] as a demand that FreeLife be indemnified for all costs and
6 fees incurred in this lawsuit.” (*Id.*, Exhibit 1 at 1) Defendants’ Response concludes that
7 “[a]ttorney fee information should be exchanged.” (*Id.* at 2) The Court agrees.

8 **ATTORNEYS’ FEES**

9 This case is based on diversity jurisdiction. (docket # 1, at ¶ 8) A federal court
10 sitting in diversity jurisdiction must apply the substantive law of the forum state. *KL Group*
11 *v. Case, Kay & Lynch*, 829 F.2d 909, 918 (9th Cir. 1987) (“The availability of
12 the attorney-client privilege in a diversity case is governed by state law.”) (citing Fed.R.Evid.
13 501). Of course, Arizona recognizes that the attorney-client privilege may be invoked to
14 prevent the disclosure of confidential communications made for the purpose of facilitating
15 the rendition of professional legal services to the client. *Ulibarri v. Superior Court*, 184 Ariz.
16 382, 387, 909 P.2d 449, 454 (Az. Ct. App. 1995); Arizona Revised Statute (“A.R.S.”) §
17 12-2234.

18 “The attorney-client privilege is the oldest of the privileges for confidential
19 communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389
20 (1981); *Valenti v. Allstate Ins. Co.*, 243 F.Supp.2d 200, 217 (M.D. Pa. 2003) (citing, among
21 others, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998)). The privilege is intended “to
22 encourage full and frank communications between attorneys and their clients and therefore
23 promote broader public interests in the observance of law and the administration of justice.”
24 *Upjohn*, 449 U.S. at 389; *Arizona Independent Redistricting Commission v. Fields*, 206 Ariz.
25 130, 142, 75 P.3d 1088, 1100 (Az.Ct.App. 2003) (“[T]he attorney-client privilege only
26 applies to confidential communications made for the purpose of obtaining or providing legal
27 assistance for the client.”) (citing A.R.S. § 12-2234(B)). “The attorney-client privilege
28 provides that an attorney cannot be required to disclose any communication between the

1 a court should award attorneys' fees under section 12-341.01 in contract actions. Id. (citing
2 *Assoc. Indem. Corp. v. Warner*, 143 Ariz. 567, 569, 694 P.2d 1181, 1183 (1985).

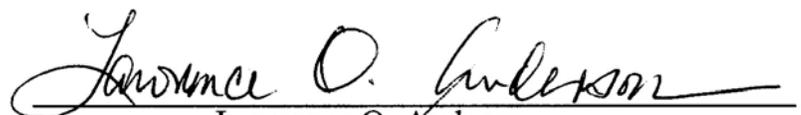
3 This settlement conference judge views that each party's actual knowledge of
4 the amount of money at risk in going to trial is an invaluable component to a successful
5 settlement conference, especially here where the non-prevailing party will be required to pay,
6 not only its or his own attorneys' fees and court-related expenses, but likely also those of the
7 adverse party. This Court agrees with Defendants that "[d]isclosure of such information will
8 assist the parties in better understanding the scope and nature of the risks and rewards they
9 face in taking this matter to trial, which can only assist the settlement process." (docket # at
10 172 at 1) Moreover, Plaintiff's citation to *Abels v. JBC Legal Group, P.C.*, 233 F.R.D. 645,
11 646 (N.D. Cal. 2006) is not persuasive and is distinguishable because this case does not
12 pertain to disclosure of the amount of attorneys' fees incurred in the context of a settlement
13 conference, but rather, deals with a request to compel production of attorneys' fees records
14 prior to trial which were not reasonably calculated to lead to the discovery of admissible
15 evidence per Fed.R.Civ.P. 26(b)(1).

16 Accordingly,

17 **IT IS ORDERED** that Plaintiff's Motion to Privately Disclose Attorneys' Fees
18 to Settlement Conference Judge and Motion for Expedited Consideration, docket # 169, is
19 **GRANTED** in part and **DENIED** in part as follows: a) granted as to Plaintiff's Motion for
20 Expedited Consideration; b) denied in all other aspects.

21 **IT IS FURTHER ORDERED**, pursuant to Rule 26(c), Fed.R.Civ.P., that all
22 parties are hereby prohibited from disclosing or otherwise publicizing the other party's
23 attorneys' and experts' fees in this case until authorized to do so by Judge Campbell. Counsel
24 shall return all settlement conference memoranda to the settlement conference Judge at the
25 conclusion of the settlement conference for destruction.

26 DATED this 29th day of January, 2010.

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Lawrence O. Anderson
United States Magistrate Judge