

# FREEDOM FROM RELIGION *foundation*

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November 18, 2014

Mr. Stephen Martin, Acting Director  
Internal Revenue Service  
Exempt Organizations Examination Office  
1100 Commerce Street  
MC 4900 DAL  
Dallas, Texas 75242

**Re: Examination of Tax Exempt Status of Answers in Genesis, Inc. and Crosswater Canyon, Inc.**

Dear Mr. Martin:

I am writing on behalf of the Freedom From Religion Foundation (“FFRF”) to report violations of the Internal Revenue Code by Answers in Genesis, Inc. and Crosswater Canyon, Inc., which are nonprofits located in Petersburg, Kentucky (EIN: 33-0596423 and EIN 27-4026852). FFRF is a nationwide nonprofit organization with over 21,500 members. FFRF works to protect the constitutional principle of separation between state and church and to represent the rights and views of nonbelievers.

It is our belief and understanding that contrary to their status as 501(c)(3) charitable organizations, Answers in Genesis, Inc. (“AiG”) and Crosswater Canyon, Inc. are not “operated exclusively for religious, charitable, scientific” or other exempt purposes. Since 2010, AiG appears to be operating and fundraising for a for-profit company, for which it is building a commercial theme park called “Ark Encounter.”<sup>1</sup> We are asking you to investigate this apparent violation of the tax code and public trust, and to take all warranted action.

## Corporate Structure

Ark Encounter, LLC is a limited liability company that was incorporated in Missouri on November 12, 2010.<sup>2</sup> Ark Encounter, LLC was organized to own, manage, lease, market, sell, develop, and operate a multi-acre paid admission project consisting of a biblical theme park.<sup>3</sup> It describes the project as “a 203.5 acre complex of associated historical displays and amenities, food and beverage, retail and event venues and parking.”<sup>4</sup>

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<sup>1</sup> The enclosed exhibits are from publicly available documents and records obtained from the State of Kentucky. The authenticity of records may need to be confirmed with the subject taxpayers.

<sup>2</sup> Exhibit 1: Ark Encounter, LLC Articles of Organization

<sup>3</sup> *Id.*

<sup>4</sup> Exhibit 2: “Application for Kentucky Tourism Development Act Tax Refund Program,” pg. 6

The Ark Encounter project has a unique corporate structure, which AiG explains this way on its website:

*Who owns The Ark Encounter?*

*Ark Encounter is a privately owned Limited Liability Company (LLC). Crosswater Canyon, a non-profit subsidiary of Answers in Genesis, will be the sole member and owner of the LLC and will also be the managing member responsible for day-to-day operations.<sup>5</sup>*

For federal tax purposes, Answers in Genesis, Inc.'s 2012 IRS Form 990 lists Ark Encounter, LLC as a "Disregarded Entity" and states that its primary activity is to "own, lease, [and] develop property."<sup>6</sup> Crosswater Canyon, Inc.'s 2012 IRS Form 990 lists its sole mission: "To operate for the benefit of, and to support the mission and purposes of Answers in Genesis, Inc."<sup>7</sup>

AiG explained its reasons for the corporate structure on the Ark Encounter webpage:

*[W]hy is a for-profit LLC going to own the Ark Encounter?*

...

*Due to the size of the Ark Encounter project, a for-profit LLC structure was selected to be able to help raise the funds necessary to build it. We also desired to avoid financing the project through primarily debt financing. In addition, this large amount of funding would not have been probable solely through donations and boarding pass sales. The for-profit LLC structure allows for the primary funding to come from private equity, while at the same time ensuring that the control of the content, design and operations of the Ark Encounter will be led by Crosswater Canyon, a wholly owned subsidiary of Answers in Genesis.*

*The for-profit LLC structure also allows the Ark Encounter to be eligible for various economic development incentives that would not have been available with a non-profit structure.<sup>8</sup>*

It is unclear to the extent that Ark Encounter, LLC, Crosswater Canyon, and AiG have involved "private equity" in funding the project. In 2013, Crosswater Canyon, Inc. and Ark Encounter, LLC instead pursued funding for the project through a \$62,000,000 municipal bond offering by the City of Williamstown, Kentucky.<sup>9</sup>

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<sup>5</sup> Exhibit 3: "About" webpage found on [www.arkencounter.com](http://www.arkencounter.com). Last accessed on Nov. 11, 2014. (See also Ex. 1 at p.4).

<sup>6</sup> Exhibit 4: Excerpts of 2012 Return of Organization Exempt from Income Tax (Form 990) of Answers in Genesis, Inc. and Crosswater Canyon, Inc.

<sup>7</sup> *Id.*

<sup>8</sup> Exhibit 5. "About" webpage found on [www.arkencounter.com](http://www.arkencounter.com). Last accessed on Nov. 11, 2014.

<sup>9</sup> Exhibit 6: "Preliminary Official Statement Dated November 6, 2013" Re: Taxable Industrial Building Revenue Bonds

## **Tax-Deductible Donations Raised For a For-Profit Company**

It appears that AiG has conducted substantial fundraising efforts to raise funds for Ark Encounter, LLC. AiG solicits donations to support Ark Encounter online and via U.S. mail. On the AiG website, donors have the option to designate their contribution to Ark Encounter in the form of a one time payment or monthly gift.<sup>10</sup> Mailed fundraising materials sent to prospective donors this year included a space for donations for an “additional gift to help build the full-scale Ark.”<sup>11</sup> The mailed statement also stated, “All gifts to Answers in Genesis, a 501(c)(3) non-profit organization, are tax deductible to the fullest extent allowed by law.” A letter dated September 1, 2014 that was mailed to supporters stated, “We have \$15 million remaining to raise in donations over the next 24 months to reach our donation commitment of \$29.5 million.”<sup>12</sup> The letter also said, “Donate towards the Ark project using the enclosed reply form or going online to ArkEncounter.com, where you can also sponsor a peg, plank or beam in the Ark.”

On the separate Ark Encounter website, Ark Encounter states that “[s]ponsorship is tax deductible.”<sup>13</sup> The donations are described in a similar manner on other portions of the website: “Support the Ark: Sponsor a peg, plank, or beam in the Ark with a tax-deductible donation, or make a specific gift of any size!”<sup>14</sup>

## **Commercial Theme Park Development**

Ark Encounter is designed as a commercial theme park. Public statements and statements to government agencies on behalf of Ark Encounter confirm that it seeks to operate a theme-park business.

In its application for State of Kentucky tourism grants, Ark Encounter, LLC lists the project in the category of “Recreation or Entertainment Facility.”<sup>15</sup> The City of Williamstown’s resolution approving its municipal bond offering describes Ark Encounter as “a Project for a recreation or amusement park, public park, or theme park, including specifically facilities for use by Crosswater Canyon, Inc...”<sup>16</sup>

After the State of Kentucky raised questions about the nature of Ark Encounter in an April 24, 2014 letter,<sup>17</sup> Ark Encounter made various statements highlighting the project as a theme park. An Ark Encounter representative stated in a letter dated May 5, 2014, that “the Project is and will remain a theme park and attraction marketed to tourists and visitors across the country that is based on biblical events or times...The Project will also include related facilities for visitors including restaurants, gift shops, parking, etc., similar to other theme park attractions.”<sup>18</sup> The letter says, “From an operational standpoint, the Project will have the look and feel of any other

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<sup>10</sup> Exhibit 7: “Donate” webpage found on <https://answersingenesis.org/>. Last accessed on Nov. 11, 2014.

<sup>11</sup> Exhibit 8: AiG Mailing to “Friend of Answers in Genesis,” Sept. 1, 2014

<sup>12</sup> *Id.*

<sup>13</sup> Exhibit 9: “Donate” webpage found on . <https://arkencounter.com/>. Last visited Nov. 11, 2014.

<sup>14</sup> Exhibit 10: “Support the Ark” webpage found on <https://arkencounter.com/>. Last visited Nov. 11, 2014.

<sup>15</sup> See Exhibit 2 at p.3.

<sup>16</sup> Exhibit 11: City of Williamstown Ordinance No. 2013-20

<sup>17</sup> Exhibit 12: April 24, 2014 letter by Kentucky Tourism, Arts and Heritage Cabinet General Counsel

<sup>18</sup> Exhibit 13: Letter from John E. Pence, Ark Encounter, to William R. Dexter, General Counsel, Kentucky Tourism, Arts and Heritage Cabinet (May 5, 2014)

theme park.” It also says, “[T]he Project will be operated as a private entity and will be taxed as such by the Commonwealth of Kentucky and other taxing districts.”

In a letter dated May 22, 2014, legal counsel writing on behalf of Ark Encounter, LLC, also addressed the underlying nature of the project. The letter said, in relevant part:

As has been previously explained by counsel for the Project, although one of the owners in the Project itself has a religious mission, the money is not going directly to that owner to further its mission in a way that would “prompt a reasonable observer to impute to [Kentucky] the religious mission that [the one owner] undertake[s].” *Id.* At 293. The Project at issue is a multi-faceted theme park, and not a sanctuary or synagogue. Like the beneficiaries of the Act, **this Project itself will be operated as a private, for-profit business...** (emphasis added)<sup>19</sup>

### Crosswater Canyon and AiG Tax-Exempt Status

Under the circumstances, Answers in Genesis, Inc. and Crosswater Canyon, Inc. are not “operated exclusively” for religious, charitable, educational or other exempt purposes, as required of 501(c)(3) organizations. An organization is not operated exclusively for an exempt purpose “if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.” 26 C.F.R. § 1.501(c)(3)-1(c)(1); *Redlands Surgical Servs. v. C.I.R.*, 113 T.C. 47, 71 (1999) *review denied, decision aff’d*, 242 F.3d 904 (9th Cir. 2001).

Courts reviewing a claimed non-profit’s operations, will conduct a factual review and make determinations concerning any purported non-exempt purpose. *See Living Faith, Inc. v. C.I.R.*, 950 F.2d 365, 371 (7th Cir. 1991); *United Missionary Aviation, Inc. v. C.I.R.*, 60 T.C.M. (CCH) 1152, 1156 (T.C. 1990) *aff’d sub nom.* 985 F.2d 564 (8th Cir. 1991). As the Seventh Circuit Court of Appeals stated in *Living Faith*:

The fact that an organization's primary activity may constitute a trade or business does not, of itself, disqualify it from classification under § 501(c)(3), provided the trade or business furthers or accomplishes an exempt purpose. Treas.Reg. § 1.501(c)(3)-1(c)(1), -1(e)(1); *Dumaine Farms v. Commissioner*, 73 T.C. 650, 668 (1980); *B.S.W. Group*, 70 T.C. at 357. If one of the activity's purposes, however, is substantial and nonexempt (*e.g.*, commercial), the organization will be denied exempt status under § 501(c)(3), even if its activity also furthers an exempt (*e.g.*, religious) purpose. *Schoger Found. v. Commissioner*, 76 T.C. 380, 386 (1981).

950 F.2d at 370 (7th Cir. 1991).

In *Living Faith*, the court looked to objective indicators in reviewing a determination that an organization operated for a substantial commercial purpose. *Id.* at 372. The court examined “[t]he particular manner in which an organization's activities are conducted, the commercial hue of those activities, competition with commercial firms, and the existence and amount of annual or accumulated profits.” *Id.* (citing *United Missionary Aviation*, 60 T.C.M. (CCH) at 1156-57).

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<sup>19</sup> Exhibit 14: Letter from J. Michael Johnson, Chief Counsel, Freedom Guard and Nate Kellum, Chief Counsel, Center for Religious Expression, to William R. Dexter, General Counsel, Kentucky Tourism, Arts and Heritage Cabinet . p.5 (May 22, 2014)

AiG and Crosswater Canyon have a substantial commercial purpose in building and operating Ark Encounter. A for-profit limited liability company is designated as the owner and manager of the endeavor and the project will be operated as a private, for-profit business.

While religiously themed, a “theme park” is quintessentially a commercial entertainment activity and not charitable. Ark Encounter representatives have said that from an operational standpoint, the project will “have the look and feel of any other theme park.” Ark Encounter will compete with other tourist attractions for visitors and business.

In its submission seeking municipal bonds, Ark Encounter included financial projections that highlight the commercial nature of the project.<sup>20</sup> Based on an estimated attendance of 1.2 million visitors in the first year, the Nehemiah Group projected gross income of \$40,801,954 from operations from admissions, retail, food sales, parking, and other income in the first year.<sup>21</sup>

The Nehemiah Group also projected a total staff of 487 employees.<sup>22</sup> This includes 137 management, accounting, maintenance, security and human resource employees; 87 retail managers, buyers and staff members; 125 food & beverage managers, frontline staff and administrative employees; 54 entertainment managers, coordinators, entertainers and special event coordinators; 64 attraction managers, operators and animal care specialists; 13 marketing specialists; and 7 technology managers and staff. Payroll, contract labor and related expenses for Ark Encounter would equate to approximately \$13,504,750 per year.

This project is like other commercial enterprises that have resulted in the revocation of nonprofit status. *See Living Faith*, 950 F.2d 365 (a Seventh Day Adventist Church organization that ran restaurants and food stores with the purpose of keeping the faith was not operated exclusively for exempt purposes); *Orange Cnty. Agr. Soc., Inc. v. C.I.R.*, 893 F.2d 529, 532 (2d Cir. 1990) (organization promoting the interests of agriculture and horticulture that created a separate company for liability purposes to run a racetrack was operating with substantial non-exempt purpose); *United Missionary Aviation*, 60 T.C.M. (CCH) 1152 (religious ministry had substantial commercial purpose in operating mail order sales business); Rev. Rul. 76-206, 1976-1 C.B. 154 (organization promoting classical music through a public relations campaign that benefited for-profit radio station was serving a private rather than a public interest).

While Ark Encounter includes biblical themes, the words and actions of the non-profits managing it evidence a large-scale commercial endeavor. The project blends religion, entertainment and tourism in an overall commercial business. In *Scripture Press Found. v. United States*, the court concluded that “however religiously inspired” the sale of religious literature was, the organization was directly involved in a business for profit. 285 F.2d 800, 805-6 (Ct. Cl. 1961). As the court said, “[T]he intensity of the religious convictions of the plaintiff’s members and officers cannot operate to exempt them from the tax law if the activities of the plaintiff cannot in themselves justify such an exemption. Piety is no defense to the assessments of the tax collector.” *Id.* at 804.

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<sup>20</sup> Exhibit 15: “Ark Encounter, LLC Feasibility Report,” Section 6 (“Financial Projections”)

<sup>21</sup> *Id.* at p.43.

<sup>22</sup> *Id.* at p. 49.

**Conclusion**

FFRF urges the Exempt Organizations Office to examine the operations and tax-exempt status of Crosswater Canyon and Answers in Genesis. Based on information that is publicly available about the operations of both organizations, they are not operated exclusively for exempt purposes.

Sincerely,



Patrick C. Elliott  
Staff Attorney  
Freedom From Religion Foundation