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DISTRICT and DR. JAMES CORBETT

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 CHAD FARNAN, a minor, by and
through his parents BILL FARNAN and
12 TERESA FARNAN,

13 Plaintiff,

14 v.

15 CAPISTRANO UNIFIED SCHOOL
DISTRICT; DR. JAMES CORBETT,
16 individually and in his official capacity as
an employee of Capistrano Unified School
17 District; and DOES 1 through 20,
inclusive,

18 Defendants.

19
20 CALIFORNIA TEACHERS
ASSOCIATION/NEA; and
21 CAPISTRANO UNIFIED EDUCATION
ASSOCIATION,

22 Union Intervenors/Defendants.
23
24

CASE NO.: SACV07-1434-JVS (ANx)

**JOINT PROPOSAL FOR
DISPOSITION OF THE
EQUITABLE AND OTHER
REMAINING ISSUES**

HEARINGS PENDING:

TYPE: Status Conference
DATE: June 1, 2009
TIME: 11:00 A.M.
COURTROOM: 10C/Judge Selna

25 Pursuant to this Court's minute order dated May 1, 2009, the parties submit the
26 following Joint Proposal for Disposition of the Equitable and Other Remaining Issues:

27 ///

28 ///

WOODRUFF, SPRADLIN
& SMART
ATTORNEYS AT LAW
COSTA MESA

JOINT STATEMENT

After meeting and conferring the parties agree that there is a need for further judicial consideration regarding various issues upon which the parties have been unable to agree. These issues include:

1. Whether Plaintiff Chad Farnan ("Farnan") is entitled to equitable and injunctive relief against Defendant Dr. Corbett;

2. Questions regarding whether Defendant Capistrano Unified School District ("CUSD") is the proper subject of Farnan's request for equitable relief;

3. Dr. Corbett's belief that he is entitled to qualified immunity and that he may raise this defense at this time whereas Farnan disputes that Dr. Corbett may raise the qualified immunity defense at this time and believes that Dr. Corbett is not entitled to qualified immunity; and

4. A determination as to who is the prevailing party for purposes of obtaining costs and attorney's fees.

In light of these disputes, Defendants and the Union Intervenors agree that further briefing is needed in order for this Court to make a determination of these issues. Farnan believes that further briefing is not needed for the Court to determine issues three and four, but is needed as to issues one and two. Therefore, should this Court order further briefing on the issues, the parties propose the following briefing schedule:

- June 8, 2009: The parties e-file and serve their moving papers;
- June 15, 2009: Opposing papers are to be e-filed and served;
- June 22, 2009: Reply papers, if any, are to be e-filed and served; and
- June 29, 2009: All motions are to be heard by this Court.

In addition to the above, the parties submit their separate statements as follows:

FARNAN'S STATEMENT AND PROPOSALS

Farnan contends and proposes the following:

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1 **1. As the Prevailing Party, Plaintiff's Motion for Attorneys' Fees Should Be**
2 **Considered by This Court Following Entry of Final Judgment**

3 In any action to enforce federal civil rights laws, including 42 U.S.C. § 1983,
4 section 1988 allows courts to award “the prevailing party, other than the United
5 States, a reasonable attorney’s fee as part of the costs.” A plaintiff is considered a
6 prevailing party when it obtains a “court-ordered change in the legal relationship
7 between the plaintiff and the defendant.” *Buckhannon Bd. and Care Home, Inc. v. W.*
8 *Va. Dep’t of Health and Human Res.*, 532 U.S. 598, 604 (2001) (quotation marks and
9 citation omitted).

10 Plaintiff brought this action under 42 U.S.C. § 1983 and has sought a permanent
11 injunction against Dr. Corbett, prohibiting him from conveying a message of
12 disapproval of religion in the classroom. This injunction “materially alters the legal
13 relationship” between Plaintiff and Defendant “by modifying [Dr. Corbett’s]
14 behavior.” *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). Plaintiff’s First Amended
15 Complaint asserted a single cause of action for violation of the First Amendment’s
16 Establishment Clause. This Court’s ruling granting Plaintiff’s Motion for Summary
17 Judgment held that Dr. Corbett did in fact violate the Establishment Clause. Thus,
18 Plaintiff is a prevailing party in this matter. *See Hensley v. Eckerhart*, 461 U.S. 424,
19 433 (1983) (“plaintiffs may be considered ‘prevailing parties’ for attorney’s fee
20 purposes if they succeed on any significant issue in litigation which achieves some of
21 the benefit the party sought in bringing suit.”) (quoting *Nadean v. Helgemoe*, 581 F.2d
22 275, 278-79 (1st Cir. 1978)).

23 Once a plaintiff is deemed to be a prevailing party, the court has narrow
24 discretion to deny attorneys’ fees under § 1988. “[T]he Supreme Court has held that
25 although it is within the district court’s discretion to award attorney’s fees under
26 section 1988, in the absence of special circumstances a district court not merely ‘may’
27 but *must* award fees to the prevailing plaintiff.” *Morscott, Inc. v. City of Cleveland*,
28 936 F.2d 271, 272 (6th Cir. 1991) (quotation marks and citations omitted; emphasis in

1 original). In fact, “a prevailing plaintiff should receive fees almost as a matter of
2 course.” *Smith v. Heath*, 691 F.2d 220, 228 (6th Cir. 1982) (quoting *Dawson v.*
3 *Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979)); *see also Maloney v. City of Marietta*, 822
4 F.2d 1023, 1024 (11th Cir. 1987) (fees should be granted to a prevailing party “as a
5 matter of course”) (citation omitted).

6 Furthermore, whether Plaintiff is the prevailing party, and entitled to attorney’s
7 fees pursuant to 42 USC § 1988, should be determined following Plaintiff’s Motion
8 for Attorneys’ Fees. Said motion will be filed following entry of final judgment in
9 this matter pursuant to this Court’s order regarding Plaintiff’s Motion for Summary
10 Judgment.

11 More importantly, however, for purposes of this Joint Proposal and to
12 determine whether further briefing on this issue is necessary, the School District is not
13 a “prevailing party,” and a “prevailing defendant” is not generally entitled to
14 attorneys’ fees pursuant to § 1988. *Allen v. City of Los Angeles*, 27 F.3d 1385, 1402
15 (9th Cir. 1994) (“A prevailing defendant in a civil rights action is not entitled to
16 attorney fees under 42 U.S.C. § 1988 merely because [it] prevails on the merits of the
17 suit”) (citing *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir.1994)).

18 Pursuant to this Court’s Order on the cross motions for summary judgment
19 dated May 1, 2009, the only potential “prevailing Defendant” is Capistrano Unified
20 School District. The School District, however, is not a prevailing party because of its
21 relationship to Dr. Corbett who was sued both in his individual and official capacity.
22 “[O]fficial-capacity suits generally represent only another way of pleading an action
23 against an entity of which an officer is an agent. Suits against state officials in their
24 official capacity therefore should be treated as suits against the State.” *Hafer v. Melo*,
25 502 U.S. 21, 24 (1991) (internal citations and quotations omitted). Here, the claim
26 against Dr. Corbett in his official capacity should be treated as a suit against the
27 School District itself, as it has employed him for approximately 20 years. As a result,
28 the School District is not a “prevailing party.”

1 Furthermore, even if this Court were to determine that the School District is a
2 prevailing defendant, attorneys' fees are only recoverable where a "§ 1983 plaintiff's
3 claims are groundless, without foundation, frivolous, or unreasonable." *Alaska Right*
4 *to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 852 (9th Cir. 2007) (internal
5 citations omitted) (quoting *Karam v. City of Burbank*, 352 F.3d 1188, 1195 (9th Cir.
6 2003)); see, e.g., *Legal Serv. of N. Cal. v. Arnett*, 114 F.3d 135 (9th Cir. 1997). Here,
7 Dr. Corbett, an employee of Capistrano Unified School District for approximately
8 twenty years, violated the Establishment Clause. Further, as the Court discussed in its
9 Order on the cross motions for summary judgment, Plaintiff submitted evidence
10 evincing the School District's knowledge of Dr. Corbett's constitutional violation and
11 its subsequent failure to act, although this Court ultimately found the evidence to be
12 insufficient. Plaintiffs' claims were therefore not groundless, frivolous, or
13 unreasonable. To the contrary, as evidenced by this Court's ruling that Dr. Corbett's
14 actions did violate the Establishment Clause, the single cause of action alleged was
15 both reasonable and meritorious.

16 Although Plaintiff's ability to recover attorneys' fees as the prevailing party can
17 and should be fully briefed following entry of judgment and a timely filed motion for
18 attorneys' fees by Plaintiff, it is unnecessary to dedicate further briefing and judicial
19 resources to determine whether Defendant Capistrano School District is eligible to
20 obtain attorney's fees. The School District is not a prevailing party, and Plaintiffs'
21 claims were certainly not frivolous. Furthermore, should Defendants wish to address
22 this issue further they may file a motion for attorneys' fees following entry of
23 judgment.

24 **2. Dr. Corbett Waived Qualified Immunity As an Affirmative Defense by**
25 **Failing to Raise It at Any Stage in the Litigation**

26 "Although the defense of qualified immunity provides public officials important
27 protection from baseless and harassing lawsuits, it is not a parachute to be deployed
28 only when the plane has run out of fuel. Defendants must diligently raise the defense

1 during pretrial proceedings and ensure it is included in the pretrial order.” *Evans v.*
2 *Fogarty*, 2007 WL 2380990, at * 6 n.9 (10th Cir. August 22, 2007). Dr. Corbett has
3 had numerous opportunities to raise the affirmative defense of qualified immunity.
4 The plane ran out of fuel, and a ruling was entered in Plaintiff’s favor regarding Dr.
5 Corbett’s Establishment Clause violation, forcing the deployment of a parachute:
6 qualified immunity.

7 Dr. Corbett now seeks to amend his Answer to add the affirmative defense, but
8 he provides no justifiable reason for why it was not argued in either Defendants’
9 Motion to Dismiss, Defendants’ Motion for Summary Judgment or, at the very
10 minimum, in Opposition to Plaintiffs’ Motion for Summary Judgment. Defendants’
11 failure to raise qualified immunity prior to this Court’s ruling on the dispositive
12 motions renders it lost. In good faith, Plaintiffs proceeded with this litigation at great
13 cost and expense, and Dr. Corbett should not be permitted to use an affirmative
14 defense as a rescue parachute.

15 Dr. Corbett asserts that “this Court must determine the applicability of the
16 qualified immunity defense to Dr. Corbett before proceeding with a determination of
17 damages” without any precedent or support for such a conclusion. Defendant cites no
18 cases, however, in support of a right to raise qualified immunity for the first time after
19 a final ruling on dispositive cross motions for summary judgment. In fact, Defendants
20 state that “[q]ualified immunity may be raised by a motion to dismiss, motion for
21 summary judgment and, of course, at trial.” Noticeably absent, however, is authority
22 indicating that qualified immunity may be raised for the first time at the current stage
23 of this litigation.

24 The Ninth Circuit follows the Supreme Court in holding that an official
25 pleading qualified immunity must plead it as an affirmative defense. *Camarillo v.*
26 *McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) (holding that while it should have been
27 pled by the defendant in his answer, since prejudice could not be shown in allowing it
28 to be raised *at summary judgment*, it would be allowed). The court in *Camarillo*

1 relied on *Gomez v. Toledo*, 446 U.S. 635 (noting that, in a § 1983 action, qualified
2 immunity is an affirmative defense that must be pled) and Federal Rules of Civil
3 Procedure, Rule 8(c) for its characterization of qualified immunity as an affirmative
4 defense that should be pled by the defendant. *See also Harlow v. Fitzgerald*, 457 U.S.
5 800, 815.

6 As a general rule, affirmative defenses must be pled as required by Rule 8(c), or
7 the result is a waiver of the defense by the defendant and the exclusion of that defense
8 from the case. *In re Adbox, Inc.*, 488 F.3d 836 (9th Cir. 2007) (citing *Morrison v.*
9 *Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005)). Courts have held that this principle
10 extrapolated from Rule 8(c) applies to the qualified immunity affirmative defense.
11 *See Ringuette v. City of Fall River*, 146 F.3d 1, 4 (1st Cir. 1998) (“Qualified immunity
12 is an affirmative defense, Fed. R. Civ. P. 8(c), and an affirmative [defense] is
13 generally lost unless it is raised in the pleadings.”).

14 While waiver of unpled affirmative defenses is the general rule, it is not always
15 applied, and there are practical exceptions based on the circumstances of the cases. 5
16 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice &*
17 *Procedure* § 1278 (2d ed. 1990). Although exceptions exist permitting qualified
18 immunity to be raised at later stages in the litigation, an important chord has been
19 sounded by the Supreme Court and lower courts – if qualified immunity is not raised
20 before a case goes to trial (or reaches the next “stage”), it is effectively lost as an
21 affirmative defense. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (holding that
22 qualified immunity provides “an immunity from suit rather than a mere defense to
23 liability; and like an absolute immunity, it is effectively lost if a case is erroneously
24 permitted to go to trial.”); *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001), disapproved
25 on other grounds (same); *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1138 (D. Col.
26 2001) (holding that “[t]he privilege is ‘an immunity from suit rather than a mere
27 defense to liability; and like an absolute immunity, it is effectively lost if a case is
28 erroneously permitted to go to trial.’ [citation] As a result, the Supreme Court has

1 stressed ‘the importance of resolving immunity questions at the earliest possible stage
2 in litigation.’” [citation]).

3 Defendants did not plead the qualified immunity affirmative defense, yet they
4 now ask this Court for leave to amend the pleading at an extraordinarily late stage in
5 the litigation. Defendants filed a motion to dismiss, a motion for summary judgment,
6 and opposed Plaintiffs’ motion for summary judgment and never raised qualified
7 immunity. This Court ruled on the dispositive motions, finding an Establishment
8 Clause violation, and Defendants now seek raise a defense that was waived and lost.

9 **3. Defendants Should Not Be Granted Leave to Amend Their Answer to**
10 **Assert the Qualified Immunity Affirmative Defense**

11 Should this Court find that qualified immunity has not been waived altogether,
12 Dr. Corbett still should not be granted the leave to amend the Answer in order to raise
13 qualified immunity as an affirmative defense. Under Rule 15(a), an affirmative
14 defense may be added to an answer by consent of the opposing party or leave of the
15 court. Fed. R. Civ. P., Rule 15(a).

16 In deciding whether to grant leave to amend, courts balance a number of factors
17 to determine when “justice so requires” leave to amend. Fed. R. Civ. P., Rule 15; 6
18 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice &*
19 *Procedure* § 1487. In the Ninth Circuit, as elsewhere, “[f]ive factors are taken into
20 account to assess the propriety of a motion for leave to amend: bad faith, undue delay,
21 prejudice to the opposing party, futility of amendment, and whether the plaintiff has
22 previously amended the complaint.” *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th
23 Cir. 2004) (citing *Nunes v. Ashcroft*, 348 F.3d 815, 818 (9th Cir. 2003)).

24 According to courts and commentators, prejudice is the most important, and the
25 most oft used, reason to deny leave to amend. *See Jackson v. Bank of Haw.*, 902 F.2d
26 1385, 1387 (9th Cir. 1990); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay
27 Kane, *Federal Practice & Procedure* § 1487 (2d ed. 1990). In considering prejudice,
28 the court generally looks to see what hardship the moving party will endure if leave is

1 not granted, the reason the moving party failed to include the material in the original
2 pleading, and the injustice that would result to the party opposing the motion. 6
3 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice &*
4 *Procedure* § 1487 (2d ed.1990). Here, because Plaintiff is seeking only nominal
5 damages, the hardship Dr. Corbett will endure if leave is not granted is non-existent.
6 Furthermore, this case involves a single cause of action for violation of the
7 Establishment Clause against a School District official and the School District itself.
8 There is no justifiable reason for Dr. Corbett's failure to assert the defense in the
9 Answer. Finally, the injustice that would result to Plaintiffs if leave to amend is
10 granted at this time is significant. Both parties engaged in significant discovery and
11 numerous motions that would be rendered futile if qualified immunity were granted at
12 this late stage. Allowing the case to be fully litigated for approximately eighteen
13 months only to grant immunity at the tail end of the case would be an injustice to
14 Plaintiff. *Campbell v. Emory Clinic*, 166 F3d 1157, 1162 (11th Cir. 1999)
15 (“[p]rejudice and undue delay are inherent in an amendment asserted after the close of
16 discovery and after dispositive motions have been filed, briefed, and decided”); *see*
17 *also, Solomon v. North American Life & Cas. Ins. Co.*, 151 F3d 1132, 1139 (9th Cir.
18 1998) (motion “on the eve of the discovery deadline” properly denied because it
19 would have required reopening discovery, thus delaying proceedings).

20 The Ninth Circuit has found that, among other things: (1) the undue prejudice
21 of having to develop new legal theories by establishing facts through the expense of
22 depositions and (2) the undue delay caused by a party that unjustifiably delayed in
23 moving to amend create a situation where movant is not entitled to leave to amend.
24 *Jackson*, 902 F.2d at 1387-88 (9th Cir. 1990) (citing *Priddy v. Edelman*, 883 F.2d 438,
25 447 (6th Cir. 1989) (“Putting the defendants ‘through the time and expense of
26 continued litigation on a new theory, with the possibility of additional discovery,
27 would be manifestly unfair and unduly prejudicial.’”) [other citations omitted].

28 In the present matter, at a minimum, more discovery would be required to look

1 into the knowledge and intent of Dr. Corbett with regard to the constitutional violation
2 to combat the affirmative defense of qualified immunity. If there had not been
3 significant delay in this defense being raised, the new legal matters that would be put
4 at issue if leave is granted could have been a part of the now completed discovery
5 process. Further, there has been undue delay in this matter on the part of Dr. Corbett
6 in raising the issues of the proposed additional affirmative defense. From the start of
7 this case he knew, or should have known, all of the facts and theories raised by this
8 new claim of qualified immunity. *See Jackson*, 902 F.2d at 1387-88 (9th Cir. 1990)
9 (“Relevant to evaluating the delay issue is whether the moving party knew or should
10 have known the facts and theories raised by the amendment in the original pleading.”)
11 citing *E.E.O.C. v. Boeing Co.*, 843 F.2d 1213, 1222 (9th Cir.), cert. denied, 488 U.S.
12 889 (1988); *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir.), vacated
13 on other grounds, 459 U.S. 810 (1982). Dr. Corbett had ample opportunity to raise
14 this issue in this matter in the Answer, in Defendants’ Motion to Dismiss, in his
15 Opposition to Plaintiff’s Motion for Summary Judgment, and in Defendants’ Motion
16 for Summary Judgment. At each of those points in time he knew all of the same facts
17 that he knows now, and his failure to raise qualified immunity until this point thus
18 constitutes undue delay and forecloses leave to amend.

19 Plaintiffs object to Dr. Corbett’s attempt to raise an unpleaded defense for
20 qualified immunity and to the entry of any evidence or discussion in support of said
21 defense. Dr. Corbett waived his right to assert qualified immunity, and the defense is
22 lost as a result of his failure to raise it any stage of the litigation prior to this Court’s
23 ruling on the dispositive motions. At this point, all evidence has been submitted, and
24 the merits have been ruled upon. Furthermore, permitting Dr. Corbett to assert
25 qualified immunity in defense of nominal damages is both prejudicial and unduly
26 burdensome. This Court should deny Dr. Corbett’s request for leave to amend the
27 Answer.

28 ///

1 **DEFENDANTS'/UNION INTERVENORS' STATEMENT AND PROPOSALS**

2 CUSD and Dr. Corbett (collectively "Defendants") and Intervenors California
3 Teachers Association/NEA; and Capistrano Unified Education Association
4 (collectively "Union Intervenors") jointly contend and propose the following:

5 **1. This Court must Determine the Applicability of the Qualified Immunity**
6 **Defense to Dr. Corbett Before Proceeding with a Determination of**
7 **Damages**

8 On May 1, 2009, this Court determined that Dr. Corbett violated the
9 Establishment Clause when Dr. Corbett stated "religious, superstitious nonsense"
10 during a discussion about the lawsuit filed against CUSD, Dr. Corbett and others by
11 former biology teacher John Pelozza. Mr. Pelozza refused to teach the state mandated
12 curriculum (the theory of evolution) but instead taught creationism in the classroom.

13 As set forth in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d
14 396 (1982), the qualified-immunity defense "shield[s] [government agents] from
15 liability for civil damages insofar as their conduct does not violate clearly established
16 statutory or constitutional rights of which a reasonable person would have known."
17 (Id. at 818; see also, Behrens v. Pelletier, 516 U.S. 299, 305-306, 116 S.Ct. 834, 133
18 L.Ed.2d 773 (1996))

19 Qualified immunity may be raised by motion to dismiss, motion for summary
20 judgment and, of course, at trial. (Ibid.; see also, Mitchell v. Forsyth, 472 U.S. 511,
21 526, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985))

22 In Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the
23 court identified two inquiries to be made in determining whether a public official is
24 entitled to qualified immunity. The first is whether the alleged acts, when construed in
25 the light most favorable to the plaintiff, show that the official's conduct violated a
26 constitutional right. (Id. at 200-201) If no constitutional right was violated even under
27 the plaintiff's allegations, the official is entitled to judgment; however, if a
28 constitutional violation could be established under a favorable view of the evidence

1 submitted, the court must move to the second step in the analysis. That step involves
2 an inquiry into whether the constitutional right was clearly established and “must be
3 undertaken in light of the specific context of the case, not as a broad general
4 proposition.” (*Ibid.*) Quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89
5 L.Ed.2d 271 (1986), the Saucier court stated that qualified immunity protects “all but
6 the plainly incompetent or those who knowingly violate the law.” (Saucier v. Katz,
7 supra, 533 U.S. at 202)

8 The inquiry on the second prong is not whether a particular right is established
9 in a vacuum. The inquiry is whether it was established on the *specific facts* of a
10 particular case. (*Id.* at 202 [the court must find that the right was clearly established in
11 light of the specific facts of a particular case such that “a reasonable official would
12 understand that what he is doing violates that right”]; see also, Dibble v. City of
13 Chandler, 515 F.3d 918, 930 (9th Cir. 2008) [since determining whether a “public
14 employee’s speech is constitutionally protected turns on a context-intensive, case-by-
15 case balancing analysis, the law regarding such claims will rarely, if ever, be sufficient
16 ‘clearly established’ to preclude qualified immunity”])

17 Under qualified immunity, public employees remain immune as long as their
18 actions do not violate clearly established [federal] statutory, or constitutional rights of
19 which a reasonable person would have known. (Harlow v. Fitzgerald, supra, 457 U. S.
20 at 818-819 [allegations of malice are insufficient to overcome application of qualified
21 immunity]; see also, Anderson v. Creighton (1987) 483 U. S. 635, 640-641 [an
22 official’s subjective belief is irrelevant; court applies an objective standard])

23 In Harlow v. Fitzgerald, the Supreme Court defined qualified immunity in
24 objective terms so that allegations of malice (or any other subjective factors) would no
25 longer suffice to subject governmental officials to the cost of trial or the burdens of
26 broad reaching discovery. (Harlow v. Fitzgerald, supra, 457 U. S. at 817-818)

27 Because the analysis as to whether a public employee's expression is
28 constitutionally protected requires a fact-sensitive, context-specific balancing of

1 competing interests, “the law regarding such claims will rarely, if ever, be
2 sufficiently ‘clearly established’ to preclude qualified immunity. . . .” (Lytle v.
3 Wondrash, 182 F.3d 1083, 1088 (9th Cir. 1999); see also, Brewster v. Board of Educ.
4 of Lynwood Unified School Dist., 149 F.3d 971, 980 (9th Cir. 1998)) The plaintiff has
5 the burden of proving that the rights he claims were “clearly established.” (Davis v.
6 Scherer, 468 U.S. 183, 197, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984))

7 Here, the Court has determined the first prong of the inquiry, i.e., Dr. Corbett
8 violated the Establishment Clause when he made the single statement during one
9 lecture that creationism was “religious, superstitious nonsense.” This determination
10 triggered, for the first time, the possibility of a qualified immunity defense.

11 Up until the Court rendered its decision, Farnan was contending that Dr.
12 Corbett made anti-Christian or anti-religious comments on a daily basis throughout
13 the 2007 semester; that anti-Christian comments essentially were the theme of Dr.
14 Corbett’s lectures. If Farnan’s contentions were accepted as true then such conduct
15 would be a violation of the Establishment Clause. Case law existed in 2007 that
16 seemed to support Farnan’s claim that a curriculum based on anti-Christian or anti-
17 religious teachings could be a violation of the Establishment Clause.

18 Examples of Farnan’s position can be found in the following documents:

19 (1) Farnan’s first amended complaint, 4:7-11 [On a regular basis during the
20 Fall 2007 semester . . .], 9:26-27 [Parents and/or students have complained to the
21 District for many years regarding Dr. Corbett’s religious hostility expressed in his
22 classroom], 10:3-7 [Dr. Corbett continues to spend a large portion of class time . . . ,
23 he clearly demonstrates hostility towards religion . . . , As a result of his ongoing
24 comments . . .];

25 (2) Farnan’s opposition to Defendants’ motion to dismiss, 10:14 [statements
26 made by Dr. Corbett are continual and incessant], 10:23 [continual and incessant
27 disapproval of religion], 12:11-14 [For months Chad Farnan sat in an AP European
28 History class . . . learning . . . about Dr. Corbett’s own propagation of a ‘religion of

1 secularism.”], 15:12-13 [When taken together, [Dr. Corbett’s comments] are clearly
2 anti-Christian diatribes];

3 (3) Farnan’s responses to Defendants’ special interrogatories, response nos. 5
4 and 7: 6:16-25 and 7:20-28 [Throughout the Fall 2007 semester, Dr. Corbett made
5 numerous statements regarding Christianity and religion generally that expresses a
6 viewpoint that is derogatory, disparaging, and belittling regarding religion and
7 Christianity in particular. . . . While there are individual comments that are
8 particularly offensive and expressive of said viewpoints, those and all of his
9 comments must be taken in context of the entire lecture and class environment. . .]

10 This Court’s ruling, however, is not based on Dr. Corbett making anti-Christian
11 or anti-religious comments on a daily basis such that it was a theme of Dr. Corbett’s
12 AP European History course. Instead, this Court has held that a single comment made
13 during a single lecture is sufficient to trigger an Establishment Clause violation. Now,
14 this Court must decide the second prong of the qualified immunity defense. Under the
15 second prong, the inquiry is not whether or not it was clearly established that a teacher
16 could violate the Establishment Clause by making “continual and incessant” anti-
17 Christian comments. The inquiry is whether it was clearly established that a teacher
18 could violate the Establishment Clause by making a single comment during the course
19 of one lecture that has been construed as being against Christianity.

20 Because Defendants/Union Intervenors agree that Dr. Corbett is entitled to raise
21 a qualified immunity defense at this time, and Farnan disputes that position, further
22 briefing on this issue should be allowed.

23 **A. This Court Should Permit Defendants to Amend their Answer to**
24 **Assert the Qualified Immunity Defense**

25 Rule 15(a) of the Federal Rules of Civil Procedure provides that leave of court
26 is required to amend any pleading more than 20 days after that pleading is served;
27 however, Rule 15(a) expressly provides that such leave “shall be freely given when
28 justice so requires.” Regarding Rule 15(a), the United States Supreme Court in Foman

1 v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), held that “this
2 mandate *is to be heeded*.” (Emphasis added)

3 In Foman, the plaintiff sought to amend her complaint after the district court
4 entered judgment dismissing the complaint. In holding that the district court abused its
5 discretion when it refused to grant the requested leave to amend, the Foman court
6 stated:

7 “In the absence of any apparent or declared reason – such as undue delay,
8 bad faith or dilatory motive on the part of the movant, repeated failure to
9 cure deficiencies by amendments previously allowed, undue prejudice to
10 the opposing party by virtue of allowance of the amendment, futility of
11 amendment, etc. – the leave sought should, as the rules require, be ‘freely
12 given.’” (Ibid.)

13 The Court continued that:

14 “. . . outright refusal to grant the leave without justifying reason
15 appearing for the denial is not an exercise of discretion; it is merely abuse
16 of that discretion and inconsistent with the spirit of the Federal Rules.”
17 (Ibid.)

18 Leave to amend should be granted unless the amendment would cause prejudice
19 to the opposing party, is sought in bad faith, is futile, or creates undue delay. (Ascon
20 Properties, Inc. v. Mobil Oil Company, 866 F.2d 1149, 1160 (9th Cir. 1989)) The
21 Court is to apply a policy of “extreme liberality” in favor of Rule 15 amendments.
22 (Abels v. JBC Legal Group, P.C., 229 F.R.D. 152, 156 (N.D. Cal. 2005); see also,
23 Morongó Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990))

24 The Ninth Circuit has held that mere delay in seeking leave to amend is not a
25 sufficient basis for denying a motion to amend. (Morongó Band of Mission Indians v.
26 Rose, supra, 893 F.2d at 1079 [finding that even a two-year delay is “not alone enough
27 to support denial”]) Further, regarding the “prejudice” element, it is the opposing
28 party who has the burden of demonstrating such prejudice. (See, In re Circuit Breaker

1 Litigation, 175 F.R.D. 547, 551 (C.D. Cal. 1997)) The prejudice demonstrated *must be*
2 *substantial*. (Morongo Band of Mission Indians v. Rose, *supra*, 893 F.2d at 1079)

3 Here, the possibility of a qualified immunity defense did not become apparent
4 until this Court, on May 1, 2009, determined that a single comment made during the
5 course of a single lecture violated the Establishment Clause. Up until that decision
6 Farnan was contending that Dr. Corbett made anti-Christian or anti-religious
7 comments on a daily basis throughout the 2007 semester; that anti-Christian
8 comments essentially were the theme of Dr. Corbett's lectures. The Court's decision
9 here was the first time that a court has held that a single comment made by a teacher
10 during the course of a single lecture that is construed as anti-Christian could constitute
11 an Establishment Clause violation. The parties have submitted numerous briefs in this
12 case and, to date, no one has produced a case that has held that a teacher can violate
13 the Establishment Clause by making a single statement during the course of one
14 lecture.

15 By seeking to amend their answer as soon as possible after this Court's
16 determination Defendants have not unreasonably delayed in raising this defense and
17 there is no prejudice to Farnan. No further discovery will be needed on this prong of
18 the test and the determination can be made by the Court following further briefing on
19 the issue. Further briefing on this issue should be allowed.

20 **2. The Court must Determine Who is the Prevailing Party before any Costs**
21 **or Fees are Awarded**

22 Under Federal Rule of Civil Procedure 54(d), "costs other than attorney's fees
23 shall be allowed as of course to the prevailing party unless the court otherwise
24 directs." (Federal Rules of Civil Procedure, Rule 54(d)(1)) Local Rule 54-1 provides
25 that, as a general rule "a prevailing party shall be entitled to costs." The plaintiff is the
26 prevailing only if "it recovers on the entire complaint." (See, Local Rule 54-2.1) The
27 defendant is the prevailing party "when the proceeding is terminated by court-ordered
28 dismissal or judgment in favor of defendant." (Local Rule 54-2.2) Under Local Rule

1 54-2.3, “[t]he Court shall determine the prevailing party when there is a partial
2 recovery or a recovery by more than one party.”

3 “A party in whose favor judgment is rendered is generally the prevailing party
4 for purposes of Rule 54(d).” (d’Hedouville v. Pioneer Hotel Co., 552 F.2d 886, 896
5 (9th Cir. 1977))


6 Here, CUSD prevailed on Farnan’s complaint. Farnan, while prevailing on one
7 claim within his complaint against one defendant did not prevail on the majority of his
8 claims. Thus, this Court must determine who the prevailing parties are before any
9 costs or fees are sought or awarded and further briefing on this issue should be
10 allowed.

11 **CONCLUSION**

12 In light of the above, the parties jointly request that this Court set the briefing
13 schedule as proposed.


14 DATED: May 22, 2009

ADVOCATES FOR FAITH AND FREEDOM

15
16
17 By: 
18 JENNIFER L. MONK
19 Attorneys for Plaintiff CHAD FARNAN, a
20 minor, by and through his parents BILL
21 FARNAN and TERESA FARNAN

22 DATED: May 22, 2009

WOODRUFF, SPRADLIN & SMART, APC

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28 JAMES CORBETT

26 ///
27 ///
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1 DATED: March ___, 2009

CALIFORNIA TEACHERS ASSOCIATION –
LEGAL DEPARTMENT

3 **ATTORNEY OUT OF STATE – VERBAL**
4 **APPROVAL RECEIVED TO FILE**

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