

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EDMUND G. BROWN JR.
Attorney General of California
RICHARD J. MAGASIN
Supervising Deputy Attorney General
ALLAN S. ONO
Deputy Attorney General
State Bar No. 130763
ERIC M. KATZ
Deputy Attorney General
State Bar No. 204011
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2604
Fax: (213) 897-2802
E-mail: Allan.Ono@doj.ca.gov
*Attorneys for California Science Center and Jeffrey
Rudolph in his official capacity as President and
CEO of the California Science Center*

FILED
LOS ANGELES SUPERIOR COURT

APR 29 2010

JOHN A. CLARKE, CLERK
Paul Sanchez
BY PAUL SANCHEZ, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
CENTRAL DIVISION

**AMERICAN FREEDOM ALLIANCE, a
nonprofit corporation,**

Plaintiff,

v.

**CALIFORNIA SCIENCE CENTER, a legal
entity of the State of California;
CALIFORNIA SCIENCE CENTER
FOUNDATION, a nonprofit corporation;
JEFFREY RUDOLPH, an Individual, and
DOES 1 through 50, inclusive,**

Defendants.

Case No. BC 423687

**CALIFORNIA SCIENCE CENTER'S
AND JEFFREY RUDOLPH IN HIS
OFFICIAL CAPACITY AS PRESIDENT
AND CEO OF THE CALIFORNIA
SCIENCE CENTER'S OPPOSITION TO
MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

Date: May 12, 2010
Time: 8:45 a.m.
Dept: 14
Judge: The Honorable Terry A. Green
Trial Date: February 14, 2011
Action Filed: October 14, 2009

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

INTRODUCTION 1

BACKGROUND FACTS AND PROCEDURAL HISTORY 1

LEGAL STANDARD 2

ARGUMENT 3

 I. Leave To Name Rudolph As A Defendant In His Individual Capacity
 Should Be Denied As Plaintiff's New Theory Of Liability Is A Sham, And
 Is Inconsistent With Plaintiff's Prior Pleadings And The Parties' Written
 Agreement..... 3

 II. Leave To Amend What Is Now The Proposed Fourth Cause Of Action
 Should Be Denied As The Center Defendants Are Immune From Lawsuits
 Brought Under 42 U.S.C. § 1983..... 6

 III. Leave To Amend To Add Causes Of Action Five Through Eight (Federal
 Civil Rights Claims) Should Be Denied As The Center Defendants Are
 Immune From Lawsuits Brought Under These Federal Laws..... 6

 IV. Leave To Amend The Other Causes Of Action Addressed In The Center
 Defendants' Pending Demurrer Should Be Denied If The Demurrer Is
 Sustained 7

 A. Leave To Amend The Second Cause Of Action (Breach Of The
 Implied Covenant Of Good Faith And Fair Dealing) Should Be
 Denied 7

 B. Leave To Amend The Eleventh Cause Of Action (Fraud) Should Be
 Denied 7

 C. Leave To Amend The Twelfth Cause Of Action (Injunction) Should
 Be Denied..... 8

 V. Leave To Add Adrian (Avi) Davis As A Plaintiff Should Be Denied As
 Such Allegations Would Conflict With Plaintiff's Prior Pleadings..... 8

CONCLUSION 10

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

STATE CASES

American Advertising & Sales Co. v. Mid-Western Transport
(1984) 152 Cal.App.3d 875..... 2, 5, 9

Amid v. Hawthorne Community Medical Group, Inc.
(1989) 212 Cal.App.3d 1383..... 2

Dodd v. Citizens Bank of Costa Mesa
(1990) 222 Cal.App.3d 1624..... 2, 9

Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.
(1998) 71 Cal.App.4th 38 9

Owens v. Kings Supermarket
(1988) 198 Cal.App.3d 379..... 4

People v. Pacific Lumber Co.
(2008) 158 Cal.App.4th 950 4, 5

Rubin v. Green
(1993) 4 Cal.4th 1187 5

Safeco Ins. Co. v. Superior Court [Hanna]
(1990) 216 Cal.App.3d 1491..... 5

State ex rel. Bowen v. Bank of America Corp.
(2005) 126 Cal.App.4th 225 9

Surrey v. TrueBeginnings
(2008) 168 Cal.App.4th 414 10

Vallejo Development Co. v. Beck Development Co.
(1994) 24 Cal.App.4th 929 2

FEDERAL CASES

Caldeira v. County of Kauai
(9th Cir. 1989) 866 F.2d 1175, cert. denied (1989) 493 U.S. 817 6

Eaglesmith v. Ward
(9th Cir. 1996) 73 F.3d 857..... 5

Kimel v. Florida Bd. of Regents
(2000) 528 U.S. 62..... 6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

McCalden v. California Library Ass'n
(9th Cir. 1990) 955 F.2d 1214, cert. denied (1992) 504 U.S. 957 6

Will v. Michigan Dept. of State Police
(1989) 491 U.S. 58 4

STATUTES

42 U.S.C. § 1983 2, 6

42 U.S.C. § 1985 6

42 U.S.C. § 1986 6

Evid. Code § 452, subd. (d)..... 5

CONSTITUTIONAL PROVISIONS

Eleventh Amendment..... passim

Fourteenth Amendment..... 6

United States Constitution 2, 4

1
2
3
4
5
6
7
8
9
10
11
12
13
14

INTRODUCTION

The California Science Center (“Center”) and Jeffrey Rudolph in his official capacity as President and CEO of the California Science Center (“Rudolph”) (collectively, “Center Defendants”) oppose Plaintiff American Freedom Alliance’s (“AFA” or “Plaintiff”) Motion for Leave to File a Second Amended Complaint (“Motion”).¹ The Motion should be denied as it impermissibly seeks:

- to name Rudolph in his individual capacity as part of a sham amendment to plead around the Eleventh Amendment immunity asserted in his pending demurrer;
- to re-plead the same causes of action subject the Center Defendants’ pending demurrer, without addressing the pleading deficiencies in those causes of action;
- to add new causes of action which are barred by the Eleventh Amendment; and
- to add Adrian (Avi) Davis as a new plaintiff based on allegations that contradict Plaintiff’s prior pleadings, and which cannot confer standing.

15
16
17
18
19
20
21

BACKGROUND FACTS AND PROCEDURAL HISTORY

This lawsuit arose following the Defendant California Science Center Foundation’s (“Foundation”) October 6, 2009 cancellation of a private event scheduled to be held by AFA on October 25, 2009 at the California Science Center’s IMAX Theater (“Event”). The Foundation’s cancelation of the Event was in response to AFA’s breach of the Event agreement due to the publication of unauthorized and misleading press releases that suggested that the Event was sponsored by the California Science Center as the West-Coast affiliate of the Smithsonian Institution.

22
23
24
25
26

A week after the Foundation canceled the Event, Plaintiff filed its original complaint on or about October 14, 2009. (Declaration of Allan S. Ono (“Ono Decl.”), ¶ 2, filed herewith.) Prior to the Center Defendants’ filing a response to the original complaint, AFA subsequently filed its First Amended Complaint (“FAC”) on or about November 19, 2009 purporting to assert causes of

27
28

¹ The Center Defendants reserve their right to file a demurrer as to any and all causes of action or parties which ultimately may be included in a Second Amended Complaint, should the Court allow such an amendment.

1 action for breach of contract, breach of the implied covenant of good faith and fair dealing,
2 violation of 42 U.S.C. § 1983, fraud, and which sought injunctive and declaratory relief. (*Id.* ¶ 3.)

3 Prior to accepting service of the FAC, Plaintiff's counsel agreed that Rudolph was being
4 sued in his official capacity only. (Ono Decl. ¶ 4.) Counsel for AFA confirmed this fact in
5 writing. (*Id.*, Ex. A.)

6 On January 19, 2010, the Center Defendants filed their demurrer to the FAC, on a number
7 of bases, including that the Eleventh Amendment to the United States Constitution immunizes the
8 Center and Rudolph (in his official capacity) from the cause of action asserted in the FAC based
9 on federal law. (Ono Decl. ¶ 6.) It was not until almost three months after the Center Defendants
10 filed their demurrer that Plaintiff's counsel informed the Center Defendants that it intended file a
11 further amendment to the FAC. (*Id.*, ¶ 7.)

12 If the Court were to grant Plaintiff's motion for leave to amend, the Center Defendants
13 expect that the private mediation currently scheduled for June 25, 2010 will need to be continued
14 as the pleadings will likely not be settled by that date, and the Center Defendants expect that the
15 trial date will need to be continued once again. (*Id.* ¶ 8.)

16 LEGAL STANDARD

17 The Court is not required to grant leave to amend in all circumstances. While ordinarily a
18 court will permit an amendment to cure a mistake or inadvertent allegation, it "is not required to
19 accept an amended complaint that is not filed in good faith, is frivolous or sham." (*American*
20 *Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 878.) In
21 considering a motion to amend, the court may examine the movant's prior pleading to determine
22 whether the proposed pleading is a sham. (*Vallejo Development Co. v. Beck Development Co.*
23 (1994) 24 Cal.App.4th 929, 946.) Any inconsistencies with prior pleadings must be explained; if
24 the pleader fails to do so, the court may disregard the inconsistent allegations. (*Amid v.*
25 *Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1390.) Allegations in
26 a complaint must yield to contrary allegations contained in exhibits to a complaint. (*Dodd v.*
27 *Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ARGUMENT

I. **LEAVE TO NAME RUDOLPH AS A DEFENDANT IN HIS INDIVIDUAL CAPACITY SHOULD BE DENIED AS PLAINTIFF'S NEW THEORY OF LIABILITY IS A SHAM, AND IS INCONSISTENT WITH PLAINTIFF'S PRIOR PLEADINGS AND THE PARTIES' WRITTEN AGREEMENT**

In light of the pending demurrer to the FAC, Plaintiff now claims that the FAC is “ambiguous” as to whether Plaintiff named Rudolph as a defendant in his individual or official capacity, or both. (Motion, at 5:12-13, 6:10.) Plaintiff asserts that its proposed amendment intends to “clarify its complaint by expressly alleging its causes of action against Defendant Jeffery Rudolph in his official capacities and his individual capacity.” (*Id.* [emphasis added].) Plaintiff’s belated assertion that the FAC needs clarification is simply wrong. Plaintiff’s proposed amendment is inconsistent with prior allegations and contradicts Plaintiff’s express written confirmation that Rudolph is being sued in his official capacity only.

On or about November 20, 2009, Plaintiff asked counsel for the Center Defendants and Foundation Defendants whether they would accept service of the FAC by notice of acknowledgment and receipt. (Ono Decl. ¶ 5.) In the course of those oral and written discussions, the parties exchanged emails to expressly clarify that Plaintiff was suing Rudolph in his official capacity only:

Counsel for Foundation: “Bill -- This email is to confirm our conversation of yesterday where you represented that in American Freedom Alliance's action against California Science Center, California Science Center Foundation, and Jeff Rudolph, the American Freedom Alliance is suing Mr. Rudolph in only his official capacity. As you represented, American Freedom Alliance is not suing Mr. Rudolph in his individual or personal capacity. As we discussed, this is critical to our ability to accept service of the complaint on Mr. Rudolph's behalf. If this is incorrect in any fashion, please inform me immediately. Sincerely, Jim Zelenay.”

Counsel for Center: “Bill: This is my understanding as well--i.e. that Jeff Rudolph is being sued soley [sic] in his official capacity and not personally. Please confirm. I plan to send out the acknowledgment today and would appreciate a prompt confirmation. Thanks. Allan.”

Counsel for Plaintiff: “Yes. Bill Becker. THE BECKER LAW FIRM.”

(Ono Declaration, Ex. A [emphasis added].)

It is black letter law that the Center and its employees acting in their official capacities are immune from suit under federal civil rights statutes based on the Eleventh Amendment to the

1 United States Constitution. (Center Defendants' Demurrer, at 9-10, citing *Will v. Michigan Dept.*
2 *of State Police* (1989) 491 U.S. 58, 74.) Plaintiff's Motion admits as much when it states, "the
3 Eleventh Amendment to the Constitution offers protection only from suits against a state officer
4 in his or her official capacity; . . ." (Motion, at 5:24-25.) Faced with a meritorious demurrer,
5 Plaintiff now seeks to plead around fatal defects in the FAC by casually stating that ". . . the
6 Defendants' demurrers have identified some issues of pleading that can be resolved economically
7 via a Second Amended Complaint." (Motion, at 2:8-9.) But Plaintiff is not allowed to simply
8 propose a new amendment which is inconsistent with the existing FAC and which plainly is
9 intended solely to avoid the Eleventh Amendment immunity afforded the Center Defendants.
10 (*People v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957 ["[W]e may properly consider
11 allegations asserted in the prior complaints: A plaintiff may not discard factual allegations of a
12 prior complaint, or avoid them by contradictory averments, in a superseding, amended
13 pleading".]) And although generally in reviewing dismissals after demurrers an appellate court
14 will assume the truth of the factual allegations of the complaint,

15 an exception exists where a party files an amended complaint and seeks to avoid the
16 defects of a prior complaint either by omitting the facts that rendered the complaint
17 defective or by pleading facts inconsistent with the allegations of prior pleadings.
18 [Citation.] In these circumstances, the policy against sham pleading permits the court
19 to take judicial notice of the prior pleadings and requires that the pleader explain the
20 inconsistency. If he fails to do so the court may disregard the inconsistent allegations
21 and read into the amended complaint the allegations of the superseded complaint.

19 (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384.)

20 Just as the United States Supreme Court in *Will* prohibited a plaintiff from suing an
21 employee acting in his official capacity as means to plead around the State's Eleventh
22 Amendment immunity, so too should this Court prohibit Plaintiff from seeking to name Rudolph
23 in his individual capacity merely to avoid the State's Eleventh Amendment immunity. (*Will v.*
24 *Michigan Dept. of State Police*, 491 U.S. at 71 ["[A] suit against a state official in his or her
25 official capacity is not a suit against the official but rather is a suit against the official's office.
26 [Citation.] As such, it is no different from a suit against the State itself. [Citation.] We see no
27 reason to adopt a different rule in the present context, particularly when such a rule would allow
28 petitioner to circumvent congressional intent by a mere pleading device".]) California courts

1 similarly take a dim view of a plaintiff's attempt to "plead around" immunities and other bars to a
2 plaintiff's ability to pursue a legal action. (*See, e.g., Rubin v. Green* (1993) 4 Cal.4th 1187, 1201-
3 1202 [rejecting plaintiff's attempt to re-label its cause of action in order to "plead around" the
4 immunity from slander actions for privileged publications]; *People v. Pacific Lumber Co.* (2008)
5 158 Cal.App.4th 950, 960 [same]; *Safeco Ins. Co. v. Superior Court [Hanna]* (1990) 216
6 Cal.App.3d 1491, 1494 [court refused to allow plaintiff to plead around prohibition on claim as
7 doing so would render prohibition "meaningless"].)

8 Plaintiff unambiguously limited claims against Rudolph to those actions taken in his official
9 capacity which Plaintiff confirmed in writing.² (Ono Decl. Ex. A).³ The Court is entitled to
10 assess the consistency (or lack thereof) of the factual averments in the proposed Second Amended
11 Complaint in light of Plaintiff's confirmation. (*Eaglesmith v. Ward* (9th Cir. 1996) 73 F.3d 857,
12 859 [where plaintiff sought amendment to name defendant in his individual capacity purportedly
13 "to clarify the capacity" in which defendant was being sued, prior correspondence between
14 counsel evidencing defendant's "official capacity" status supported court's conclusion that
15 plaintiff intended to sue defendant in his official capacity only].) Absent "very satisfactory
16 evidence" explaining its paradigm shift in position, Plaintiff cannot now amend its complaint to
17 seek relief against Rudolph inconsistent with its prior pleadings and the written agreement of
18 counsel simply to avoid the consequences of a pending demurrer. (*American Advertising & Sales*
19 *Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 879.)

20 ///

21 ///

22 ///

23 ///

24 _____
25 ² Plaintiff does not even allege the Rudolph breached the contract. (Proposed
26 Second Amended Complaint, ¶ 32 ["Defendants CENTER and FOUNDATION breached the
27 contract"])

28 ³ The Center Defendants request that the Court take judicial notice of the excerpts of
pleadings filed in this action and which are attached as exhibits to the Ono Declaration. (Evid.
Code § 452, subd. (d) ["Judicial notice may be taken of . . . records of any court of this
state"])

1 **II. LEAVE TO AMEND WHAT IS NOW THE PROPOSED FOURTH CAUSE OF ACTION**
2 **SHOULD BE DENIED AS THE CENTER DEFENDANTS ARE IMMUNE FROM LAWSUITS**
3 **BROUGHT UNDER 42 U.S.C. § 1983**

4 The FAC's Third Cause of Action (now the Second Amended Complaint's proposed Fourth
5 Cause of Action)⁴ alleges that the Center Defendants violated 42 U.S.C. § 1983. The Center
6 Defendants demurred to that cause of action on the basis that the Eleventh Amendment bars the
7 action against the State and its employees acting in their official capacities. (Center's Demurrer,
8 at 9-10.) The proposed Second Amended Complaint's Fourth Cause of Action does not differ in
9 any material way from the FAC's Third Cause of Action which is now the subject of the pending
10 demurrer. If the Court sustains the Center Defendants' demurrer to the FAC's Third Cause of
11 Action, it should likewise deny Plaintiff leave to plead the proposed Fourth Cause of Action.

12 **III. LEAVE TO AMEND TO ADD CAUSES OF ACTION FIVE THROUGH EIGHT (FEDERAL**
13 **CIVIL RIGHTS CLAIMS) SHOULD BE DENIED AS THE CENTER DEFENDANTS ARE**
14 **IMMUNE FROM LAWSUITS BROUGHT UNDER THESE FEDERAL LAWS**

15 The State's immunity discussed above in connection with the 42 U.S.C. § 1983 applies with
16 equal force to the other causes of action based on alleged violations of Plaintiff's federal civil
17 rights (*i.e.*, the Second Amended Complaint's proposed Fifth, Sixth, Seventh and Eighth Causes
18 of Action.)⁵ As such, to the extent that the Court sustains the Center Defendants' demurrer to the
19 FAC's Third Cause of Action, the Court should also deny Plaintiff leave to add new causes of
20 action that would similarly be barred. The Center Defendants' Eleventh Amendment immunity

21 ⁴ The difference in numbering this cause of action between the FAC and the Second
22 Amended Complaint appears to be a scrivener's error, as Plaintiff does not propose to assert a
23 Third Cause of Action in the Second Amended Complaint.

24 ⁵ Each cause of these causes of action fail due to the State's Eleventh Amendment
25 immunity to federal statutes. The Fifth Cause of Action is also based on 42 U.S.C. section 1983,
26 and therefore fails for all the reasons discussed in the demurrer. The Sixth Cause of Action is
27 based on 42 U.S.C. section 1985, which cannot lie when a plaintiff has failed to state a cause of
28 action for a section 1983 claim. (*Caldeira v. County of Kauai* (9th Cir. 1989) 866 F.2d 1175,
1182 cert. denied, (1989) 493 U.S. 817.). The Seventh Cause of Action is based on 42 U.S.C.
section 1986, which cannot lie when a plaintiff has failed to state a cause of action for a section
1985 claim. (*McCalden v. California Library Ass'n* (9th Cir. 1990) 955 F.2d 1214, 1223, cert.
denied, (1992) 504 U.S. 957. The Eighth Cause of Action is based on the Fourteenth Amendment
but is not grounded in any federal statute. The Eleventh Amendment precludes all causes of
action against a state unless Congress specifically enacted a statute to advance the purposes of the
Fourteenth Amendment, and it expressly made "its intention unmistakably clear in the language
of the statute" to abrogate a state's sovereign immunity. (*Kimel v. Florida Bd. of Regents* (2000)
528 U.S. 62, 73.) Plaintiff cites to no such statute, and therefore its Eighth Cause of Action also
fails.

1 precludes the Second Amended Complaint's proposed Fifth, Sixth, Seventh and Eighth Causes of
2 Action which, like the FAC's Third Cause of Action, are similarly grounded in federal civil rights
3 law for which the Center Defendants are immune.

4 **IV. LEAVE TO AMEND THE OTHER CAUSES OF ACTION ADDRESSED IN THE CENTER**
5 **DEFENDANTS' PENDING DEMURRER SHOULD BE DENIED IF THE DEMURRER IS**
6 **SUSTAINED**

7 **A. Leave to Amend The Second Cause of Action (Breach of the Implied**
8 **Covenant of Good Faith and Fair Dealing) Should be Denied**

9 The only change Plaintiff proposes to make to the Second Cause of Action is to substitute
10 "Plaintiffs" for "Plaintiff." (*Compare* First Amended Complaint ¶¶ 40-44, *with* Proposed Second
11 Amended Complaint, ¶¶ 39-43.) No other change is proposed.

12 The Center Defendants demurred to the Second Cause of Action on the basis that a breach
13 of the covenant of good faith and fair dealing can only be maintained if the parties stand in a
14 special relationship with one another. (Center Defendants' Demurrer, at 8:6-9:3.) If the Court
15 sustains the Center Defendants' demurrer to this cause of action, it should not grant leave to
16 amend as Plaintiff's proposed Second Amended Complaint does not even attempt to cure the
17 defect (which it could not.) Therefore, if the Court sustains the Center Defendants' demurrer to
18 the Second Cause of Action, it should deny leave to amend as the proposed Second Cause of
19 Action does not plead any new facts which would overcome the basis for the demurrer.

20 **B. Leave to Amend the Eleventh Cause of Action (Fraud) Should be Denied**

21 Similarly, the proposed Eleventh Cause of Action (Fraud) is substantially identical to the
22 FAC's Fourth Cause of Action (Fraud) which is subject to the Center Defendants' pending
23 demurrer to the FAC. The only change Plaintiff proposes is to substitute "Plaintiffs" for
24 "Plaintiff."

25 The Center Defendants demurred to the fraud cause of action as Plaintiff did not, and
26 cannot, plead that it relied on any alleged misrepresentations or that any damages it allegedly
27 suffered were due to the alleged misrepresentation. (Center Defendants' Demurrer, at 10-12.)
28 Even after having had three months to consider the Center Defendants' demurrer, Plaintiff has not
made any new allegations in its proposed Eleventh Cause of Action to address the claim's

1 deficiencies raised in the pending demurrer. If the Court sustains the Center Defendants'
2 demurrer as to the FAC's Fourth Cause of Action (Fraud), it should deny Plaintiff leave to amend
3 to add the proposed Eleventh Cause of Action (Fraud) as Plaintiff has now demonstrated that it
4 cannot meet fraud's heightened pleading requirements.

5 **C. Leave to Amend the Twelfth Cause of Action (Injunction) Should be**
6 **Denied**

7 Plaintiff's proposed Twelfth Cause of Action for issuance of an injunction is substantively
8 identical to the Fifth Cause of Action in the operative complaint, save for the proposed
9 substitution of "Plaintiffs" for "Plaintiff." If the Court sustains the Center Defendants' demurrer
10 as to the Fifth Cause of Action, it should deny leave to amend to add the identical claim in the
11 proposed Twelfth Cause of Action.

12 **V. LEAVE TO ADD ADRIAN (AVI) DAVIS AS A PLAINTIFF SHOULD BE DENIED AS SUCH**
13 **ALLEGATIONS WOULD CONFLICT WITH PLAINTIFF'S PRIOR PLEADINGS**

14 On Plaintiff's third attempt to state its claims, Plaintiff seeks leave to add Adrian (Avi)
15 Davis ("Davis") as a plaintiff on all proposed causes of action against all defendants. As set forth
16 below, Plaintiff's request contradicts the facts alleged in its prior pleadings and the contract
17 attached thereto. As Plaintiff's pleadings and the Event contract attached thereto demonstrate,
18 Davis is not a party to the Event contract nor does he have standing to assert claims.

19 Davis belatedly seeks to assert a breach of contract claim against the Center Defendants,
20 claiming that he *and* AFA were both parties to the contract at issue. (Proposed Second Amended
21 Complaint, ¶ 9.) However, this allegation is contrary to the averments in the original complaint
22 and the FAC which allege that "Plaintiff's President Avi Davis (hereinafter "DAVIS") entered
23 into a written contract (hereinafter the "contract") on Plaintiff's behalf with Defendants" (Ono Decl., Ex. B [original Complaint, ¶ 9; Ex. C [First Amended Complaint, ¶ 11 [emphasis
24 added]].) In neither iteration of the complaint was it ever alleged that Davis entered into the
25 contract on his own behalf. Even AFA's application for a temporary restraining order plainly
26 alleges, "[o]n or about October 1, 2009, AFA, a non-profit corporation, entered into a contract
27 (hereinafter, the "Contract") with the CENTER and its partner, the FOUNDATION" (Ono
28

1 Decl. Ex. D [AFA's Application and Order to Show Cause, Oct. 14, 2009, at 3:1-2 [emphasis
2 added]].)

3 "The well-established rule is that a proposed amendment which contradicts allegations in
4 an earlier pleading will not be allowed in the absence of very satisfactory evidence upon which it
5 is clearly shown that the earlier pleading is the result of mistake or inadvertence." (*American*
6 *Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 879.) An exhibit
7 to a complaint which contradicts an allegation in a proposed amended complaint is cause to deny
8 the motion for leave to amend. (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d
9 1624, 1627.) Plaintiff's original complaint, FAC, exhibits and other pleadings all contradict the
10 proposed new allegation that Davis was a party to the Event contract at issue. Tellingly, nor does
11 Plaintiff proffer any explanation, let alone "very satisfactory evidence," for why the proposed
12 amendment contradicts the earlier pleadings. To the extent that Davis believed that he was a
13 party to the contract, he certainly would have been aware of that fact when Plaintiff filed the
14 original complaint and the first amended complaint. "Courts are understandably suspicious of a
15 party's belated claim of mistaken admission of facts where the party has had unrestricted access
16 to the facts, presumptive knowledge of what occurred, and several opportunities to present the
17 correct facts." (*American Advertising & Sales Co.*, 152 Cal.App.3d at 879.)

18 Furthermore, the contract itself shows that Davis was identified only as AFA's contact
19 person and as a "Senior Fellow" at AFA. Nowhere does it identify Davis as a party to the
20 contract. (Proposed Second Amended Complaint, Ex. A.) Because he is not a contracting party,
21 Davis does not have standing to pursue a breach of contract claims. (*State ex rel. Bowen v. Bank*
22 *of America Corp.* (2005) 126 Cal.App.4th 225, 238 [noting that plaintiff who was not party to a
23 contract nor its intended third party beneficiary had standing to assert a breach of contract claim];
24 *Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.* (1998) 71 Cal.App.4th 38,
25 60 [entity must be in privity of contract to bring a breach of contract cause of action].)

26 Davis is similarly barred from bringing causes of action against the Center Defendants for
27 alleged violation of federal civil rights law (proposed Causes of Action Four through Eight) for
28

1 the same reasons AFA is barred from pursuing such claims. The Center Defendants' immunity
2 bars claims by corporations and individuals alike.

3 Davis is also barred from asserting claims based on the Unruh Civil Rights Act. As Davis
4 had not personally entered into or attempted to enter into a contract to rent the IMAX theater, he
5 cannot now bring an Unruh Civil Rights Act arising from the cancelation of AFA's contract to
6 rent the IMAX theater. In *Surrey v. TrueBeginnings* (2008) 168 Cal.App.4th 414, a putative
7 plaintiff filed an Unruh Civil Rights Act lawsuit alleging that an online dating service violated the
8 Act because its policy of charging men to use its service while allowing women to use its service
9 for free was discriminatory. (*Id.*, at 416-417.) The putative plaintiff was interested in using the
10 service, but did not join the service after he learned of the differential pricing policy based on
11 gender. (*Id.*, at 417.) The Court found that the plaintiff did not have standing to assert an Unruh
12 Civil Rights Act cause of action (or any other cause of action) based on that incident as he "did
13 not attempt to or actually subscribe to [defendant's] services." (*Id.*, at 420.) In the same way,
14 Davis lacks standing to sue under the Unruh Civil Rights Act as he did not, as an individual,
15 attempt to or actually contract to rent the IMAX theater for his own benefit.

16 CONCLUSION

17 The Center Defendants respectfully request that the Court deny Plaintiff's motion:

- 18 (i) to add Jeff Rudolph as a defendant in his individual capacity;
19 (ii) to file a Second Amended Complaint attempting to assert substantially identical
20 causes of action which are subject to the Center Defendants' demurrer to the FAC
21 (i.e., proposed causes of action two, four eleven and twelve);
22 (iii) to file a Second Amended Complaint attempting to assert new causes of action which
23 are barred by the Center Defendants' Eleventh Amendment immunity (i.e., proposed
24 causes of action five, six, seven and eight, and

25 ///

26 ///

27 ///

28 ///

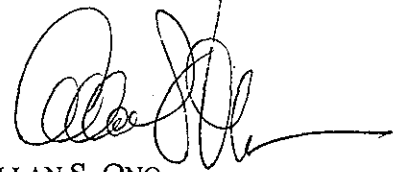
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(iv) to name Davis as a new plaintiff based upon factual allegations that cannot be reconciled with Plaintiff's prior pleadings.

Dated: April 29, 2010

Respectfully Submitted,

EDMUND G. BROWN JR.
Attorney General of California



ALLAN S. ONO
Deputy Attorney General
*Attorneys for California Science Center and
Jeffrey Rudolph in his official capacity as
President and CEO of the California
Science Center*

LA2009604304
50624925.doc

DECLARATION OF SERVICE BY ELECTRONIC MAIL & U.S. MAIL

Case Name: **American Freedom Alliance v. California Science Center, et al.**

Case No.: **BC 423687**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

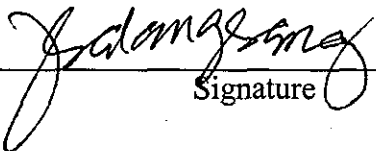
On April 29, 2010, I served the attached **CALIFORNIA SCIENCE CENTER'S AND JEFFREY RUDOLPH IN HIS OFFICIAL CAPACITY AS PRESIDENT AND CEO OF THE CALIFORNIA SCIENCE CENTER'S OPPOSITION TO MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT** by transmitting a true copy via **ELECTRONIC MAIL**. In addition, I placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

William J. Becker, Jr., Esq.
THE BECKER LAW FIRM
11500 Olympic Boulevard
Suite 400
Los Angeles, CA 90064
Phone: (310) 636-1018
Fax: (310) 765-6328
*Attorneys for Plaintiff, American
Freedom Alliance*

Patrick W. Dennis, Esq.
James L. Zelenay, Jr., Esq.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Phone: (213) 229-7000
Fax: (213) 229-7520
*Attorneys for Defendants, California
Science Center Foundation and Jeffrey
Rudolph, in his capacity as President and
CEO of the California Science Center
Foundation*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 29, 2010, at Los Angeles, California.

Joanna C. Salansang
Declarant


Signature