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**FILED**  
LOS ANGELES SUPERIOR COURT

MAY 05 2010

JOHN A. CLARKE, CLERK  
BY PAUL SANCHEZ, DEPUTY

9 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
10 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

11 **AMERICAN FREEDOM ALLIANCE**, a  
12 nonprofit corporation;

13 Plaintiff,

14 vs.

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

21 Defendants.

Case No. BC423687

*Assigned to: The Hon. Terry A. Green  
Dept. 14*

**PLAINTIFF AMERICAN FREEDOM  
ALLIANCE'S REPLY TO THE  
OPPOSITION OF DEFENDANTS  
CALIFORNIA SCIENCE CENTER  
FOUNDATION AND JEFFREY  
RUDOLPH TO PLAINTIFF'S MOTION  
FOR ORDER GRANTING LEAVE TO  
FILE SECOND AMENDED  
COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Complaint Filed: 10/14/09

Amended Complaint 11/19/09

Filed:

**BY FAX**

Trial Date: 2/14/2011

Date: 5/12/2010

Time: 8:45 a.m.

Dept.: 14

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**PLAINTIFF AMERICAN FREEDOM ALLIANCE'S REPLY TO THE OPPOSITION OF DEFENDANTS  
CALIFORNIA SCIENCE CENTER FOUNDATION AND JEFFREY RUDOLPH TO PLAINTIFF'S MOTION FOR  
ORDER GRANTING LEAVE TO FILE SECOND AMENDED COMPLAINT**

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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 Plaintiff AMERICAN FREEDOM ALLIANCE ("Plaintiff") hereby replies to the Oppo-  
3 sition of Defendants California Science Center Foundation ("Foundation") and Jeffrey Rudolph  
4 ("Rudolph") acting in his official capacity (collectively "Defendants") to Plaintiff's Motion for  
Leave to File Second Amended Complaint.

5 I. INTRODUCTION

6 Defendants argue that Plaintiff's proposed Second Amended Complaint ("SAC") is of-  
7 fered in bad faith and is a sham.

8 A. *Plaintiff Is Not Guilty Of Bad Faith.*

9 Defendants have resorted to accusing Plaintiff's counsel of "lacking good faith" by pro-  
10 posing to file an amended complaint, reasoning that had counsel proposed the amended pleading  
11 before agreeing to modify the case management schedule continuing mediation and trial dates,  
12 efforts to mediate the case would not somehow be threatened. Despite Defendants' charged rhe-  
13 toric, their argument never explains how the filing of an amended complaint will result in actual  
14 prejudice to them, and even omits the word "prejudice" altogether. Although they claim that it  
15 will be more difficult to resolve the case informally at mediation, and they may not be ready for  
16 trial some nine months from now, courts have not recognized these factors as constituting preju-  
dice. In fact, courts liberally allow amendments at any time in the lawsuit.

17 Defendants additionally complain that Plaintiff's counsel should have considered filing  
18 the amended complaint before agreeing to join in a stipulation to continue the mediation and trial  
19 dates. But they do not explain how the agreement has been undermined. Had Plaintiff's counsel  
20 *not* agreed to continue those dates, the parties would be facing an even more unmerciful sche-  
dule, with mediation to be completed by the end of May and trial in December.

21 Finally, as to the lack of good faith contention, Defendants appear to be asserting it on  
22 behalf of Defendant Rudolph in his personal capacity, even though there can be no prejudice to  
23 him since he is not presently involved in the case in his personal capacity but nevertheless is on  
notice of the claims against him.

24 B. *Plaintiff Has Not Filed Sham Amendments.*

25 Defendants have misinterpreted and misstated the law relating to the filing of "sham"  
26 amendments. True sham amendments involve the manipulation of factual allegations by modify-  
27 ing, adding or omitting facts to avoid demurrer. But Plaintiff has not altered, added or omitted

1 the facts, and Defendants have not pointed to a single factual allegation that has been changed or  
2 that does not derive from the original set of facts driving this lawsuit. Their main contention is  
3 that Plaintiff should not be allowed to allege constitutional claims against Defendant in his per-  
4 sonal capacity because it would constitute a change from the original complaint. But alleging the  
5 legal capacity does not constitute a *factual* change, and Defendants cannot show that *they* would  
6 be prejudiced by allowing the amendment.

7 C. *Mr. Davis Has Standing To Sue For Constitutional Violations, Fraud And Statu-*  
8 *tory Civil Rights Violations.*

9 Adrian (Avi) Davis has standing to assert constitutional claims, fraud and violation of the  
10 Unruh Civil Rights Act.

11 For these reasons, the motion should be granted.

12 II. THE JUDICIAL POLICY OF RESOLVING ALL DISPUTED MATTERS IN THE  
13 LAWSUIT GENERALLY WILL NOT BE DISTURBED ABSENT EVIDENCE OF  
14 PREJUDICE.

15 “[J]udicial policy favors resolution of all disputed matters between the parties in the  
16 same lawsuit. Thus, the court’s discretion will usually be exercised liberally to permit amend-  
17 ment of the pleadings.” *See Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; *Mabie v. Hyatt*  
18 (1998) 61 Cal.App.4th 581, 596.

19 The liberal policy of allowing amendments extends up to the time of trial and even during  
20 trial. “That trial courts are to liberally permit such amendments, at *any* stage of the proceeding,  
21 has been established policy in this state since 1901.” *Hirsa v. Sup. Ct.* (1981) 118 Cal.App.3d  
22 486, 488-89. “Courts are bound to apply a policy of great liberality in permitting amendments to  
23 the complaint at any stage of the proceedings, up to and including trial, absent prejudice to the  
24 adverse party.” *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761 (internal quotes omitted).

25 Defendants complain that they cannot be prepared for trial in February 2011 if required to  
26 respond to a second amended complaint. However, even where Plaintiff is the party seeking  
27 leave to amend knowing the trial will be delayed, “proximity to the trial date is not ground for  
28 denial.” Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group  
2010) ¶ 6:653, quoting *Mesler v. Bragg Mgmt. Co.* (1985) 39 Cal.3d 290, 297 [no surprise to de-  
29 fendant because parties had conducted discovery on the issues sought to be raised by amend-  
30

1 ment]. "As long as no prejudice to the defendant is shown, the liberal policy re amendment pre-  
2 vails and it is an abuse of discretion to refuse the amendment." *Id.*

3 III. DEFENDANTS HAVE FAILED TO SHOW THAT THEY HAVE BEEN OR  
4 WILL BE PREJUDICED.

5 Two factors justify the court in exercising its discretion to deny the motion: the party  
6 seeking the amendment has been dilatory, *and the delay has prejudiced the opposing party.* See  
7 *Hirsa v. Sup.Ct., supra*, 118 Cal.App.3d at 490. Here, neither factor is present. *Hirsa* is instruc-  
8 tive. In that case, the lawsuit was at issue and the Defendant had been deposed when plaintiff  
9 sought leave to file an amended complaint alleging an additional legal theory. Defendants op-  
10 posed the motion on the ground that the cause of action did not "relate back" and was barred by  
11 the statute of limitations. The defendant also argued that plaintiff engaged in an "unwarranted  
12 delay" in presenting the amendment. The court observed that the Defendant had already been  
13 named in the lawsuit, stating:

14 "It is difficult to understand how such a defendant can be prejudiced by amendment to  
15 add an additional theory of liability against it. Particularly is this true in light of the Su-  
16 preme Court holdings in both *Austin [v. Massachusetts Bonding & Insurance Co. (1961)*  
17 *56 Cal.2d 596]* and *Smeltzley [v. Nicholson Mfg. Co. (1977) 18 Cal.3d 932]* that amend-  
18 ing a complaint to substitute a named defendant for a fictitiously named defendant after  
19 the statute of limitations has run does not establish that the plaintiff was dilatory or that  
20 the newly substituted defendant was prejudiced."

21 *Id.* The rationale for claiming prejudice here is even more remote. This case is not yet at issue  
22 and no depositions have been taken. Indeed, Plaintiff has significant opportunity to add addi-  
23 tional defendants in place of the fictitiously-named Defendants and thus add parties, new legal  
24 theories and new factual allegations consistent with the facts already alleged. If the trial date  
25 does not dictate Plaintiff's right to place all disputed matters in issue in this case, the mediation  
26 date surely does not either. In fact, if it becomes clear that the parties are in no position to at-  
27 tempt mediation, they are free to seek relief to avoid the unnecessary expense. Moreover, this  
28 Court retains its discretion to modify the trial schedule.

Plaintiff filed the First Amended Complaint on November 19, 2009, and served Defen-  
dants on November 24, 2009. Defendants filed demurrers on January 19, 2010. The Court set  
the matter for hearing on May 12, 2010. Plaintiff's opposition to the demurrers was not due until  
nine (9) court days prior to the hearing (April 29, 2010). The instant motion was timely filed and  
served 16 court days prior to the hearing (April 19, 2010), and Plaintiff sought to have it heard

1 prior to the hearing on the demurrer. As Plaintiff's motion to amend was filed before the hearing  
2 on the demurrers and the Court may consider it before considering the demurrers, Plaintiff has  
3 not committed inexcusable delay. The fact that Defendants may file new demurrers and that  
4 those demurrers may not result in having the case put at issue before the current date for media-  
5 tion does not constitute prejudice. The Court can extend the mediation completion date again, or  
6 the parties are free to petition the Court to withdraw their consent to mediate. Moreover, the  
7 proposed amendments are based on the same set of facts, the same injury and the same incident,  
8 and the statute of limitations has not expired. *See, e.g., Barrington v. A. H. Robins Co.* (1985) 39  
9 Cal.3d 146, 150.

10 IV. PLAINTIFF'S COUNSEL HAS NOT COMMITTED BAD FAITH BY SEEKING  
11 LEAVE TO AMEND THE COMPLAINT TO IDENTIFY RUDOLPH AS AN  
12 INDIVIDUAL DEFENDANT.

13 A. *The Decision To Amend The Complaint To Identify Rudolph As An Individual De-*  
14 *fendant Was Not Based On Mistake Or Inadvertence.*

15 Defendants' failure to argue prejudice is revealing. Their main objection to the proposed  
16 amendment is the assertion of existing claims against Defendant Rudolph in his individual ca-  
17 pacity. The FAC failed to identify under which capacity Rudolph would be sued. This omission  
18 was not, as Defendants suggest, an implied promise not to sue him in his personal capacity at  
19 some point in the lawsuit. The decision not to serve Rudolph initially in his individual capacity  
20 was a matter of legal judgment. Prudence dictated that counsel conduct a modicum of discovery  
21 and reflect cautiously and carefully on the basis for asserting claims against Rudolph as a private  
22 individual, particularly in light of his dual role as president of both the state entity, Defendant  
23 Center, and the private entity, Defendant Foundation.

24 Plaintiff sought to amend the complaint so that the Court could rule on the motion prior  
25 to hearing argument on the demurrers. Plaintiff has a right to amend the complaint up to the time  
26 of the hearing on the demurrer. *Code of Civil Procedure* § 472 ("before the trial of the issue of  
27 law thereon"; *see Barton v. Khan* (2007) 157 Cal.App.4th 1216, 1221. According to Weil and  
28 Brown, "[t]his enables plaintiff to concede any error or objection to the complaint raised by the  
29 defendant, or otherwise discovered, and immediately draft and file an amended complaint."  
30 Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2010) ¶

1 6:603. "If the opposing party demurs to your pleading, and the demurrer appears to have some  
2 merit, it is usually smarter to amend .... " *Id.* Plaintiff's amendment is thus prudent and proper.

3 B. *The Proposed Amendment Naming Rudolph As An Individual Defendant Does Not*  
4 *Depend On New Or Inconsistent Factual Allegations, And Therefore, Does Not*  
5 *Constitute A Sham Amendment.*

6 In addition to incorrectly asserting that Plaintiff's counsel failed to allege constitutional  
7 claims against Rudolph in his individual capacity due to mistake or inadvertence, Defendants  
8 have misinterpreted the law as to "sham" amendments. A "sham" amendment, as they note, is  
9 one in which a party seeks to avoid *factual* defects in the original pleading. ["Under the sham  
10 pleading doctrine, plaintiffs are precluded from amending complaints to omit *harmful allega-*  
11 *tions*, without explanation, from previous complaints to avoid attacks raised in demurrers or mo-  
12 tions for summary judgment." (Opp., 5:27-28. 6:1, citing *Deveny v. Entropin, Inc.* (2006) 139  
13 Cal.App.4th 408, 425) (emphasis added.); "If a party files an amended complaint and attempts to  
14 avoid the defects of the original complaint . . . by *adding facts* inconsistent with those of previous  
15 pleadings, the court may take judicial notice of prior pleadings and may disregard any inconsis-  
16 tent allegations"; (Opp., 7:9-14, citing *Colapinto v. County of Riverside* (1991) 230 Cal.App.3d  
17 147, 151)].

18 "The rationale for this rule is obvious. A pleader may not attempt to breathe life into a  
19 complaint by *omitting relevant facts* which made his previous complaint defective." *Vallejo De-*  
20 *velopment Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946 (internal punctuation  
21 omitted) (emphasis added). It is the sameness of the facts rather than the rights or obligations  
22 arising from those facts that is determinative. Thus, amendments alleging a new theory of liabili-  
23 ty against the defendant relate back to the original complaint, so long as based on the same set  
24 facts previously alleged. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1199-1200.

25 Defendants have not focused the Court's attention on a single *factual* inconsistency be-  
26 tween the FAC and the proposed Second Amended Complaint. The "inconsistency" they point  
27 to rests on the legal capacity in which Rudolph is sued, not on any factual allegations. Indeed, the  
28 facts alleged against Rudolph in his individual capacity (terminating the contractual relationship  
with Plaintiff resulting in cancellation of the IMAX fundraising event) remain identical to the  
facts alleged against him in his official capacity. Accordingly, Plaintiff has not contradicted

1 facts alleged in the FAC by asserting constitutional claims against Rudolph in his individual ca-  
2 pacity.

3 **V. PLAINTIFF IS ENTITLED TO ALLEGE CLAIMS ON BEHALF OF ADRIAN**  
4 **(AVI) DAVIS.**

5 *Code of Civil Procedure* § 473 provides that "The court may, in furtherance of justice,  
6 and on such terms as may be proper, allow a party to amend any pleading or proceeding by add-  
7 ing or striking out the name of any party...." Defendants complain that Mr. Davis is not a real  
8 party in interest for the purpose of suing on the contract. While that may be true with respect to  
9 the contract action (First and Second Causes of Action), Mr. Davis has standing to sue under the  
10 remaining claims (including the constitutional claims, fraud and violation of the Unruh Act), and  
11 Defendants have not argued otherwise. "The standing requirements of Article III are only that  
12 the party be injured by the challenged conduct. However, the Supreme Court has further limited  
13 standing, as a prudential matter, requiring that a party assert its own rights and interests not those  
14 of third parties." *Halet v. Wend Inv. Co.* (9<sup>th</sup> Cir.1982) 672 F.2d 1305, 1308. Here, Mr. Davis  
15 has a separate and independent right to obtain relief based on Defendants' violations of his con-  
16 stitutional expressive rights and right of association. In addition, Mr. Davis has a right to assert  
17 fraud and violation of the Unruh Act for deceiving him and concealing the reasons for cancelling  
18 the IMAX event and for depriving him of his protected expressive activities and association  
19 rights at the Center's IMAX Theater.

17 **VI. CONCLUSION**

18 For the above reasons, the Court is urged to grant the motion for leave to file a Second  
19 Amended Complaint.

20 DATED: May 5, 2010

**THE BECKER LAW FIRM**

21  
22 By:

  
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24 Attorneys for Plaintiff,  
25 AMERICAN FREEDOM ALLIANCE