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

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

14 Plaintiff,

15 vs.

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

22 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 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 Filed: 11/19/09

Filed:

**BY FAX**

Trial Date: 2/14/2011

Date: 5/12/2010

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Dept.: 14

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**PLAINTIFF AMERICAN FREEDOM ALLIANCE'S REPLY TO THE OPPOSITION OF DEFENDANTS  
CALIFORNIA SCIENCE CENTER 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 ("Center") and Jeffrey Rudolph ("Rudolph") act-  
4 ing in his official capacity (collectively "Defendants") to Plaintiff's Motion for Leave to File  
5 Second Amended Complaint.

6 I. INTRODUCTION

7 A. *Defendants Have Not Made A Showing Of Prejudice.*

8 Defendants are required to show that they are prejudiced by the filing of an amended  
9 complaint at this time, but have failed to show prejudice. The fact that the mediation and trial  
10 dates have been continued by stipulation and order does not constitute prejudice. Nor does the  
11 fact that Rudolph was initially sued only in his official capacity constitute prejudice. Rudolph  
12 cannot assert prejudice as an individual in his official capacity for being sued as an individual in  
13 his personal capacity where he is sufficiently on notice of the claims and the case is not at issue.

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

15 Defendants have misinterpreted and misstated their authority relating to the filing of  
16 "sham" amendments. Such amendments involve the manipulation of factual allegations by mod-  
17 ifying, adding or omitting facts to avoid demurrer. Plaintiff has not altered, added or omitted the  
18 facts, and Defendants have not pointed to a single factual allegation that has been changed or that  
19 does not derive from the original set of facts driving this lawsuit. Their main contention is that  
20 Plaintiff should not be allowed to allege constitutional claims against Defendant Rudolph in his  
21 individual capacity, because it would constitute a change from the original complaint. But it  
22 does not constitute a *factual* change, and Defendants have not shown how *they* would be preju-  
23 diced by allowing the amendment.

24 C. *Defendants Are Not Entitled To Assert Immunity At The Pleading Stage, And, In  
25 Any Event, Do Not Necessarily Possess Eleventh Amendment Immunity Rights.*

26 Defendants completely misstate the law regarding immunity. A state agency may not be  
27 an arm of the state entitled to Eleventh Amendment immunity on the mere basis that it is a statu-  
28 tory creation of the state. State officials may be sued for constitutional violations in both their  
official and individual (personal) capacities and, in the latter capacity, are entitled only to quali-  
fied immunity.

1 D. *Mr. Davis Has Standing To Sue For Constitutional Violations, Fraud And Statu-*  
2 *tory Civil Rights Violations.*

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

5 For these reasons, the motion should be granted.

6 II. THE JUDICIAL POLICY OF RESOLVING ALL DISPUTED MATTERS IN THE  
7 LAWSUIT GENERALLY WILL NOT BE DISTURBED ABSENT EVIDENCE OF  
8 PREJUDICE.

9 “[J]udicial policy favors resolution of all disputed matters between the parties in the  
10 same lawsuit. Thus, the court's discretion will usually be exercised liberally to permit amend-  
11 ment of the pleadings.” See *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; *Mabie v. Hyatt*  
12 (1998) 61 Cal.App.4th 581, 596.

13 The liberal policy of allowing amendments extends up to the time of trial and even during  
14 trial. “That trial courts are to liberally permit such amendments, at any stage of the proceeding,  
15 has been established policy in this state since 1901.” *Hirsa v. Sup. Ct.* (1981) 118 Cal.App.3d  
16 486, 488-89. “Courts are bound to apply a policy of great liberality in permitting amendments to  
17 the complaint at any stage of the proceedings, up to and including trial, absent prejudice to the  
18 adverse party.” *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761 (internal quotes omitted).

19 Defendants complain that they cannot be prepared for trial in February 2011 if required to  
20 respond to a second amended complaint. However, even where Plaintiff is the party seeking  
21 leave to amend knowing the trial will be delayed, “proximity to the trial date is not ground for  
22 denial.” Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group  
23 2010) ¶ 6:653, quoting *Mesler v. Bragg Mgmt. Co.* (1985) 39 Cal.3d 290, 297 [no surprise to de-  
24 fendant because parties had conducted discovery on the issues sought to be raised by amend-  
25 ment]. “As long as no prejudice to the defendant is shown, the liberal policy re amendment pre-  
26 vails and it is an abuse of discretion to refuse the amendment.” *Id.*

27 III. DEFENDANTS HAVE FAILED TO SHOW THAT THEY HAVE BEEN OR  
28 WILL BE PREJUDICED.

Two factors justify the court in exercising its discretion to deny the motion: the party  
seeking the amendment has been dilatory, and the delay has prejudiced the opposing party. See  
*Hirsa v. Sup.Ct., supra*, 118 Cal.App.3d at 490. Here, neither factor is present. *Hirsa* is instruc-

1 tive. In that case, the lawsuit was at issue and the Defendant had been deposed when plaintiff  
2 sought leave to file an amended complaint alleging an additional legal theory. Defendants op-  
3 posed the motion on the ground that the cause of action did not “relate back” and was barred by  
4 the statute of limitations. The defendant also argued that plaintiff engaged in an “unwarranted  
5 delay” in presenting the amendment. The court observed that the Defendant had already been  
6 named in the lawsuit, stating:

7 “It is difficult to understand how such a defendant can be prejudiced by amendment to  
8 add an additional theory of liability against it. Particularly is this true in light of the Su-  
9 preme Court holdings in both *Austin* [*v. Massachusetts Bonding & Insurance Co.* (1961)  
10 56 Cal.2d 596] and *Smeltzley* [*v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932] that amend-  
11 ing a complaint to substitute a named defendant for a fictitiously named defendant after  
12 the statute of limitations has run does not establish that the plaintiff was dilatory or that  
13 the newly substituted defendant was prejudiced.”

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

22 Plaintiff filed the First Amended Complaint on November 19, 2009, and served Defen-  
23 dants on November 24, 2009. Defendants filed demurrers on January 19, 2010. The Court set  
24 the matter for hearing on May 12, 2010. Plaintiff’s opposition to the demurrers was not due until  
25 nine (9) court days prior to the hearing (April 29, 2010). The instant motion was timely filed and  
26 served 16 court days prior to the hearing (April 19, 2010), and Plaintiff sought to have it heard  
27 prior to the hearing on the demurrer. As Plaintiff’s motion to amend was filed before the hearing  
28 on the demurrers, Plaintiff has not committed inexcusable delay. The fact that Defendants may  
file new demurrers and that those demurrers may not result in having the case put at issue before  
the current date for mediation does not constitute prejudice. The Court can extend the mediation  
completion date again, or the parties are free to petition the Court to withdraw their consent to  
mediate. Moreover, the proposed amendments are based on the same set of facts, the same in-

1 jury and the same incident, and the statute of limitations has not expired. *See, e.g., Barrington v.*  
2 *A. H. Robins Co.* (1985) 39 Cal.3d 146, 150.

3 IV. THE PROPOSED SECOND AMENDED COMPLAINT DOES NOT  
4 CONSTITUTE A "SHAM."

5 A. *The Decision To Amend The Complaint To Identify Rudolph As An Individual De-*  
6 *fendant Does Not Contradict Plaintiff's Earlier Decision To Sue Rudolph In His*  
7 *Official Capacity.*

8 Claiming the proposed Second Amended Complaint is a "sham," Defendants' main ob-  
9 jection to the proposed amendment is the assertion of existing claims against Defendant Rudolph  
10 in his individual capacity. (See argument, *infra*, as to why Rudolph is not entitled to assert Ele-  
11venth Amendment immunity in his personal capacity but is only entitled to qualified immunity).

12 The FAC failed to identify under which capacity Rudolph would be sued. This omission  
13 was not, as Defendants suggest, an implied promise not to sue him in his personal capacity at  
14 some point in the lawsuit. The decision not to serve Rudolph initially in his individual capacity  
15 was a matter of legal judgment. Prudence dictated that counsel conduct a modicum of discovery  
16 and reflect cautiously and carefully on the basis for asserting claims against Rudolph as a private  
17 individual, particularly in light of his dual role as president of both the state entity, Defendant  
18 Center, and the private entity, Defendant Foundation.

19 Plaintiff sought to amend the complaint so that the Court could rule on the motion prior  
20 to hearing argument on the demurrers. Plaintiff has a right to amend the complaint up to the time  
21 of the hearing on the demurrer. *Code of Civil Procedure* § 472 ("before the trial of the issue of  
22 law thereon"; *see Barton v. Khan* (2007) 157 Cal.App.4th 1216, 1221. According to Weil and  
23 Brown, "[t]his enables plaintiff to concede any error or objection to the complaint raised by the  
24 defendant, or otherwise discovered, and immediately draft and file an amended complaint."

25 Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2010) ¶  
26 6:603. "If the opposing party demurs to your pleading, and the demurrer appears to have some  
27 merit, it is usually smarter to amend ...." *Id.* Plaintiff's amendment is thus prudent and proper.

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

4 Defendants have misinterpreted the law as to “sham” amendments. A “sham” amend-  
5 ment is one in which a party seeks to avoid *factual* defects in the original pleading. “Under the  
6 sham pleading doctrine, plaintiffs are precluded from amending complaints to omit *harmful alle-*  
7 *gations*, without explanation, from previous complaints to avoid attacks raised in demurrers or  
8 motions for summary judgment.” *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425  
9 (emphasis added). “If a party files an amended complaint and attempts to avoid the defects of  
10 the original complaint . . . *by adding facts* inconsistent with those of previous pleadings, the court  
11 may take judicial notice of prior pleadings and may disregard any inconsistent allegations.” *Co-*  
12 *lapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151.

13 Defendant Center argues: “Faced with a meritorious demurrer, Plaintiff now seeks to  
14 plead around fatal defects in the FAC.... But Plaintiff is not allowed to simply propose a new  
15 amendment *which is inconsistent with the existing FAC* and which plainly is intended solely to  
16 avoid the Eleventh Amendment immunity afforded the Center Defendants.” (Opp., 4:10). But  
17 the cases Center quotes from do not stand for such a broad principle. As the language of those  
18 cases make clear, it is not whether an amendment is inconsistent with the original allegations but  
19 whether new facts have been alleged that are inconsistent with the original claims: “[W]e may  
20 properly consider allegations asserted in the prior complaints: A plaintiff may not discard *factual*  
21 *allegations* of a prior complaint, or avoid them by *contradictory averments*, in a superseding,  
22 amended pleading.” *People v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957. “[A]n ex-  
23 ception exists where a party files an amended complaint and seeks to avoid the defects of a prior  
24 complaint either by *omitting the facts* that rendered the complaint defective or by *pleading facts*  
25 *inconsistent* with the allegations of prior pleadings.” *Ovvens v. Kings Supermarket* (1988) 198  
26 Cal.App.3d 379, 383-384.

27 “The rationale for this rule is obvious. A pleader may not attempt to breathe life into a  
28 complaint by *omitting relevant facts* which made his previous complaint defective.” *Vallejo De-*  
29 *velopment Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946 (internal punctuation  
30 omitted) (emphasis added). It is the sameness of the facts rather than the rights or obligations  
31 arising from those facts that is determinative. Thus, amendments alleging a new theory of liabili-

1 ty against the defendant relate back to the original complaint, so long as based on the same set  
2 facts previously alleged. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157.

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

9 V. DEFENDANTS CENTER AND RUDOLPH CANNOT CLAIM ELEVENTH  
10 AMENDMENT IMMUNITY FOR PURPOSES OF THIS MOTION.<sup>1</sup>

11 A. *State Entities Are Neither Presumptively Nor Conclusively Arms Of The State For*  
12 *Purposes Of Establishing Liability Under 42. U.S.C. § 1983, And Therefore May*  
13 *Have Only Qualified Immunity.*

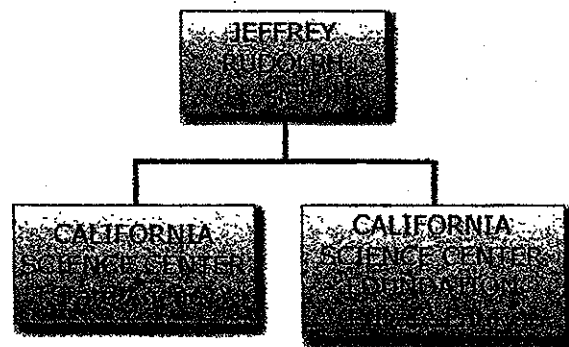
14 Actions against government and private defendants under the civil rights provisions of 42  
15 U.S.C. § 1983 must allege that the defendants acted "under color of state law." A claim upon  
16 which relief may be granted under § 1983 requires Plaintiff(s) to prove (1) that Defendants de-  
17 prived them of a right secured by the Constitution and the laws of the United States; (2) while  
18 acting under color of state law. *See Flagg Bros. v. Brooks* (1978) 436 U.S. 149, 155. Plaintiff  
19 AFA and prospective Plaintiff Avi Davis (collectively "Plaintiffs") have satisfied the first re-  
20 quirement by alleging that Defendants deprived them of their First Amendment rights of speech  
21 and association under the U.S. Constitution. They have satisfied the second requirement by al-  
22 leging that the Center is a state entity, that its partner, the Foundation, operates the state entity's  
23 public programs, and that the president of both entities, Rudolph, acted in his capacity as an of-  
24 ficer and agent of the Center and Foundation and on behalf of both entities' joint interests. A  
25 state entity is not protected by Eleventh Amendment immunity if it is not deemed an arm of the  
26 state. *See, e.g., Kirchmann v. Lake Elsinore Unified School District* (2000) 83 Cal.App.4th 1098,  
27 1104. The Center does not perform a central government function and therefore cannot, for pur-  
28 poses of opposing leave to amend, be presumed to enjoy Eleventh Amendment immunity.

<sup>1</sup> Defendants Center and Rudolph have incorporated argument from their demurrer. As such, Plaintiff hereby incor-  
porates its opposition argument to their demurrer.

1 B. *State Officials Are Neither Presumptively Nor Conclusively State Actors For Pur-*  
2 *poses Of Establishing Liability Under 42 U.S.C. § 1983.*

3 42 U.S.C. § 1983 basically seeks “to deter state actors from using the badge of their au-  
4 thority to deprive individuals of their federally guaranteed rights and to provide related relief.”  
5 *Richardson v. McKnight* (1997) 521 U.S. 399. “It imposes liability only where a person acts ‘un-  
6 der color’ of a state ‘statute, ordinance, regulation, custom, or usage.’”

7 Rudolph is president of two entities sued in his official capacity:



13 State officials sued in their official capacities may not be sued for *damages* under the Eleventh  
14 Amendment. However, under the doctrine of *Ex parte Young* (1908) 209 U.S. 123, *prospective*  
15 *relief* against a state official in his official capacity to prevent future federal constitutional or fed-  
16 eral statutory violations is not barred by the Eleventh Amendment. “In *Ex Parte Young* ... the  
17 Supreme Court held individuals could, in certain circumstances, bring an action *for injunctive*  
18 *relief* against state officials directly under the Constitution without violating the Eleventh  
19 Amendment. *Ahlmeier v. Nevada System of Higher Educ.* (9<sup>th</sup> Cir. 2009) 555 F.3d 1051, 1060  
20 (citation omitted). “*Ex Parte Young* provided a narrow exception to Eleventh Amendment im-  
21 munity for certain suits seeking declaratory and injunctive relief against unconstitutional actions  
22 taken by state officers in their official capacities.” *Rounds v. Or. State Bd. of Higher Educ.* (9<sup>th</sup>  
23 Cir.1999) 166 F.3d 1032, 1036.

24 C. *State Officials May Be Sued In Their Individual Capacity For Violating The Unit-*  
25 *ed States Constitution.*

26 The Eleventh Amendment does not grant immunity when a § 1983 claim for damages is  
27 asserted against a state official in his personal capacity. *Hafer v. Melo* (1991) 502 U.S. 21, 30-  
28 31. The fact that Rudolph may have acted in the course and scope of his employment in causing  
the deprivation of the Plaintiffs’ rights does not transform these claims into “official-capacity”

1 B. *State Officials Are Neither Presumptively Nor Conclusively State Actors For Pur-*  
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28 31. The fact that Rudolph may have acted in the course and scope of his employment in causing  
the deprivation of the Plaintiffs’ rights does not transform these claims into “official-capacity”

1 claims. “[S]tate officials, sued in their individual capacities, are ‘persons’ within the meaning of  
2 § 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely im-  
3 mune from personal liability under § 1983 solely by virtue of the ‘official’ nature of their  
4 acts.” *Hafer*, 502 U.S. at 31. The monetary relief awarded on such a claim would not be payable  
5 out of the state treasury, but would come from the state official’s personal funds, which are not  
6 protected by the Eleventh Amendment. *Id.* See also *Johnson v. Poway* (S.D.Cal. 2008) WL  
5657801.

7 “Qualified immunity protects government officials from civil liability for actions taken  
8 within their official discretion insofar as these actions do not violate clearly established statutory  
9 or constitutional rights of which a reasonable official would have been aware.” *Brentwood Acad-*  
10 *emy v. Tennessee Secondary School Athletic Ass’n* (6th Cir. 2006) 442 F.3d 410, 438. It involves  
11 a two-step inquiry: (1) whether the official’s conduct violated a constitutional right; and (2)  
12 whether that right was clearly established when viewed in the context of the case. See *Center for*  
13 *Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept.* (9th Cir. 2008) 533 F.3d 780, 793.  
14 “A right is clearly established if its contours are “sufficiently clear that a reasonable official  
15 would understand that what he is doing violates that right.” *Id.* Even if the right is clear, howev-  
16 er, whether the official made a reasonable mistake about the law’s requirements needs to be as-  
17 sessed. *Id.* at 793-94.

18 It is a clearly established law that where free speech is permitted on government property,  
19 government may not discriminate based on the speaker’s viewpoint. *Johnson v. Poway, supra*,  
20 (S.D.Cal. 2008) WL 5657801 at 14. At the pleading stage of litigation, individual defendants are  
21 not entitled to qualified immunity from suit. *Id.*

22 VI. PLAINTIFF IS ENTITLED TO ALLEGE CLAIMS ON BEHALF OF ADRIAN  
23 (AVI) DAVIS.

24 *Code of Civil Procedure* Section 473 provides that “The court may, in furtherance of jus-  
25 tice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by  
26 adding or striking out the name of any party....” Defendants complain that Mr. Davis is not a  
27 real party in interest for the purpose of suing on the contract. While that may be true with re-  
28 spect to the contract action (First and Second Causes of Action), Mr. Davis has standing to sue  
under the remaining claims (including the constitutional claims, fraud and violation of the Unruh  
Act), and Defendants have not argued that he lacks standing as to those claims.

1 "The standing requirements of Article III are only that the party be injured by the chal-  
2 lenged conduct. However, the Supreme Court has further limited standing, as a prudential matter,  
3 requiring that a party assert its own rights and interests not those of third parties." *Halet v. Wend*  
4 *Inv. Co.* (9<sup>th</sup> Cir. 1982) 672 F.2d 1305, 1308. Here, Mr. Davis has a separate and independent  
5 right to obtain relief based on Defendants' violations of his constitutional expressive rights and  
6 right of association. In addition, Mr. Davis has a right to assert fraud and violation of the Unruh  
7 Act for deceiving him and concealing the reasons for cancelling the IMAX event and for depriv-  
8 ing him of his protected expressive activities and association rights at the Center's IMAX Thea-

9 **VII. THE PROPOSED SECOND AMENDED COMPLAINT INCLUDES CAUSES OF**  
10 **ACTION THAT HAVE BEEN CHALLENGED BY DEMURRER AND HAVE**  
11 **NOT BEEN ADJUDICATED BY THE COURT.**

12 As Defendants Center and Rudolph in his official capacity as a Center official have in-  
13 corporated by reference their arguments from the Demurrer on file, Plaintiff hereby incorporates  
14 by reference the arguments submitted in Opposition to the Demurrers relating to the Second  
15 Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing, the Ele-  
16 venth Cause of Action for Fraud and the Twelfth Cause of Action for Injunctive Relief and re-  
17 quests judicial notice of same.


18 **VIII. CONCLUSION**

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

21 DATED: May 5, 2010

THE BECKER LAW FIRM

22 By:

  
23 WILLIAM J. BECKER, JR. ESQ.  
24 Attorneys for Plaintiff,  
25 AMERICAN FREEDOM ALLIANCE