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13 Foundation

14 SUPERIOR COURT, STATE OF CALIFORNIA
15 COUNTY OF LOS ANGELES

16 AMERICAN FREEDOM ALLIANCE, a
17 nonprofit corporation;

18 Plaintiffs,

19 v.

20 CALIFORNIA SCIENCE CENTER, a legal
21 entity of the State of California; CALIFORNIA
22 SCIENCE CENTER FOUNDATION, a
23 nonprofit corporation; JEFFREY RUDOLPH, an
24 individual; and DOES 1 through 50, inclusive;

25 Defendants.

CASE NO. BC 423687

Assigned to: The Honorable Terry A. Green,
Dept. 14

**DEFENDANTS CALIFORNIA SCIENCE
CENTER FOUNDATION'S AND JEFFREY
RUDOLPH'S (AS PRESIDENT OF THE
FOUNDATION AND IN HIS INDIVIDUAL
CAPACITY) REPLY IN SUPPORT OF
THEIR DEMURRERS TO PLAINTIFF
AMERICAN FREEDOM ALLIANCE'S
THIRD AMENDED COMPLAINT**

DATE OF FILING
OF ORIGINAL
COMPLAINT: October 14, 2009

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THIRD AMENDED
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I. INTRODUCTION

In responding to the instant Demurrers, Plaintiff American Freedom Alliance (“AFA”) provides no legal or factual arguments that could cure the deficiencies raised in the demurrer filed by defendants California Science Center Foundation (the “Foundation”) and Jeffrey Rudolph, a private individual and the President of the California Science Center Foundation (“Rudolph”) (collectively, the “Defendants”). Plaintiff provides no grounds by which this Court can conclude the Third Amended Complaint (“TAC”) states a valid cause of action as to Plaintiff’s Fifth, Sixth, and Seventh Causes of Action against Defendants.¹ Further, Plaintiff has provided no scenario under which it could state sufficient facts to support valid causes of action that are challenged here. Thus, the Court should grant the Defendants’ demurrers and dismiss with prejudice the aforementioned causes of action.

II. ARGUMENT

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A. The Demurrer as to the Seventh Cause of Action under the Unruh Civil Rights Act Should Be Sustained Because Plaintiff Has Not Alleged Discriminatory Intent

This Court previously recognized that “there must be discriminatory intent for [] Unruh [Act claims].” (Transcript of June 19, 2010 Demurrer Hearing (“Demurrer Hearing Transcript”) at 6:18–19.) Because the Second Amended Complaint (“SAC”) failed to adequately allege discriminatory intent, the Court sustained Defendants’ demurrer to the SAC, granting Plaintiff leave to amend. Despite access to substantial discovery, Plaintiff again fails to adequately plead facts in the TAC alleging discriminatory intent.

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28

1. Plaintiff has not denied that the factual allegations supporting its claim of discriminatory intent under the Unruh Act are identical to the SAC

Despite this Court having generously granted Plaintiff leave to amend its Unruh Act claim, the TAC presents the exact same allegations that the Court previously found to be inadequate in the SAC. The TAC—like the SAC—rests its allegations of discriminatory intent on two e-mails that this

¹ Plaintiff now concedes that pursuing its Fifth and Sixth Causes of Action “may be quixotic.” (See Plaintiff’s Opposition to Demurrers to Third Amended Complaint (“Opposition”) at 10:13–11:16.)

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1 Court has already deemed inadequate to allege intent. (See Demurrer Hearing Transcript at 6:20–23
2 [“I take judicial notice of the e-mails . . . and the e-mails don’t show discriminatory intent.”].)

3 Plaintiff has not advanced any new allegations in the TAC to show intent, and its Opposition
4 does not suggest that it has done so. Thus, the arguments set forth in Plaintiff’s Opposition should be
5 seen for what they are: an unsupported and untimely motion for reconsideration.² Plaintiff argues
6 that “[b]ecause the Court may not make factual findings on demurrer, . . . the Court must *revisit* this
7 issue with an eye toward making findings of fact, and considering factual findings in the aggregate.”
8 (Opposition at 5:2–5. emphasis added.) In effect, Plaintiff’s Opposition requests that this Court
9 reconsider its prior decision to sustain Defendant’s demurrer to the Unruh claim. But courts are
10 “foreclosed from rendering a new determination on the viability of [] claims unless some *new facts or*
11 *circumstances*” are brought to their attention. (*Bennett v. Suncloud* (1997) 56 Cal.App.4th 91, 97.)
12 Plaintiff has not argued that “new facts or circumstances” exist. In fact, while the TAC incorporates
13 three new paragraphs, they are wholly irrelevant to these issues and Plaintiff’s Opposition makes no
14 reference to them; instead relying exclusively on the same allegations that were previously made in
15 the SAC. As such, Plaintiff’s argument is simply a transparent attempt to have this Court improperly
16 reconsider its prior decision.³

21 ² The Code of Civil Procedure establishes a process through which a court’s decision may be
22 reconsidered. (Code Civ. Proc., § 1008(a).) A motion for reconsideration must be filed within 10
23 days of the decision and must be “based upon new or different facts, circumstances, or law.”
(*Ibid.*) Additionally, the motion must include an affidavit outlining the basis for reconsideration.
(*Ibid.*) Plaintiff has not met these requirements, or even attempted to do so.

24 ³ Plaintiff’s blatant attempt to circumvent the reconsideration process is consistent with its pattern
25 of disregarding procedural rules and indicative of its lack of respect for this Court and opposing
26 counsel. (See, e.g., Defendants California Science Center Foundation’s and Jeffrey Rudolph’s
27 Memorandum and Points of Authorities in Support of Their Demurrer to the SAC at p. 1, fn.2
28 [discussing prior procedural violations].) Indeed, the fact that Plaintiff forced Defendants to go
through the process of preparing and filing yet another demurrer—only to have Plaintiff
voluntarily dismiss its Fifth and Sixth Causes of Action that had previously been dismissed—is
further evidence of this conduct.

1 Because Plaintiff has not and cannot deny that its allegations of discriminatory intent are the
2 same as the SAC and were previously rejected by the Court, Defendants' demurrer should be
3 sustained with prejudice.⁴

4 **2. Plaintiff has not adequately alleged discriminatory intent.**

5 As in the SAC, Plaintiff's Unruh Act claim again fails to state "nonconclusory allegations
6 setting forth *evidence of unlawful intent*." (*Grier v. Brown* (N.D. Cal. 2002) 230 F.Supp.2d 1108,
7 1120, emphasis added.) Plaintiff suggests that the argument set forth in Defendants' demurrer
8 "invoke[s] judicial fact finding." (Opposition at 4:20.) But the Defendants' argument requires no
9 fact-finding. Rather, the demurrer notes that Plaintiff's allegations are simply a series of
10 "contentions, deductions and conclusions of fact or law" which "*are not considered* in judging the
11 sufficiency of the pleading." (*Lehto v. City of Oxnard* (1985) 171 Cal.App.3d 285, 287, emphasis
12 added.)

13 Here, and as the Court earlier held, the facts alleged in the SAC and now the TAC do not
14 show discriminatory intent. Plaintiff's primary contention of discriminatory intent is based upon the
15 use of the term "creationist" in two e-mails—which this Court has previously determined "don't
16 show discriminatory intent." (Demurrer Hearing Transcript, at 6:23.) The full texts of those e-
17 mails—which this Court has earlier judicially noticed—refute any suggestion that the cancellation
18 was motivated by discriminatory intent. In fact, the only interpretation that can be drawn from these
19 emails is that Defendants were concerned about the inaccurate press releases which inappropriately
20 implied that Defendants were affiliated with Plaintiff in cosponsoring the Event and which violated
21 clear contractual provisions specifically intended to prevent these inaccuracies. For example, the full
22 text of one e-mail indicates that "cancelling [the AFA] would send the clearest message that we don't
23 appreciate the way the[y] misrepresented b[oth] the Science Center and the Smithsonian." (CSCF

24 _____
25 ⁴ Plaintiff has disregarded this Court's invitation to provide a new factual basis for its Unruh claim,
26 choosing instead to recycle its prior allegations and arguments. Further, Plaintiff has conceded
27 that it cannot maintain its conspiracy claims based on arguments Defendants set forth in their
28 demurrer to the SAC. Defendants believe this was a needless waste of this Court's and
Defendants' resources. Although reimbursement of Defendants' attorney's fees in preparing for
this latest demurrer would be warranted under the statute, Defendants are not seeking such
sanctions at this time. (See Code Civ. Proc., § 128.7(b)(3).)

1 0000233.) The second e-mail includes a statement that “a science center should not even be asked to
2 *partner* with any group associated with debating Darwinism – it’s not our place.” (TAC, ¶ 17,
3 emphasis added) Rather than evincing a discriminatory intent, Plaintiff’s allegations unambiguously
4 show that the Foundation cancelled the event because of Plaintiff’s conduct of releasing unapproved
5 press materials—and that this case is a simple breach of contract action and nothing more.

6 Despite this Court’s statement that they do not evince discriminatory intent, Plaintiff boldly
7 suggests that the e-mails “facially denote[] annoyance with Plaintiff’s message,” which can be “better
8 understood in its proper context.” (Opposition, at 5:18–19.) Plaintiff asks the Court to ignore the
9 plain meaning of the e-mails, infer that Foundation employees were “annoyed” by the Plaintiff’s
10 message, and conclude that the term “creationist” is pejorative. But the mere use of the term
11 “creationist” is not evidence of discriminatory animus. (Cf. *Afkhami v. Carnival Corp.* (S.D. Fla.
12 2004) 305 F.Supp.2d 1308, 1320 [Statement that “they are Iranian, but they’re nice” was not evidence
13 of intentional discrimination based on national origin.]) Further, Plaintiff’s argument ignores the fact
14 that the term “creationist” was never used to describe the Plaintiff but instead referred to the
15 Discovery Institute—which Plaintiff asserts is an entirely separate organization from the Plaintiff.
16 (TAC, ¶ 17.)

17 To buttress its argument that the e-mails show “annoyance,” Plaintiff alleges the Smithsonian
18 Institution “has a long history of discrimination against academic freedom for intelligent design
19 proponents.” (Opposition, at 6:1–2.) But—even if true—this allegation does not show that
20 Defendants also discriminated on this basis. Likewise, whatever inferences may be drawn from the
21 statement that the Smithsonian “was alarmed at the news release” cannot be attributed to the
22 Foundation. (See Opposition at 6:20–24.) It is a fallacy to conclude that, because the California
23 Science Center is a member of the Smithsonian’s Affiliations Program, they share the same beliefs,
24 characteristics, or motivations for their actions. As before, the Court need not and should not
25 unquestionably accept the “contentions, deductions and conclusions of fact or law” that Plaintiff
26 chooses to draw from these allegations. (See *Lehto v. City of Oxnard, supra*, 171 Cal.App.3d at p.
27 287.)

28 Contrary to Plaintiff’s assertions, sustaining Defendants’ demurrer does not require the Court

1 to weigh evidence or inferences. Rather, the demurrer argues that Plaintiff's allegations are founded
2 on a series of inferences built upon two selectively edited e-mail exchanges. Because the full-texts of
3 those e-mails unambiguously demonstrate a lack of discriminatory intent, Plaintiff's entire cause of
4 action is founded on unjustified inferences and "conclusions of law and fact"—which "are not
5 considered in judging the sufficiency of the pleading." (*Ibid.*) As such, Defendants' demurrer should
6 be sustained with prejudice.

7 **B. As Conceded By Plaintiff, Demurrer Should Be Granted On Plaintiff's Conspiracy**
8 **Claims**

9 Plaintiff has conceded that the Fifth and Sixth Causes of Action should be dismissed without
10 prejudice. Nevertheless, Plaintiff repleaded these claims after they were earlier dismissed by the
11 Court, and forced Defendants to go through the process of filing yet another demurrer to them—only
12 to now voluntarily withdraw them. This was a needless waste of this Court's and Defendants' time
13 and resources.⁵ Given that Plaintiff has already had the opportunity to replead these claims and—
14 only after an additional demurrer by Defendants—admits these claims should be dismissed, the Court
15 should sustain Defendants' demurrer without leave to amend.

16 **III. CONCLUSION**

17 For the foregoing reasons, the Foundation and Mr. Rudolph, individually and in his official
18 capacity as President of the California Science Center Foundation, respectfully request that the Court
19 grant the instant Demurrers and dismiss with prejudice.

20 DATED: October 1, 2010

GIBSON, DUNN & CRUTCHER LLP

21
22 By: 
Patrick W. Dennis

23 Attorneys for Defendants CALIFORNIA SCIENCE
24 CENTER FOUNDATION and JEFFREY RUDOLPH,
individually and in his official capacity as President of the
25 California Science Center Foundation

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27 ⁵ Plaintiff's consistent claim throughout this litigation that what is precluding resolution is the
28 amount of attorneys' fees Plaintiff's counsel has incurred. This demurrer is a clear example of
the needless waste of Defendants', and the Court's, resources because of Plaintiff's counsel's
failure to abide by procedural and substantive requirements.