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13 Foundation

14 SUPERIOR COURT, STATE OF CALIFORNIA
15 COUNTY OF LOS ANGELES
16 CENTRAL DISTRICT

17 AMERICAN FREEDOM ALLIANCE, a
18 nonprofit corporation; and ADRIAN (AVI)
19 DAVIS;

20 Plaintiffs,

21 v.

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

27 Defendants.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

FEB 08 2011

John A. Clarke, Executive Officer/Clerk
BY Raul Sanchez, Deputy

CASE NO. BC 423687

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

**DEFENDANT CALIFORNIA SCIENCE
CENTER FOUNDATION'S OPPOSITION
TO PLAINTIFF AMERICAN FREEDOM
ALLIANCE'S DEMURRER TO THE
AMENDED CROSS-COMPLAINT**

[Memorandum of Points and Authorities in
Support Thereof Filed Concurrently Herewith]

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TAC Filed: 10/8/2010
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1 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD HEREIN:

2 COMES NOW Defendant and Cross-Complainant CALIFORNIA SCIENCE CENTER
3 FOUNDATION which responds to Plaintiff and Cross-Defendant AMERICAN FREEDOM
4 ALLIANCE'S Demurrer to the Amended Cross-Complaint as follows:

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. INTRODUCTION**

7 Defendant and Cross-Complainant California Science Center Foundation ("Foundation")
8 hereby opposes the demurrer to its Amended Cross-Complaint ("Cross-Complaint") filed by Plaintiff
9 and Cross-Defendant American Freedom Alliance ("AFA"). AFA has not advanced a single
10 meritorious argument demonstrating that the Foundation has failed to plead the required elements of
11 any one of its three causes of action. Instead, AFA relies on heated rhetoric, matters outside the
12 pleadings, and arguments about how the Court should interpret evidence. Such devices are wholly
13 inappropriate for demurrer, and the Foundation respectfully requests that the Court deny AFA's
14 motion.

15 **II. ARGUMENT**

16 **A. Legal Standard**

17 A demurrer tests only the sufficiency of a pleading's factual allegations. (*Gervase v. Superior*
18 *Court* (1995) 31 Cal.App.4th 1218, 1224.) Unlike a motion for summary judgment or trial, a
19 demurrer does not ask whether evidence supports an allegation, how to resolve competing
20 interpretations of evidence, or which party should prevail. (*Id.*) "Instead, a demurrer admits,
21 provisionally for purposes of testing the pleading, all material facts properly pleaded, however
22 improbable they may be." (*Id.*) Accordingly, a court must deny a demurrer where a party states a
23 cause of action "under any *possible* legal theory." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th
24 962, 967 (emphasis added).) In assessing whether a cause of action survives demurrer, a court may
25 only consider a pleading's allegations. (*Four Star Electric, Inc. v. F & H Construction* (1992) 7
26 Cal.App.4th 1375, 1379.) It may not consider evidence or other extrinsic matters not judicially
27 noticed. (*Id.*) Additionally, it must construe allegations "liberally," always "with a view to

1 substantial justice.” (Code Civ. Proc., § 452.) And even where a court grants a demurrer, justice
2 demands “great liberality” in granting leave to amend. (*Scott v. Indian Wells* (1972) 6 Cal.3d 541,
3 549.) Provided a reasonable possibility exists that the defect could be cured by amendment, a court
4 must grant leave to amend, regardless of whether the pleading’s defect is procedural or substantive in
5 nature. (*Id.* at pp. 549–550.)

6 **B. The Foundation Has Adequately Pled Its First Cause of Action For Breach Of Contract**

7 Contrary to AFA’s claims, the Foundation has adequately pled its first cause of action for
8 breach of contract. To survive demurrer, a party need only allege: (1) a contract; (2) that party’s
9 performance of the contract or excuse for nonperformance; (3) the opposing party’s breach; and (4)
10 resulting damage. (*Lortz v. Connell* (1969) 273 Cal.App.2d 286, 290.) No other elements are
11 required. (See *id.*)

12 Here, the Foundation has provided a sufficient factual basis to support each element. *First*,
13 the Cross-Complaint alleges a contract—the Event Price Estimate containing the Event Services’
14 Policies and Procedures. (Am. Cross-Compl. ¶¶ 9, 11–14, 22.) Paragraph 22 states, “AFA signed an
15 Event Price Estimate regarding the booking of the Science Center for \$3,900 for the Event. As part
16 of *this* alleged contract, AFA agreed to abide by the Event Services’ Policies and Procedures.” (*Id.* at
17 ¶ 22 (emphasis added).) Exhibit A even provides the pertinent portion of that contract—the provision
18 AFA breached. (*Id.* at ¶ 11.) *Second*, the Cross-Complaint alleges the Foundation’s performance of
19 the contract or excuse for nonperformance. As Paragraph 23 asserts, “[t]he Foundation fulfilled, or
20 was prepared to fulfill, all of the requirements set forth in the alleged contract regarding the Event.”
21 *Third*, the Cross-Complaint states that AFA breached the contract by issuing publicity materials—
22 both on its own accord and through collaboration with the Discovery Institute—in strict violation of
23 AFA’s contractual obligation to submit “all” promotional materials for approval prior to their release.
24 (Am. Cross-Compl. ¶¶ 9, 12–20, 24.) Paragraph 24 reads: “AFA materially breached the alleged
25 contract when it coordinated with the Discovery Institute to issue publicity, which included the press
26 releases regarding the Event, without obtaining the prior approval of the Events Services Office as
27 required under the Event Services’ Policies and Procedures. AFA also materially breached the

1 alleged contract by issuing publicity on its own website without obtaining approval from the
2 Foundation.” *Finally*, the Cross-Complaint alleges resulting damage, stating that “[a]s a result of
3 AFA’s breach” the Foundation “suffered damage.” (*Id.* at ¶ 25.)

4 Despite the Cross-Complaint’s clear allegations supporting each required element, AFA
5 challenges the sufficiency of those allegations as they pertain to the first and fourth elements—the
6 existence of a contract and resulting damage. AFA’s contentions, however, are irrelevant and wholly
7 without merit. With regard to the first element (existence of a contract), AFA claims it is unclear
8 whether the contract was written, oral, or implied by conduct. (Notice of Demurrer at pp. 11–12.)
9 Yet the Foundation unequivocally alleges that the contract was written, particularly since it states that
10 AFA “signed” that agreement and even attached as Exhibit A the contractual provision at issue.
11 (Am. Cross-Compl. ¶ 11.)

12 AFA further contests the Foundation’s statements regarding the “alleged” contract. (Mem. of
13 Ps & As at p. 2.) For purposes of a demurrer, all the Foundation needs to *allege* is the existence of a
14 contract. (See *Lortz v. Connell, supra*, 273 Cal.App.2d at p. 290.) By characterizing the agreement
15 as an “alleged contract,” the Foundation has met its pleading obligation to *allege* the existence of a
16 contract. (Am. Cross-Complaint ¶ 22.) To the extent AFA takes issue with the Foundation’s
17 previous denials that the Event Services Agreement constituted a valid contract, a party may plead
18 any allegations in the alternative. (*Lim v. The TV Corp. Internat.* (2002) 99 Cal.App.4th 684, 690.)
19 A party may even allege inconsistent legal theories—that is, conflicting legal interpretations of the
20 same facts. (*Id.*) Here, although the Foundation’s position in response to AFA’s operative complaint
21 has been that the Event Services Agreement was not a validly executed contract, the Foundation
22 asserts—in the alternative, if the agreement is deemed legally valid—that AFA breached its
23 contractual obligations first and caused resulting damage to the Foundation. The Foundation bases its
24 allegations on the same *facts*, just with differing *legal* interpretations of those facts.

25 AFA additionally argues—without a single legal citation—that the contract was entered into
26 “as a charitable act” and thus that the contract is uncertain. (Mem. of Ps & As at p. 8.) First, no such
27 allegation is contained on the face of the Cross-Complaint. Rather, the Foundation alleges a valid
28

1 and enforceable contract. (See, e.g., Am. Cross-Compl. ¶ 22.) Second, why the Foundation might
2 have chosen to contract with AFA is irrelevant for purposes of demurrer, as it is not a required
3 element. (See *Lortz v. Connell*, *supra*, 273 Cal.App.2d at p. 290.)

4 Finally, regarding the fourth element (resulting damage), AFA argues that the Cross-
5 Complaint fails to allege proximate cause or the origin and nature of damages. (Mem. of Ps & As at
6 p. 3.) However, to adequately allege contractual damages for purposes of demurrer, the Foundation
7 need only assert that there was damage resulting from AFA's breach. (See *Lortz v. Connell*, *supra*,
8 273 Cal.App.2d at p. 290.) Provided damages are plausibly of a type that would naturally arise from
9 such a breach (Civ. Code, § 3300), damages allegations generally pled are adequate for purposes of
10 demurrer. Although AFA relies on *McDonald v. John P. Scripps Newspapers*, that case involved a
11 complaint's allegations that in no way plausibly supported a finding of *actual* causation. (*McDonald*
12 *v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 104 (affirming a trial court's grant of
13 demurrer where the plaintiff "[could not] show that anything would have been different" had the
14 alleged breach not occurred).) Here, on the other hand, the Foundation alleges that but for AFA's
15 breach in issuing the unapproved press releases, the resulting damage would not have occurred. (Am.
16 Cross-Compl. ¶¶ 14, 25.) Although the precise *measure* of damages of course must be determined at
17 the summary judgment or trial phase, the Foundation has adequately pled resulting damage for
18 purposes of demurrer.

19 **C. The Foundation Has Adequately Pled Its Second Cause of Action For Breach Of The**
20 **Covenant Of Good Faith And Fair Dealing**

21 AFA next asks the Court to dismiss the Foundation's second cause of action for breach of the
22 covenant of good faith and fair dealing. (Mem. of Ps & As at pp. 8-10.) Because this Court
23 previously dismissed AFA's cause of action for breach of this covenant, AFA argues that the same
24 outcome is warranted.¹ (*Id.*) However, what AFA fails to appreciate is the critical way in which the
25 Foundation's cause of action differs from AFA's previous claim.

26
27 ¹ AFA also contends that, as with its cause of action for breach of contract, the Foundation fails to
28 allege the existence of a contract and resulting damage. (Mem. of Ps & As at pp. 8-10.) For the
[Footnote continued on next page]

1 "Every contract imposes upon each party a duty of good faith and fair dealing in its
2 performance and its enforcement." (Rest.2d Contracts, § 205.) "In essence the covenant is implied as
3 a *supplement* to the express contractual covenants." (*Love v. Fire Ins. Exchange* (1990) 221
4 Cal.App.3d 1136, 1153 (emphasis in original).) Its purpose is "to prevent a contracting party from
5 engaging in conduct which (*while not technically transgressing the express covenants*) frustrates the
6 other party's right to the benefits of the contract." (*Id.* (parenthesis in original, italics added).)
7 Contrary to AFA's allegation, a special relationship between the parties, although common
8 particularly for tort liability, is not required. (See *Smith v. City and County of San Francisco* (1990)
9 225 Cal.App.3d 38, 49.) Rather, a *contracting* relationship is the prerequisite to liability. (*Id.*; 1
10 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 800, p. 894.)

11 Here is where the Foundation's and the AFA's claims differ. AFA previously alleged that, *by*
12 *terminating the contract*, the Foundation breached *both* the contract's express terms *and* the implied
13 covenant of good faith and fair dealing. This is incorrect. The same conduct (terminating the
14 contract) cannot simultaneously constitute duplicate breaches giving rise to doubled recovery.
15 Contrary to AFA's flawed position, the Foundation asserts a breach of contract claim, *or in the*
16 *alternative*, a cause of action for breach of the implied covenant of good faith and fair dealing. The
17 Foundation's primary allegation is that AFA breached the contract's express publicity provision.
18 (Am. Cross-Compl. ¶ 24.) However, in the event a trier of fact were to disagree and conclude that
19 AFA's collaboration with the Discovery Institute to issue unapproved press releases somehow did not
20 violate the contract's publicity provision (i.e. AFA's conduct did not technically transgress the
21 express terms of the contract's express covenants), the Foundation asserts, *in the alternative*, that
22 AFA's collusion with the Discovery Institute, at the very least, violated the implied covenant to act in
23 good faith and not frustrate the purpose of the contract. (*Id.* at ¶ 28.) Were this Court to dismiss the
24 Foundation's second cause of action, it would be left without a remedy to challenge AFA's
25 purposeful frustration of the contract in the event that AFA's conduct is not deemed an express

26 [Footnote continued from previous page]

27 reasons previously stated, the Foundation has adequately plead these elements to survive
28 demurrer.

1 breach. Indeed, the Foundation is *forced* to assert this claim due to the fact that AFA has argued,
2 spurious as it is, that its coordinated effort with the Discovery Institute did not constitute a breach of
3 the contract's plain terms.

4 **D. The Foundation Has Adequately Pled Its Third Cause Of Action For Fraud**

5 Finally, AFA's challenges to the third cause of action for fraud are equally without merit.
6 The Foundation alleges that AFA committed promissory fraud by agreeing to comply with the
7 contract's publicity provision without any intention of performing. (Am. Cross-Compl. ¶¶ 34–35.)
8 To state a claim for promissory fraud, the Foundation alleges, with particularity, the following
9 required elements: (1) that AFA entered into a promise; (2) that promise was important to the
10 transaction; (3) AFA agreed to the promise without any intention of performing; (4) AFA intended to
11 induce reliance on that promise; (5) the Foundation reasonably relied on that promise; (6) AFA failed
12 to perform the promised act; and (7) the Foundation's reliance was a substantial factor in causing the
13 resulting harm. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; CACI No. 1902; Am. Cross-
14 Compl. ¶¶ 33–47.)

15 AFA first asserts that the "importance" element is not alleged. (Mem. of Ps & As at p. 10.)
16 AFA is mistaken. The Cross-Complaint plainly states, "[t]he promotional materials provision was an
17 *important* component of the agreement, allowing the Foundation to ensure that the good-will it has
18 developed for the California Science Center's name is not misappropriated." (Am. Cross-Compl. ¶
19 37 (emphasis added).) It further alleges that "[b]ased upon the plain language of the agreement, AFA
20 was aware or should have been aware that the release of promotional material was *important* to the
21 alleged contract and that the Foundation might take action if unapproved promotional materials were
22 released before or after the contract was formed." (*Id.* at ¶ 38 (emphasis added).) The Foundation
23 thus provides, not only the relevant *legal* allegations regarding the promise's import, but an adequate
24 *factual* basis as well. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 638.)

25 AFA counters by arguing that the Court should adopt a different interpretation of the
26 evidence. For instance, AFA argues that because the publicity provision itself "says nothing about its
27 importance," the promise must not have been important. (Mem. of Ps & As at p. 11.) Such
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1 arguments are irrelevant for demurrer. As stated, demurrers accept as true all factual allegations; they
2 do not ask whether evidence supports an allegation, how to resolve competing interpretations of
3 evidence, or which party should prevail. (*Gervase v. Superior Court, supra*, 31 Cal.App.4th at p.
4 1224.) This type of argument about whether the provision was actually “important” or whether AFA
5 thought it was “important” are arguments reserved for summary judgment or trial, not demurrer. The
6 Foundation has made the allegation that it needs to make to survive demurrer.

7 Similarly, AFA’s arguments that the alleged facts do not support the intent element are also
8 misplaced for demurrer. AFA’s three-page recital on this issue—devoid of any legal authority—is
9 simply an argument based on the evidence, attempting to *prove* that AFA intended to comply with its
10 promise after all. (Mem. of Ps & As at pp. 12–15.) However, such arguments construing the
11 evidence are inappropriate for demurrer. (*Gervase v. Superior Court, supra*, 31 Cal.App.4th at p.
12 1224.) Based on the Cross-Complaint’s factual allegations, which must be accepted as true for
13 purposes of demurrer, the Foundation has adequately alleged that AFA did not intend to comply with
14 the publicity provision when it agreed to the alleged contract. (Am. Cross-Compl. ¶¶ 39–46.) The
15 *facts* pled to support this allegation include that, prior to signing the alleged contract: (1) “AFA [had]
16 already begun coordinating promotion for the Event before it even delivered a signed Event Price
17 Estimate to the Foundation” (*id.* at ¶ 39); (2) “AFA forwarded an [unapproved] press release to the
18 Discovery Institute and indicated ‘we are ready to start publicizing the event’” (*id.* a ¶ 40); and (3)
19 Peter Bylsma of the AFA “discussed delivering unapproved press releases to various media outlets”
20 and even gave the Discovery Institute the signal to “‘distribute everywhere you like’” (*id.* at ¶ 41).
21 Ultimately, based on these and other allegations, the Foundation has more than adequately alleged
22 that AFA lacked the intent to comply with its contractual obligations. AFA’s evidentiary arguments
23 to the contrary are proper for summary judgment or trial—not demurrer.

24 Finally, AFA contends that the Foundation fails to adequately plead damages. Once again,
25 AFA’s claims are baseless. The Foundation has sufficiently alleged, with particularity, resulting
26 damage from AFA’s fraudulent conduct. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 638.) The
27 Cross-Complaint asserts, for example, that “[a]s a result of its reliance on AFA’s false promise, the
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1 Foundation and its staff spent time and resources making arrangements for the Event to be held at the
2 Science Center, including coordinating with outside vendors.” (Am. Cross-Compl. ¶ 47.) It further
3 states, “the unauthorized press releases utilized the California Science Center name for a private
4 event, resulting in harm to the reputation of the Foundation, and the Science Center, within the
5 community.” (*Id.*) Moreover, it even explains that the Foundation “has incurred costs in an effort to
6 protect its reputation after the press releases were issued.” (*Id.*) Contrary to AFA’s claims, these
7 fact-based allegations advance the type and nature of the harm flowing from AFA’s fraudulent
8 conduct and overwhelmingly satisfy the Foundation’s pleading obligations. AFA’s rhetoric does not
9 alter the fact that the Foundation’s fraud claim is sufficiently pled.

10 III. CONCLUSION

11 For the foregoing reasons, the Foundation respectfully requests that this Court deny AFA’s
12 demurrer, or in the alternative, grant leave to amend.

13 DATED: February 8, 2010

14 GIBSON, DUNN & CRUTCHER LLP

15
16 By: 

Patrick W. Dennis

17 Attorneys for Defendants CALIFORNIA SCIENCE
18 CENTER FOUNDATION and JEFFREY RUDOLPH
19 individually and in his official capacity as President of
20 the California Science Center Foundation
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1 **CERTIFICATE OF SERVICE**

2 I, Jacquelyne Murray, declare as follows:

3 I am employed in Los Angeles, California; I am over the age of eighteen years and am not a party to
4 this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071. On February 8, 2011, I
5 served the following documents:

6 **DEFENDANT CALIFORNIA SCIENCE CENTER FOUNDATION'S OPPOSITION TO
7 PLAINTIFF AMERICAN FREEDOM ALLIANCE'S DEMURRER TO THE AMENDED
8 CROSS-COMPLAINT**

9 by placing a copy thereof in an envelope addressed to each of the persons named below at the address shown:

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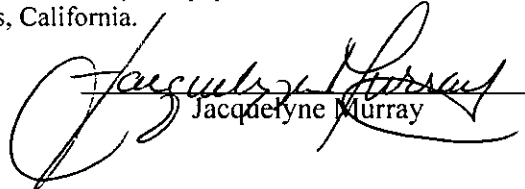
Counsel for Defendants California Science Center
and Jeffrey Rudolph, in his official capacity as
President and CEO of the California Science Center

18 **BY PDF FORMAT:** I caused each such document to be transmitted by PDF format, to the
19 parties and email addresses listed above.

20 **(STATE)** I declare under penalty of perjury under the laws of the State of California that the
21 foregoing is true and correct.

22 **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct.

23 I declare under penalty of perjury under the laws of the State of California that the foregoing is true
24 and correct and that the foregoing document was printed on recycled paper. This Declaration of Service was
25 executed by me on February 8, 2011, at Los Angeles, California.

26 
27 Jacquelyne Murray
28