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12 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

14 **AMERICAN FREEDOM ALLIANCE**, a
15 nonprofit corporation;

16 Plaintiff,

17 vs.

18 **CALIFORNIA SCIENCE CENTER**, a legal
19 entity of the State of California; **CALIFOR-**
20 **NIA SCIENCE CENTER FOUNDATION**,
21 a nonprofit corporation; **JEFFREY RU-**
22 **DOLPH**, an Individual, and **DOES 1** through
23 **50**, inclusive;

24 Defendants.

Case No. BC423687

Hon. Terry A. Green, Dept. 14

**REPLY TO DEFENDANT CALIFORNIA
SCIENCE CENTER FOUNDATIONS
OPPOSITION TO DEMURRER TO
CROSS-COMPLAINT; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[Request For Judicial Notice Filed Concur-
rently Herewith]

Complaint Filed: 10/14/2009

TAC Filed: 10/8/2010

Cross-Complaint Filed: 11/8/2010

Hearing Date: 2/23/2011

Hearing Time: 8:45 a.m.

Hearing Dept.: 14

Trial: 6/13/2011

BY FAX

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

2 COMES NOW Plaintiff American Freedom Alliance ("AFA") and hereby replies to the
3 Opposition of Defendant California Science Center Foundation (the "Foundation") to AFA's
4 Demurrer to Cross-Complaint.

5 DATED: February 12, 2011

THE BECKER LAW FIRM

6 By: _____/s_____
7 WILLIAM J. BECKER, JR., ESQ.
8 Attorneys for Plaintiff,
9 AMERICAN FREEDOM ALLIANCE
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Foundation struggles in vain to make the point of its inscrutable Cross-Complaint
4 clear. Very simply, the Cross-Complaint is based on a theory that AFA violated the following
5 provision:

6 **PROMOTIONAL MATERIALS:** It is required that the Event Services Office approve,
7 **for technical and factual accuracy**, all promotional materials mentioning the California
8 Science Center produced for your event (including invitations, programs, press releases,
9 etc.) prior to printing or broadcast. Please allow sufficient time for this approval.

10 (Emphasis added.) The Cross-Complaint's narrative weaves around a theme that AFA agreed to
11 present its publicity for its IMAX theater event to the Foundation for "technical and factual accu-
12 racy" review prior to publication without ever intending to do so. In other words, when AFA
13 entered into the contract, it secretly did not intend to ever produce its publicity for review. The
14 implication – and it is only that – appears to be that AFA conspired with the Discovery Institute
15 to harm the Foundation's reputation and somehow succeeded in achieving its nefarious goal.
16 This amounts to an allegation of intentional, rather than negligent, conduct. **But why? And why**
17 **would AFA deliberately sabotage its own event?**

18 The Foundation's indifference to these basic questions represents a fatal oversight. The
19 Cross-Complaint's narrative is honeycombed with logical voids, depriving AFA of essential
20 facts needed to understand the claims against it. Yet the Foundation seems oblivious to the
21 Cross-Complaint's glaring factual shortcomings. Among the more pertinent facts overlooked, the
22 Cross-Complaint:

- 23 • not once identifies any "promotional material" to be technically and factually inaccurate;
- 24 • never explains any supposed inaccuracy in such material;
- 25 • omits foundational facts identifying when the contract was accepted and formed;
- 26 • fails to explain how AFA was legally responsible for publicizing anything prior to the
27 contract's cancellation;
- 28 • omits essential facts needed to explain the relationship between AFA and the Discovery
Institute giving rise to AFA's duty to manage and control the activities of third parties;
- conceals facts needed to show how the October 5, 2009, publication of two press releases
would likely result in harm to the Foundation's reputation; and

- 1 • omits facts explaining how the Foundation's reputation was supposedly harmed by press
2 releases issued.

3 In short, the Cross-Complaint's factual narrative is an unrecognizable blur of innuendo
4 seen through the Foundation's uncalibrated lens of desperation.

5 **II. THE FOUNDATION HAS NOT JUSTIFIED ITS FAILURE TO ADEQUATELY**
6 **PLEAD A BREACH OF CONTRACT CAUSE OF ACTION.**

7 A. The Foundation Has Not Pled Allegations In The "Alternative" Under Any Rec-
8 ognizable Understanding Of Alternative Pleading.

9 Only in its opposition brief does the Foundation assert that its Cross Complaint is some
10 variety of argument in the alternative. (Found.Opp. at p. 3.) But to plead an alternative theory,
11 the Foundation must still abide by pleading requirements.¹ If the Foundation is pleading a breach
12 of contract, then the Foundation must allege that a contract existed and provide the relevant
13 terms of that contract. A breach of contract claim requires alleging a contract, i.e., stating its rel-
14 evant terms formally.

15 The law does not recognize inconsistent allegations of the existence and non-existence of
16 a contract. Illogically, the alternative theories the Foundation attempts to justify would be a
17 claim for "breach of contract" and a claim for "breach of no contract," the latter theory not con-
18 stituting a valid cause of action. While either factually or legally inconsistent allegations are
19 permissible (e.g., pleading intentional and negligent misrepresentation alternatively), they cannot
20 cancel each other out, and each version of the facts or each legal theory must be pleaded in a
21 separate cause of action in the complaint. Campbell v. Rayburn (1954) 129 Cal.App.2d 232, 235.
22 Here, the Foundation cannot properly claim that it is pleading inconsistent allegations for pur-
23 poses of satisfying the elements of a breach of contract claim. Neither can the Foundation logi-
24 cally claim that AFA breached something only alleged to be a contract (but not really a contract).

25 ¹ The Foundation cites Lim v. The.TV Corp. Internat. (2002) 99 Cal.App.4th 684, 690, as allow-
26 ing pleading in the alternative in contract actions. The Foundation's cross complaint, however,
27 nowhere asserts it is pleading in the alternative. In Lim, the issue centered on the effect on the
28 state of the pleadings when a few words were changed in a second amended complaint. By con-
29 trast, the defect in the Foundation's cross complaint is its attempt to plead a maybe contract. Lim
30 does not support that approach.

1 B. The Foundation's Ambiguous, Equivocal Use of "Alleged" Is Not Cured By Its
2 Opposition Brief.

3 A complaint is subject to demurrer for failure to state a cause of action when the allega-
4 tions are indirect. O'Hare v. Marine Elec. Co. (1964) 229 Cal.App.2d 33, 36 (minority share-
5 holder's complaint that each defendant was "an officer and/or director and/or shareholder" failed
6 to state a cause of action for breach of fiduciary duty because there was no direct allegation that
7 any defendant was a director or shareholder). Here, the Foundation insists that use of the term
8 "alleged" to modify "contract" does not present a pleading ambiguity. Slipperiness in the defini-
9 tion of terms can cause ambiguity known in logic as the "fallacy of equivocation." See Bear
10 Creek Master Ass'n v. Edwards (2005) 130 Cal.App.4th 1470, 1482 (fallacy occurs when the
11 document or argument "has shifted the meaning of the word"). When a complaint uses a term
12 having two substantially different meanings implying different legal positions, it is appropriate to
13 grant a demurrer. See CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal.App.4th 631, 639-
640 ("this case would probably not be on appeal had counsel chosen some word other than" the
14 ambiguous one supporting demurrer).

15 The Foundation's argument perfectly embodies an equivocation (a double meaning ap-
16 plied to the term "alleged").² Circularly, the Foundation's brief states: "For purposes of a demur-
17 rer, all the Foundation needs to allege is the existence of a contract. ... By characterizing the
18 agreement as an 'alleged contract,' the Foundation has met its pleading obligation to allege the
19 existence of a contract." (Found.Opp. at p. 3.) This tortuous argument is the equivalent of alleg-
20 ing a "putative contract," a "theoretical contract," a "doubtful contract," or like terms to modify
21 and distort the clear meaning of the word "contract." If the Foundation were "alleging" a contract
22 in the pleading sense, then the Cross-Complaint would describe the contract concretely. No
23 amount of rhetorical tap-dancing can overcome so obvious a pleading deficit.

24 C. Doubtful Pleading Of The Contract Will Lead To Summary Judgment.

25 Concrete pleading of the contract is necessary because otherwise there is no sensible way
26 to frame a motion for summary judgment, much less a jury instruction. The complaint "defines
27 what issues are material for summary judgment purposes." FPI Development, Inc. v. Nakashima
28

² It also gives rise to the logical fallacies of circumlocution (an ambiguous or roundabout figure of speech), and, more precisely, an amphilogism (a form of circumlocutory speech used to avoid telling something that might otherwise harm the speaker, e.g., whether the parties entered into an enforceable contract).

1 (1991) 231 Cal.App.3d 367, 381 (pleadings delimit the scope of issues in summary judgment
2 proceedings). If the Foundation's claim does not identify and plead an actual contract, then pre-
3 sumably there would be no triable issue about the contract – that element having not been plead-
4 ed.

5 If there is no way to establish the existence of the contract, then summary judgment
6 would be granted against the contract claim. By statute, “[a]ny party may move for summary
7 judgment in any action ... if the action has no merit ...” Code Civ. Proc., § 437c, subd. (a). “A
8 cause of action has no merit if ... [o]ne or more of the elements of the cause of action cannot be
9 separately established, even if that element is separately pleaded.” Consumer Cause, Inc. v.
10 SmileCare (2001) 91 Cal.App.4th 454, 467. Here, the Foundation's Cross Complaint does not
11 even plead the existence of a contract and thus cannot separately establish that element of the
12 claim. As a matter of law, the Foundation could not prevail against summary judgment on that
13 count.

14 D. The Foundation's Citation To Lortz Does Not Relieve Its Duty To Plead Damages
15 Correctly.

16 The Foundation cites Lortz v. Connell (1969) 273 Cal.App.2d 286, 290, to say that a con-
17 tract claim needs only to assert the existence of damages. That is not the law. Lortz addressed
18 the failure to properly plead excuse by nonperformance; it had nothing to do with pleading dam-
19 ages. AFA's Demurrer, on pages 3, 6 and 7, states the law and cites the California authorities
20 holding that contract damages must be pleaded specifically, not just mentioned.

21 **III. THE FOUNDATION'S JUSTIFICATION FOR ALLEGING A BREACH OF IM-**
22 **PLIED COVENANT OF GOOD FAITH AND FAIR DEALING CAUSE OF AC-**
23 **TION WAS PREVIOUSLY REJECTED BY THIS COURT.**

24 The Foundation has blatantly disregarded this Court's unequivocal position that there is
25 no such thing as a separate cause of action for Breach of the Implied Covenant of Good Faith and
26 Fair Dealing. (See Demurrer, Request for Judicial Notice of Reporter's Transcript of Proceed-
27 ings, July 19, 2010). This Court stated its view: “It's not a cause of action.” (Id., 25:1); “It's a
28 way of breaching a contract. It's a way you breach a contract. You can breach a contract any
number of ways. That's one of them.” (Id., 25:11-13); “It's a legal theory. It's not a cause of ac-
tion.” (Id., 26:4-5).

1 But the Foundation insists that its claim differs from Plaintiff's in ways this Court would
2 recognize. In fact, there is absolutely no difference between the argument Plaintiff articulated
3 and the one the Foundation persists in advocating.

4 In Plaintiff's Opposition to the Demurrer to the Second Amended Complaint, Plaintiff
5 stated that "[c]ancellation of the contract by Defendants on the preposterously flimsy pretext that
6 publicity had harmed Defendants' reputation with the Smithsonian frustrated Plaintiff's right to
7 the financial benefit it hoped to realize through the IMAX event." (Request to Take Judicial No-
8 tice, Pl.Opp.to Demurrer filed July 6, 2010, p.7, Ins. 8-11).³ In other words, Plaintiff alleged that
9 the Foundation had engaged in conduct (pretextual cancellation), which, while not technically
10 transgressing any specific term of the contract, frustrated its right to the benefits of the contract.
11 This is precisely the argument being made by the Foundation. (See Found.Opp. at p.5, Ins. 4-
12 6, 20-21). This is also precisely the argument this Court previously rejected. Accordingly,
13 consistency in this Court's rulings would lead to dismissing the Foundation's claim here.

14 **IV. THE FOUNDATION FAILS TO ALLEGE FRAUD WITH REQUIRED SPECI-
15 FICITY.**

16 A. The Cross-Complaint Does Not Allege A Single Properly Pled Fact Showing That
17 AFA Lacked Present Intent To Perform Under The Contract's Promotional Mate-
18 rial Provision.

19 "In California, fraud must be pled specifically; general and conclusory allegations do not
20 suffice. Thus the policy of liberal construction of the pleadings will not ordinarily be invoked to
21 sustain a pleading defective in any material respect. This particularity requirement necessitates
22 pleading facts which "show how, when, where, to whom, and by what means the representa-
23 tions were tendered." Small v. Fritz Companies, Inc. (2003) 30 Cal.4th 167, 184 (Citations and
24 internal punctuation omitted; emphasis added.)

25 "A promise of future conduct is actionable as fraud only if made without a present in-
26 tent to perform." Magpali v. Farmers Group, Inc. (1996) 47 Cal.App.4th 1024, 481; Civ.Code,
27 § 1710, subd. 4. (Emphasis added.) "A declaration of intention, although in the nature of a prom-
28 ise, made in good faith, without intention to deceive, and in the honest expectation that it will be
fulfilled, even though it is not carried out, does not constitute a fraud." Id. (Citations and internal
quotes omitted.) "Moreover, something more than nonperformance is required to prove the de-

³ Plaintiff's counsel also argued this point at the July 19, 2010, hearing.

1 fendant's intent not to perform his promise. If plaintiff adduces no further evidence of fraudulent
2 intent than proof of nonperformance of an oral promise, he will never reach a jury." Id. (Cita-
3 tions and internal punctuation omitted.)

4 Not only does the Cross-Complaint not allege a single properly pled fact showing that
5 AFA lacked a "present intent to perform" under the contract's Promotional Materials provision,
6 it fails even to allege the date on which the contract was formed (the "when" requirement, Small
7 v. Fritz Companies, Inc., supra). "The existence of an acceptance is necessary and essential to a
8 completed contract." Ten Winkel v. Anglo California Securities Co. (1938) 11 Cal.2d 707, 721.
9 The Cross-Complaint does not allege the effective date of the contract (when it was accepted); it
10 conclusorily alleges that "When AFA and the Foundation entered into the alleged contract to
11 hold the Event, AFA promised to abide by the Event Services' Policies and Procedures, including
12 the provision governing the approval of promotional materials." (Cross-Complaint, ¶ 35, p. 8,
13 Ins. 18-20).

14 The Cross-Complaint alleges that AFA engaged in activity on September 31 and October
15 2, 2009 (Cross-Complaint, ¶ 40-43), **before it received and/or signed and delivered the con-**
16 **tract.** Thus, allegations of activity **prior to AFA's receipt of the contract and prior to its exe-**
17 **cuttion of it** do not demonstrate a lack of "present intent to perform" on May 5, 2009.

18 The Cross-Complaint does allege that on "On October 5, 2009, the Foundation received a
19 signed Event Price Estimate from AFA...." (Cross-Complaint, ¶ 11, p. 4, Ins. 24-25). It further
20 alleges that "On October 5, 2009, the same day that the Foundation received a signed Event Price
21 Estimate from AFA, the Foundation became aware of press releases that were issued over the PR
22 Newswire relating to the Event." (Id., ¶ 13, p. 5, Ins. 4-6; ¶ 44, p. 9, Ins. 21-26). Assuming, ar-
23 guendo, that the date of receipt implies the date of acceptance, the contract would have been
24 formed on October 5, 2009. Accordingly, AFA would have been required to have a "present in-
25 tent to perform" some time on October 5, 2009. But allegations that "the Foundation became
26 aware of press releases that were issued" on that date do not identify that AFA issued the releas-
27 es, how they were "issued," when they were "issued" in order to appear on October 5, or any
28 other fact that would show AFA's lack of intent.

At ¶ 45, the Cross-Complaint's only potentially relevant allegation that AFA might not
have had a present intent to perform appears when it states that "On the same day, an unapproved
announcement of the Event appeared on AFA's website, specifically referencing the California

1 Science Center.” Here, the Cross-Complaint subtly represents a fact neither based on the person-
2 al knowledge of any relevant Foundation official nor alleged on information and belief. “Where
3 plaintiff is basing his or her allegations on hearsay or surmise, rather than personal knowledge,
4 they should be pleaded ‘on information and belief.’” Weil & Brown, Cal. Prac. Guide: Civ. Pro.
5 Before Trial (The Rutter Group 2011)¶ 6:225. “[A] [p]laintiff may allege on information and be-
6 lief any matters that are not within his personal knowledge, if he has information leading him to
7 believe that the allegations are true.” Pridonoff v. Balokovich (1951) 36 Cal.2d 788, 792. The
8 allegation that “an unapproved announcement of the Event appeared on AFA’s website” is nei-
9 ther attributed to a Foundation employee nor alleged on information and belief. Accordingly, it is
10 improperly pled on the basis of hearsay or surmise.

11 Objectively read, the Cross-Complaint nowhere properly pleads facts showing AFA did
12 not intend to perform as promised when the contract was formed.

13 **B. The Cross-Complaint Fails To Allege Sufficient Facts To Show Causation.**

14 To allege fraud, “the pleading must show a cause and effect relationship between the
15 fraud and damages sought; otherwise no cause of action is stated.” Zumbrun v. University of
16 Southern California (1972) 25 Cal.App.3d 1, 12. The Cross-Complaint has not pleaded facts, on-
17 ly conclusions (e.g., the “fact” that AFA should have been aware of the contract’s “importance”
18 is a conclusion subjectively arrived at by facts nowhere pleaded). The Foundation’s claim that
19 its purported damages are based on the suggested “importance” of the contract provision and the
20 allegation that the provision somehow announces that the Foundation “might take action” if not
21 performed nowhere explains how the failure to allow the Foundation to review publicity for
22 technical and factual accuracy would result in reputational damage to the Foundation, an educa-
23 tional charitable organization.

24 **C. The Foundation Cannot Properly Claim Entitlement To Damages For The Ser-**
25 **vices It Was Required To Perform Under The Contract It Cancelled.**

26 In an action for fraud, damage is an essential element of the cause of action, which must
27 be specifically pled. Small v. Fritz Companies, Inc., supra, 30 Cal.4th at 202. “If the existence-
28 and not the amount-of damages alleged in a fraud pleading is “too remote, speculative or uncer-
tain,” then the pleading cannot state a claim for relief.” Id. The Foundation alleges two elements
of fraud damages: (1) financial loss resulting from services it provided, presumably under the

1 contract, before it cancelled the contract; and (2) damages associated with protecting its reputa-
2 tion.

3 In the first instance, the Cross-Complaint fails to allege facts that show specifically what
4 costs it incurred under the contract and how it sought to mitigate such loss in light of its own
5 cancellation of the contract. "The doctrine of mitigation of damages holds that a plaintiff who
6 suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable
7 steps to mitigate those damages and will not be able to recover for any losses which could have
8 been thus avoided." Valle de Oro Bank v. Gamboa (1994) 26 Cal.App.4th 1686, 1691. (Citations
9 and internal punctuation omitted.) Because the Foundation cancelled the contract, it foreclosed
10 its right to receive the financial benefit of the contract for which it bargained. Further, it failed to
11 mitigate its damages by taking the simple step of contacting AFA to ask for a public correction
12 of information it perceived to be inaccurate, or other actions necessary to avoid a loss. By can-
13 celling the contract, the Foundation was itself responsible for any financial loss incurred as a re-
14 sult of services provided under the contract with AFA.

13 D. Damages Relating To A Business's Loss Of Reputation Are Not Recoverable In
14 A Fraud Cause Of Action.

15 General damages based on loss of reputation are personal damages recoverable in Cali-
16 fornia as a remedy for libel and slander by an individual. Cal.Civ.Code § 48a(4)(a). The Founda-
17 tion has cited no authority, and AFA has been unable to locate any, that entitles a business entity
18 to recover damages for loss of reputation under a claim of fraud.

18 E. Even If A Business Entity Could Recover Damages For Loss Of Reputation, The
19 Foundation Has Failed To Allege Sufficient Facts To Show Entitlement To Such
20 Relief.

21 "Allegations of damages without allegations of fact to support them are but conclusions
22 of law, which are not admitted by demurrer." Zumbrun v. University of Southern California,
23 supra, 25 Cal.App.3d at p. 12. The Cross-Complaint fails to allege facts that show (1) what ne-
24 cessitated efforts to protect the Foundation's reputation; (2) what activities the Foundation en-
25 gaged in to protect its reputation; (3) what the costs associated with those activities were; and (4)
26 how they were directly related to any alleged conduct by AFA.

26 ///

27 ///

