IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL ON AMERICAN-ISLAMIC RELATIONS, Plaintiffs, v. PAUL DAVID GAUBATZ; CHRIS GAUBATZ, a.k.a. "David Marshall"; and JOHN AND JANE DOE NOS. 1-10, Defendants.	)	Civil Action No. 09-2030 (CKK) Judge Colleen Kollar-Kotelly

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND COMPLAINT

Plaintiff, Council on American-Islamic Relations Action Network, Inc., previously misnamed "Council on American-Islamic Relations" and referred to hereinafter as "CAIR," moves for leave to file the attached First Amended Complaint.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). However, "the court should freely give leave when justice so requires." *Id.* "It is common ground that Rule 15 embodies a generally favorable policy toward amendments." *Davis v. Liberty Mut. Ins. Co.*, 871 F.2d 1134, 1136-37 (D.C. Cir. 1989) (citations omitted). The decision whether to grant leave to amend a complaint is within the discretion of the district court, but "[t]he presumption runs in the plaintiff's favor that he may amend his complaint" *Steinbuch v. Cutler*, 463 F. Supp. 2d 1, 3 (D.D.C. 2006). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

THE FIRST AMENDED COMPLAINT

Pursuant to LCvR 15.1, the proposed First Amended Complaint is attached. The principal changes are as follows:

(1) The caption is revised to add "Action Network, Inc." at the end of "Council on American-Islamic Relations" so as to state CAIR's full legal name and the same change is made to ¶ 11 describing CAIR;

(2) CAIR-Foundation, Inc. is included in the caption as an additional plaintiff and a new paragraph (¶ 12) is added to provide a description of CAIR-Foundation, Inc.;

(3) Where appropriate, references to CAIR have been revised to reflect that both CAIR and CAIR-Foundation are plaintiffs;

(4) An unjust enrichment claim has been added (*see* ¶¶ 97-101) along with the factual allegations relating to that claim (*see* ¶¶ 5, 31, 45, 49); and

(5) The allegations are supplemented and clarified in several respects, including as relating to:

(a) Defendant Chris Gaubatz's fiduciary obligations (¶¶ 29, 66);

(b) the sources from which Defendants stole documents and information (*see* ¶¶ 3, 35, 50, 52, 67(b), 92);

(c) the nature of the materials stolen by Defendants (*see* ¶ 5, 6);

(d) the identification of the entity with which Defendant Chris Gaubatz first interned, *i.e.*, CAIR-Maryland-Virginia located in Herndon, Virginia (*see* ¶¶ 17, 18);

(e) the non-public nature of CAIR's premises (¶¶ 24-25, 84);

(f) the Confidentiality and Non-Disclosure Agreement entered into between CAIR and Defendant Chris Gaubatz (¶ 75); and

(g) the injuries and damages resulting from Defendants' conduct (*see* ¶¶ 55-57, 62, 63, 71-72, 81-82, 88-89, 95-96 & Request for Relief ¶ 6).

ARGUMENT

A. Leave Should Be Granted to Correct the Misnaming of CAIR by Less than Its Complete Legal Name

The original Complaint identified the "Council on American-Islamic Relations" as the plaintiff. It should have instead read "Council on American-Islamic Relations Action Network, Inc." CAIR was originally incorporated in 1994 as "Council on American-Islamic Relations, Inc.," but changed its name in 2007 to "Council on American-Islamic Relations Action Network, Inc." It has continued, however, to be referred to (by both itself and others, including Defendants) by the shorthand acronym, CAIR.

As detailed previously (*see* Doc. 37 at 3-6), the misnomer in the original Complaint did not cause Defendants any prejudice or confusion. It did not prevent them from appreciating who it was that had sued them, what documents the Complaint was referring to, or what actions were being alleged to have been wrongful. In the book *Muslim Mafia* and on his website, Defendant Paul David Gaubatz himself repeatedly and exclusively identified as "CAIR" or "Council on American-Islamic Relations" the entity from which he and his son had stolen documents and about which he was making accusations. The omission of two words and an abbreviation from the name of a plaintiff in the Complaint, a plaintiff everyone—including Defendants—know as "CAIR," causes no confusion or prejudice.

Courts generally allow amendments to change or correct the name of a party, whether corporation or individual, where the change does not have the effect of substituting another party, and the court conceives it has jurisdiction. As explained by the Fourth Circuit,

> Under modern practice, … [w]here the proper party is before the court, although there under a wrong name, and if the plaintiff, he is the party having the cause of

> action, and, if the defendant, he is the party the plaintiff intended to sue and did sue, and the court considers such defendant within its jurisdiction, an amendment of process and pleading will be allowed to change or correct the name of either plaintiff or defendant to cure the misnomer.

A.H. Fischer Lumber Co. v. A.H. Fischer Co., Inc., 162 F.2d 872, 873 (4th Cir. 1947) (denying dismissal and permitting amendment where word "Inc." was omitted from party's name and "Lumber" was added where "[t]he defendant was engaged in some branch of the lumber or woodworking business, there was no other corporation in the locality with a similar name, and nobody was misled in the first case"); *see also Hemphill Contracting Co. v. United States*, 34 Fed. Cl. 82, 86 (Fed. Cl. 1995) (granting motion to amend to correct misnomer of plaintiff from "Hemphill Contracting Company, Inc." to "Hemphill Contracting Co., Inc.").

This is not a situation of the wrong plaintiff being named and a proper plaintiff later being substituted as would implicate Rule 17, but rather an instance of a proper plaintiff being named incompletely. No substitution of parties is required as CAIR has been from the outset and will remain a plaintiff. *See Hilgraeve Corp. v. Symantec Corp.*, 212 F.R.D. 345, 347-48 (E.D. Mich. 2003) (granting motion to amend complaint to correct name of plaintiff from "Hilgraeve Corporation" to "Hilgraeve, Inc." because "Defendant has adduced no evidence that the *entity* bringing this suit … would change following the proposed amendment to the complaint").

Even if an amendment to complete CAIR's full legal name by adding "Action Network, Inc." somehow constitutes a substitution of a different party, the Court should nonetheless grant leave to amend under Rule 17(a) such that the claims in this case may be asserted by the real party in interest. The misnomer was the result of a good faith oversight by counsel. It was not the result of any bad faith, was not intended to confuse or prejudice Defendants in any way, and did not in fact confuse or prejudice them.

B. Leave Should Be Granted to Add CAIR-Foundation, Inc. as a Plaintiff

Rule 15(a) allows a party to amend its pleading to add a new party. *Wiggins v. Dist. Cablevision, Inc.*, 853 F. Supp. 484, 499 (D.D.C. 1994); 6 FED. PRAC. & PROC. 2d § 1474.

The joinder of CAIR-Foundation, Inc. as a plaintiff in this action is permissible under Rule 20(a) and, in fact, desirable. CAIR-Foundation is a separate non-profit organization which supports and assists CAIR in its mission. It shares office space with CAIR in Washington, D.C. and, accordingly, has property interests in the premises at 453 New Jersey Avenue and in documents and personal property maintained therein. As a result, both CAIR and CAIR-Foundation have been injured, jointly and/or severally, by Defendants' actions.

Rule 20 provides that persons may join in one action as plaintiffs if (1) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (2) any question of law or fact common to all plaintiffs will arise in the action. Fed. R. Civ. P. 20(a)(1). Because they both have property interests in the 453 New Jersey Avenue offices and the contents thereof, Defendants' actions in gaining entry to those premises by deception and under false pretenses and their theft of personal property therefrom and their making of surreptitious recordings therein implicate the rights of both CAIR and CAIR-Foundation. By the First Amended Complaint, CAIR and CAIR-Foundation seek to assert their rights to relief arising from Defendants' conduct, both jointly and severally. Further, the factual and legal issues relating to Defendants' actions will be common to the actions of both plaintiffs. Accordingly, joinder is appropriate under Rule 20(a).

C. There Is No Other Reason Why Leave Should Not Be Granted

Beyond clarifying the full legal name of CAIR and adding CAIR-Foundation as a plaintiff, the First Amended Complaint merely adds an additional cause of action, makes certain technical corrections to the allegations, and clarifies the legal theories and factual grounds for this action.

Defendants would suffer no unfair prejudice by permitting the amendment of the complaint at this stage of the proceedings. Moreover, the First Amended Complaint clarifies a number of the allegations with respect to which Defendants claimed confusion and/or misread in their Motion to Dismiss. As such, the amendments obviate certain of the arguments advanced in that motion, including the argument that the Complaint had to and did not specifically allege that CAIR's offices were not generally open to the public (*see* First Amended Complaint ¶¶ 24-25, 84) and that it had to and did not specifically allege consideration for the Confidentiality and Non-Disclosure Agreement between CAIR and Defendant Chris Gaubatz (*see id.* ¶ 75). CAIR does not concede the correctness of Defendants' arguments on these technical points of pleading, but will nonetheless make these amendments to save the Court the time and effort required to address them.[1]

The amendments also expand the fiduciary duty allegations to include not only the allegation that Defendant Chris Gaubatz's fiduciary obligations resulted from his employment by CAIR as an intern, but additionally by virtue of both CAIR and CAIR-Foundation's placement of trust and confidence in him and his inducement of that trust. (*Id.* ¶¶ 29, 66.) Plaintiff maintains that an employment relationship alone is sufficient to give rise to a fiduciary duty, but nevertheless will add the alternative theory because it would also be supported by the facts. The

[1] To the extent that, in ruling on Defendants' pending motion to dismiss, the Court finds any of Plaintiffs' allegations to be insufficient in any other respect, Plaintiffs hereby request leave to further amend their complaint so as to cure any such defects.

amendments also expand upon the nature of the injuries suffered and resulting damages. (*See id.* ¶¶ 55-57, 62, 63, 71-72, 81-82, 88-89, 95-96 & Request for Relief ¶ 6.)

When "an amendment would do no more than clarify legal theories or make technical corrections," leave is typically granted. *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999). The assertion of a new claim or the introduction of a new legal theory is generally not a basis for denial of leave to amend. *Foman*, 371 U.S. at 182 (reversing district court's denial motion to amend where "the amendment would have done no more than state an alternative theory for recovery"); *Hanson v. Hoffmann*, 628 F.2d 42, 53 n.11 (D.C. Cir. 1980) ("Unless a defendant is prejudiced on the merits by a change in legal theory, a plaintiff is not bound by the legal theory on which he or she originally relied."); *cf. Ellis v. Georgetown Univ. Hosp.*, 631 F. Supp. 2d 71, 80 (D.D.C. 2009) (granting motion to amend to add new legal theories requiring additional discovery even though filed at the close of discovery as any prejudice could be ameliorated by supplemental discovery).

Further, this case was filed only a little more than four months ago, initial disclosures have not yet been made, and discovery has not begun in full. Under such circumstances and at such an early stage of the proceedings, there can be no unfair prejudice to defendants in permitting the amendment and no reason to deny leave to amend. *See, e.g., Clark v. Feder Semo & Bard, P.C.*, 560 F. Supp. 2d 1, 4 (D.D.C. 2008).

CONCLUSION

For the reasons stated above, CAIR requests that the Court grant it leave to amend its complaint and that the Court order the Clerk to docket the attached First Amended Complaint.

Respectfully submitted,

Dated: March 1, 2010

/s/Daniel Marino
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