

1 Irwin M. Zalkin, Esq., (#89957)
Devin M. Storey, Esq. (#234271)
2 Michael J. Kinslow, Esq. (#238310)
THE ZALKIN LAW FIRM, P.C.
3 12555 High Bluff Drive, Suite 260
San Diego, CA 92130
4 Tel: 858-259-3011
Fax: 858/259-3015

5 Attorney for Plaintiffs
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN DIEGO**
10

11 John Dorman, Individually, and Joel
Gamboa, Individually,

12 Plaintiffs,

13 vs.

14 Defendant Doe 1, La Jolla Church;
15 Defendant Doe 2, Linda Vista Church;
16 Defendant Doe 3, Supervisory Organization;
17 Defendant Doe 4, Perpetrator; and Does 5
through 100,

18 Defendants.
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Case No: 37-2010-00092450-CU-PO-CTL

**PLAINTIFFS REPLY TO LINDA
VISTA SPANISH CONGREGATION'S
OPPOSITION TO PLAINTIFFS'
MOTION TO AMEND COMPLAINT
TO ALLEGE PUNITIVE DAMAGES**

**Date: 12-2-11
Time: 10:30 a.m.
Judge: Steven R. Denton
Dept: C-73**

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28 **PLAINTIFFS REPLY TO LINDA VISTA SPANISH CONGREGATION'S OPPOSITION TO
PLAINTIFFS' MOTION TO AMEND COMPLAINT TO ALLEGE PUNITIVE DAMAGES**

1 **I. INTRODUCTION**

2 Plaintiffs John Dorman and Joel Gamboa filed a joint motion to file a Third Amended
3 Complaint alleging claims for punitive damages against Defendants. Specifically, John Dorman
4 seeks to assert a claim for punitive damages against Defendant Linda Vista Spanish
5 Congregation of Jehovah's Witnesses, San Diego, California (Linda Vista) and Defendant
6 Watchtower Bible and Tract Society of New York, Inc. (Watchtower). Joel Gamboa seeks to
7 assert a claim for punitive damages against Linda Vista, Watchtower and Defendant La Jolla
8 Spanish Congregation of Jehovah's Witnesses, San Diego, California (Playa Pacifica). Plaintiffs
9 were both molested by Gonzalo Campos (Campos) on numerous occasions when they were
10 minors associated with Defendants.

11 In response to Plaintiffs' joint motion to amend, the three Church Defendants filed
12 separate Oppositions. For the sake of increased clarity, Plaintiffs will file three reply briefs - one
13 for each Opposition. This brief is filed by both Plaintiff John Dorman and Plaintiff Joel Gamboa
14 in reply to the Opposition filed by Defendant Linda Vista.

15 Linda Vista's Opposition must fail since a long line of authority bears witness to this
16 State's policy of liberally permitting amendments to pleadings, even up to and during trial.
17 Plaintiffs did not delay in bringing this motion, but instead filed it diligently after obtaining
18 necessary evidence supporting the motion. Defendants, on the other hand, delayed the bringing
19 of Plaintiffs' motion by objecting to the production of documents and forcing Plaintiffs to bring a
20 motion to compel; not producing Campos to be deposed until September 2, 2011, and opposing
21 Plaintiffs' effort to specially set the hearing date on Plaintiffs' motion for November 10, 2011.
22 Plaintiffs acted diligently, and Linda Vista will suffer no prejudice if Plaintiffs are permitted to
23 amend this complaint. Linda Vista's arguments are insufficient to justify the denial of Plaintiffs'
24 motion.

25 **II. PLAINTIFFS' MOTION TO AMEND TO STATE CLAIMS FOR PUNITIVE**
26 **DAMAGES WAS FILED WITHIN A REASONABLE TIME OF OBTAINING**
27 **NECESSARY EVIDENCE, AND LINDA VISTA WOULD NOT BE PREJUDICED**
28 **BY THE INCLUSION OF SUCH A CLAIM**

“A court, at any time before or after commencement of trial, may allow an amendment to

1 a pleading in furtherance of justice.” *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564
2 (underline emphasis added.) In *Honig v. Financial Corporation of America*, the court noted:

3 “Motions to amend are appropriately granted as late as the first day of trial (e.g., *Higgins*
4 *v. Del Faro* (1981) 123 Cal.App.3d 558 [176 Cal.Rptr. 704]) or even during trial (*Rainer*
5 *v. Community Memorial Hosp.* (1971) 18 Cal.App.3d 240, 251-256 [95 Cal.Rptr. 901]) if
6 the defendant is alerted to the charges by the factual allegations, no matter how framed (*Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 489 [173 Cal.Rptr. 418]) and the
7 defendant will not be prejudiced.”

8 (1992) 6 Cal.App.4th 960, 965; *See Deetz v. Carter* (1965) 232 Cal.App.2d 851, 856-857 (since
9 the underlying facts of the claim were not changed, no abuse of discretion to grant plaintiffs leave
10 to amend complaint on the day of trial, even though conceivably the last minute change could
11 dramatically affect trial plans, and there was no good reason why the plaintiffs could not have
12 sought such an amendment prior to the day of trial); *Daum Development Corp. v. Yuba Plaza,*
13 *Inc.* (1970)11 Cal.App.3d 65, 75-76 (no abuse of discretion to allow plaintiffs to file third
14 amended complaint adding new theory of breach of contract after trial began because new
15 pleading did not assert a new cause of action, only a new theory, and defendants could not claim
16 to be surprised by the theory.)

17 In *Honig*, the complaint was filed in February of 1988, while the plaintiff was still
18 employed by the defendant. *Id.* The plaintiff was terminated from his employment in April of
19 1988. *Id.* The action was scheduled for trial on November 13, 1990. *Id.* Defendants’ motions
20 for summary judgment were filed in September of 1990, and when the plaintiff filed his
21 opposition to the summary judgment motions, he also filed a motion to amend to add new
22 paragraphs relating to the plaintiff’s existing claims, and also to add a new claim for defamation.
23 *Id.* at 965-66. The court determined that since the defendants were aware of the facts underlying
24 the new claim in advance of the motion, and had deposed the plaintiff regarding those issues, no
25 prejudice inured to the defendant as a result of the proposed amendment. *Id.* at 966.

26 The same is true here. Plaintiffs assert claims that Linda Vista and their agents
27 negligently, hired, retained, supervised, and failed to warn of the dangers posed by Campos; that
28 Linda Vista breached a confidential duty to Plaintiffs; and that Linda Vista negligently failed to
warn, train or educate Plaintiffs. Plaintiffs also claim that, by virtue of the vicarious liability

1 doctrine of ratification, Linda Vista is liable for the sexual harassment and sexual battery of
2 Plaintiffs by Campos. (Plaintiff's Exhibit 22, Proposed Third Amended Complaint.)

3 The evidence Plaintiffs will offer to prove Linda Vista's liability is the same evidence
4 that Plaintiffs will introduce to establish that Linda Vista is liable for punitive damages. In fact,
5 the theory of ratification is both a basis for which Linda Vista is liable for punitive damages, and
6 an underlying theory of liability in the case in chief. There is no difference in the evidence that
7 would be introduced, and no need for additional discovery by either party relating to the punitive
8 damages claim. Plaintiffs' motion to amend should be granted.

9 **A. Plaintiffs' Motion to Amend was Timely Made**

10 Linda Vista claims that Plaintiffs were dilatory in pursuing this motion to amend to allege
11 punitive damages. Linda Vista argues that Plaintiffs could have included a claim for punitive
12 damages at the time of the filing of the complaint, or at the latest in October of 2010 after
13 receiving many of the documents attached as Exhibits to Plaintiffs' motion.¹ Linda Vista's
14 argument regarding the purported tardiness of Plaintiffs' motion does not hold up under scrutiny.

15 Much of the evidence relied upon by Plaintiffs only became available to Plaintiffs
16 recently. For instance, Plaintiffs did not have access to Exhibit 5, Exhibit 7, Exhibit 11, Exhibit
17 12, Exhibit 14, Exhibit 15, Exhibit 16, Exhibit 18, Exhibit 19, Exhibit 20 or Exhibit 21 until July
18 13, 2011, after Plaintiffs had successfully compelled production of those documents over
19 Defendants' objections and assertions of privilege. (Declaration of Devin M. Storey at ¶10.)
20 Plaintiffs could not possibly have relied on such documents before they had won access to them.

21 Defendant claims that some of the documents listed above were produced to Plaintiffs on
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23 ¹ Defendant concedes that since it is not a religious corporation, or religious corporation
24 sole, it is not entitled to the protections of Code of Civil Procedure § 425.14. In light of that
25 concession, Linda Vista argues that a claim for punitive damages against it could have been
26 included in the complaint long ago, and that it would be prejudiced by the addition of such a
27 claim at this time. Defendant's argument fails to establish any prejudice. Even if Plaintiffs had
28 the information it needed and could have added a claim for punitive damages against Linda
Vista, a motion to amend to allege punitive damages could not have been made with respect to
Defendant Watchtower until now, since that Defendant is a religious corporation and is entitled
to the benefits of Code of Civil Procedure § 425.14. The motion to amend to allege punitive
damages as to that Defendant could not have been brought earlier. If Defendant is correct and a
continuance is necessary, it would have been needed regardless of when Plaintiffs moved to
amend to assert a claim for punitive damages against Linda Vista.

1 October 10, 2010, and others were produced on July 13, 2011. This statement is incomplete and
2 misleading. As Defendant is well aware, the documents identified on October 11, 2010 were
3 produced subject to protective order. (PE 23, December 16, 2010 Protective Order.) Plaintiffs'
4 use of such documents was limited "to the sole and exclusive purpose of Plaintiffs' preparation
5 for mediation." (PE 23, December 16, 2010 Protective Order, at ¶ 4.) Pursuant to that stipulated
6 order, Plaintiffs could not rely on said documents for any other purpose (including making a
7 motion to amend) until they were provided by Playa Pacifica and Watchtower on July 13, 2011
8 following an order of this Court.

9 Next, due to his flight from the Country, the deposition of Gonzalo Campos was not
10 taken until September 2, 2011. (Storey Dec. at ¶11.) Excerpts from Campos' deposition are
11 attached as Exhibit 3 to Plaintiffs' motion to amend.

12 After obtaining the documents referenced above and taking the deposition of Campos,
13 Plaintiffs' motion to amend was ready to be filed on October 13, 2011. (Storey Dec. at ¶12.) In
14 the days preceding the completion of Plaintiffs' motion, Plaintiffs' Counsel was informed by the
15 Court that the first available date for the hearing of such a motion was on December 2, 2011.
16 (Storey Dec. at ¶13.) Plaintiffs appeared ex parte on October 13, 2011 to specially set a hearing
17 date on Plaintiffs' motion for November 10, 2011, which would have resulted in the motion
18 being decided two and a half months prior to trial. (Storey Dec. at ¶14.) Plaintiffs also indicated
19 willingness to have a motion for summary adjudication of the issue of punitive damages heard on
20 short notice. (Storey Dec. at ¶14.)

21 Defendants opposed Plaintiffs' request to specially set the hearing date and the ex parte
22 was denied. (Storey Dec. at ¶15.) Plaintiffs' motion was consequently filed on November 7,
23 2011, which allowed for the statutorily required notice to Defendants of the December 2, 2011,
24 hearing. (Storey Dec. at ¶15.) Plaintiffs acted diligently in preparing and filing this motion to
25 amend, particularly in light of when much of the evidence relied upon by Plaintiffs was obtained.
26 Plaintiffs did not delay inexcusably in bringing this motion.

27 **B. Defendant will Suffer no Prejudice from the Amendment**

28 Defendant will suffer no prejudice as a result of allowing Plaintiffs to amend this

1 complaint to assert claims for punitive damages, but Plaintiffs would be severely prejudiced if
2 this amendment was denied on procedural bases. Defendants are entitled to assert objections and
3 privileges in response to a request for production of documents, but in this case, those assertions
4 of privilege precluded Plaintiffs from accessing the evidence supporting their claims for punitive
5 damages until July of this year. Additional relevant evidence was obtained in September. If this
6 Court were to find that Plaintiffs' motion is untimely and deny Plaintiffs the opportunity to
7 amend their complaint, it would be doing so because Plaintiffs were required to bring a motion to
8 compel to obtain relevant and unprivileged documents supporting the motion. This would
9 reward Defendants for declining to produce relevant and unprivileged documents, while
10 punishing Plaintiffs despite their diligent pursuit of their claims.

11 **1. Linda Vista has not stated any cognizable prejudice that would result**
12 **from the amendment**

13 Defendant claims that if Plaintiffs' motion to amend is granted, it will be prejudiced
14 because: 1) a continuance of the trial would be needed so it could "study its exposure for punitive
15 damages"; 2) witnesses would need to be re-interviewed or re-deposed to obtain further details in
16 light of this new exposure; 3) expert witness designations would need to be amended to address
17 the issue of punitive damages; 4) new costs associated with responding to Plaintiffs' claim for
18 punitive damages would be incurred; and 5) Linda Vista would be precluded from bringing a
19 motion to strike or motion for summary judgment challenging the new allegations as a result of
20 the motion cutoff date. (Defendant's Opposition at 6-7.) None of these arguments demonstrate
21 any recognizable prejudice that would require the denial of Plaintiffs' motion.

22 As to the claim that Defendant will need to "study its exposure for punitive damages," it
23 is difficult to believe that Linda Vista has not already done so. Counsel for Linda Vista was
24 informed months ago that after Plaintiffs filed their motion to compel, a motion to amend to
25 allege punitive damages was contemplated. (Storey Dec. at ¶6; PE 24, Plaintiffs' April 14, 2011
26 Case Management Conference Statement.) If Defendant chose not to consider that such liability
27 was possible, any resulting prejudice was of its own making. Regardless, Plaintiffs' motion to
28 amend is being heard on December 2, 2011, eight full weeks prior to the scheduled trial date. No

1 continuance is necessary and no prejudice inures to the detriment of Linda Vista since Defendant
2 has ample time to study its exposure prior to the commencement of trial.

3 As to the need to re-interview or re-depose witnesses, it is a doubtful proposition. The
4 punitive damage claims will encapsulate the same facts that support the underlying action. This
5 discovery has already been largely completed. Moreover, re-interviewing witnesses would pose
6 no burden to Linda Vista since Defendants produced every witness who has given testimony in
7 this case other than Plaintiffs. Most of those witnesses were represented by the same Counsel
8 who represents Playa Pacifica, and who represented Linda Vista at the time fo the depositions of
9 the Linda Vista associated witnesses. Defendant will suffer no prejudice if the Plaintiffs' motion
10 is granted.

11 Nor does Defendant's argument that it will experience additional costs as a result of the
12 amendment establish the type of prejudice that would warrant the denial of Plaintiffs' motion.
13 An analogous argument was made and rejected in *Hirsa*, where defendant claimed that if an
14 amendment was permitted, it would allow otherwise inadmissible evidence to become admissible
15 at trial. 118 Cal.App.3d at 490. The court noted: "At oral argument counsel conceded that if
16 plaintiff had included the negligent entrustment theory in his original complaint, the evidence of
17 defendant Fred Vickers' driving record would be relevant and admissible. Such evidence is not
18 transmuted to a 'prejudicial' matter by later amendment to the pleadings." *Id.*

19 The same is true here. If Plaintiffs had obtained evidence to support their motion to
20 amend at an earlier date, Defendant would have had to expend the same resources dealing with
21 the claim. The fact that the need to expend such resources will arise as a result of the instant
22 motion does not transmute the matter into prejudice. Defendant's related argument that it will be
23 prejudiced by the need to supplement its expert witness designation is similarly unavailing since
24 Defendant has ample time to do so prior to trial and will enjoy the right to completely defend
25 itself, simply with one more expert witness.

26 As to Defendant's claim that it would be prejudiced by the inability to file a motion for
27 summary adjudication or motion to strike the punitive damages claim, it is wholly unclear that
28 the inability to bring such a motion is "prejudice." Amendments to add new theories are

1 routinely allowed during trial. *See Daum Development Corp.*, 11 Cal.App.3d 65; *Deetz*, 232
2 Cal.App.2d 851. Defendant retains the ability to challenge the punitive damage theory through a
3 motion in limine or to have the trial bifurcated on the issue of punitive damages.

4 Moreover, if Defendant would suffer prejudice, it has invited it. Plaintiffs sought an ex
5 parte order of this Court specially setting the hearing of the instant motion for November 10,
6 2011. This would have allowed Defendant sufficient time to bring a motion to strike prior to the
7 motion cut off, or to file a motion for summary judgment on stipulated short notice. Defendant
8 opposed the ex parte request that would have allowed it ample time to proceed with a motion to
9 strike prior to the motion cutoff date. (Storey Dec. at ¶ 15.) Defendant should not be allowed to
10 create its own prejudice and then use it against Plaintiffs. Defendant made its bed, and should
11 now be required to sleep in it.

12 **III. CONCLUSION**

13 Plaintiffs successfully compelled the production of fourteen documents from Defendants
14 in July of 2011. Those documents were produced on July 13, 2011. Plaintiffs had previously
15 seen those documents, but were precluded by protective order from using those documents for
16 any purpose unrelated to mediation. Eleven of those documents are attached as Exhibits to
17 Plaintiffs' Motion to Amend. Plaintiffs could not have utilized those documents, which form the
18 heart of this motion to amend, until prevailing on the motion to compel. Later, on September 2,
19 2011, the deposition of Campos was taken in Mexico. Portions of the transcript of that
20 deposition, including confessions by Campos, are attached as an Exhibit to Plaintiffs' motion.

21 Defendant would suffer no prejudice from the granting of Plaintiffs' motion. Eight full
22 weeks separate the hearing of Plaintiffs' motion and the scheduled start of trial. Defendant has
23 ample time to prepare for trial. Since this State embraces a policy of allowing amendment of
24 pleadings during trial, there is no basis to claim that the inability to file a motion to strike
25 Plaintiffs' punitive damage claim constitutes prejudice, but if it did, Defendant would have
26 created that prejudice itself. Plaintiffs offered Defendants an opportunity to have this motion
27 heard with sufficient time to allow for the filing of such a challenge, and Defendant opposed
28 Plaintiffs. If Defendant will suffer prejudice, it was created by Defendant's own actions. In

1 short, Plaintiffs diligently pursued this claim and filed this motion when the evidence permitted
2 it. Defendant slowed the prosecution of this action and delayed the hearing of the instant motion.
3 Plaintiffs should not be prejudiced by the tactic of the Defendants.

4 Respectfully submitted,
5 THE ZALKIN LAW FIRM, P.C.

6 Dated: 11-23-11

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8 Devin M. Storey, Esq.
9 Attorney for Plaintiffs

1 **PROOF OF SERVICE**

2 Irwin M. Zalkin, Esq. SBN 89957
3 Devin M. Storey, Esq. SBN 234271
4 Michael J. Kinslow, Esq. SBN 238310
5 **THE ZALKIN LAW FIRM, P.C.**
6 12555 High Bluff Drive, Suite 260
7 San Diego, California 92130
8 Telephone (858) 259-3011
9 Facsimile: (858) 259-3015
10 Attorney for Plaintiffs

11 I, Lisa E. Maynes, am employed in the city and county of San Diego, State of
12 California. I am over the age of 18 and no a party to the action; my business address is 12555
13 High Bluff Drive, Suite 260, San Diego, CA 92130.

14 On November 23, 2011, I caused to be served:

15 **PLAINTIFFS REPLY TO LINDA VISTA SPANISH CONGREGATION'S OPPOSITION**
16 **TO PLAINTIFFS' MOTION TO AMEND COMPLAINT TO ALLEGE PUNITIVE**
17 **DAMAGES**

18 in this action by placing a true and correct copy of said documents(s) in sealed envelopes
19 addressed as follows:

20 **SEE ATTACHED SERVICE LIST**

21 (BY MAIL) I am readily familiar with the firm's practice of collection and processing
22 correspondence for mailing. Under that practice it would be deposited with the U.S.
23 Postal Service on that same day with postage thereon fully prepaid at San Diego,
24 California, in the ordinary course of business. I am aware that on motion of the party
25 served, service is presumed invalid if postal cancellation date or postage meter date is
26 more than one day after date of deposit for mailing in affidavit.

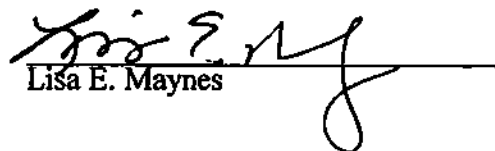
27 (BY PERSON SERVICE) By causing to be delivered by hand to the offices of the
28 addressee(s).

(BY OVERNIGHT DELIVERY) By sending by Federal Express to the addressee(s) as
indicated on the attached list.

(BY FAX) I caused to be transmitted to the above-described document by facsimile
machine to the fax number(s) as shown. The transmission was reported as complete
and without error. (Service by Facsimile Transmission to those parties on the attached
List with fax numbers indicated.)

29 I declare under penalty of perjury under the laws of the State of California that the
30 foregoing is true and correct.

31 Dated: 11-23-11

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33 Lisa E. Maynes

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MAILING LIST

James M. McCabe, Esq.
The McCabe Law Firm, APC
4817 Santa Monica Avenue, Suite B
San Diego, CA 92107
Tel: 619-224-2848
Fax: 619-224-0089
email: jim@mccabelaw.net
Attorneys for Defendants
Defendant Doe 1, Playa Pacifica Spanish Congregation of Jehovah's Witnesses (formerly La Jolla Spanish Congregation)

Rocky K. Copley, Esq.
Law Office of Rocky K. Copley
225 Broadway, Suite 2100
San Diego, CA 92101
Tel: 619-232-3131
Fax: 619-232-1690
email: rkopley@rkc-rocklaw.com
Attorney for Defendant
Defendant Doe 2, Linda Vista Spanish Congregation

Mario Moreno, Esq.
Law Offices of Mario Moreno
100 Watchtower Drive
Patterson, New York 12563
Tel: 845-306-0700
Fax: 845-306-0709
Attorney for Defendant Defendant Doe 3, Watchtower Bible & Tract Society of New York