

D-14

FILED

Superior Court of California
County of Los Angeles

OCT 14 2009

John A. Clarke, Executive Officer/Clerk
By A. Fajardo, Deputy
ANNETTE FAJARDO

GIBSON, DUNN & CRUTCHER LLP
PATRICK W. DENNIS, SBN 106796
JAMES L. ZELENAY, JR., SBN 237339
MATTHEW C. WICKERSHAM, SBN 241733
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Attorneys for Defendant,
CALIFORNIA SCIENCE CENTER FOUNDATION

SUPERIOR COURT, STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DIVISION

AMERICAN FREEDOM ALLIANCE,

Plaintiff,

v.

CALIFORNIA SCIENCE CENTER
FOUNDATION,

Defendant.

CASE NO. BC 423687

**DEFENDANT CALIFORNIA SCIENCE
CENTER FOUNDATION'S OPPOSITION
TO PLAINTIFF AMERICAN FREEDOM
ALLIANCE'S REQUEST FOR
EMERGENCY RELIEF AND TEMPORARY
RESTRAINING ORDER**

[Declarations of Jeffrey N. Rudolph, Christina
M. Sion and James L. Zelenay, filed concurrently
herewith]

DATE OF FILING
OF COMPLAINT: October 14, 2009
TRIAL DATE: None.

Hearing Date: October 14, 2009
Hearing Time: 8:30 a.m.
Hearing Location: Dept. 85 or 86

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. OVERVIEW

The California Science Center Foundation (the "Foundation") is a nonprofit organization created to function as a membership auxiliary to the California Science Center. The Foundation is responsible for designing and administering the variety of world-renown exhibitions and educational programs at the California Science Center, which is located in Exposition Park near the University of Southern California.

Through this action, the American Freedom Alliance ("AFA"), a group which describes itself as a "movement of concerned Americans which identifies threats to western civilization," seeks to enforce a contract that AFA breached. (Declaration of James Zelenay ("Zelenay Decl."), ¶ 2 & Ex. A.) The Foundation respectfully requests that the Court deny AFA's request for emergency relief. Among other things, AFA is unable to show: (1) that it has incurred any irreparable harm; (2) that legal damages are not an adequate remedy; (3) that it is likely to prevail on the merits; and (4) that equity supports issuance of injunctive relief in this instance.

II. STATEMENT OF FACTS

A. Operation of the California Science Center

The California Science Center is the West Coast's largest interactive science center and museum. (Declaration of Jeffrey N. Rudolph ("Rudolph Decl."), ¶ 3.) Located within Exposition Park in downtown Los Angeles, it is currently the most-attended museum in Southern California, attracting 1.4 million guests each year. (*Id.*) The California Science Center and the Foundation are one of the oldest and most successful public-private partnerships in the State of California. (*Id.*, ¶ 6.) The Foundation funds design and development of exhibitions and education programs at the California Science Center. (*Id.*) The Foundation also manages and arranges for the use of areas within the Science Center for private events. (*Id.*, ¶ 7; Declaration of Christina M. Sion ("Sion Decl."), ¶¶ 2-3.) The California Science Center is a department of the State of California and owns

1 the buildings and the land upon which they are built, and is responsible for the operation and
2 maintenance of the physical facilities.¹ (Rudolph Decl., ¶ 6.)

3 As one of its responsibilities, the Foundation operates the Event Services Department. (*Id.*,
4 ¶ 7.) The Foundation also leases and operates the IMAX Theater. The Event Services Department
5 allows private groups to hold events within the Science Center and IMAX Theater, such as corporate
6 meetings, school events, or weddings. (*Id.*) In addition to scheduling and arranging for the holding
7 of these private events, the Event Services Department of the Foundation requires all contracting
8 parties to comply with the Event Services' Policies and Procedures. (*Id.*, ¶ 7.)

9 One of the provisions within the Event Services' Policies and Procedures requires the
10 contracting party to obtain the prior approval of the Event Services Department before any
11 promotional materials relating to the private event are released or broadcast. (*Id.*, ¶ 8; Sion Decl., Ex.
12 B at p. 4.) This provision is intended to ensure, among other things, that the California Science
13 Center name is not used inappropriately by private groups that are contracting for use of the property.
14 (Rudolph Decl., ¶ 8.) Because the Foundation and the California Science Center (the state agency)
15 have spent considerable resources to build a reputation as a highly regarded and respected scientific
16 institution, they are very attentive to ensure that private groups do not appropriate the reputation of
17 the California Science Center for their own benefit. (*Id.*) The promotional materials may not suggest
18 or imply that the California Science Center is sponsoring or endorsing any particular position, group
19 or product, which may be related to the private event. (*Id.*)

20 **B. The October 25, 2009 Private Event**

21 On September 23, 2009, employees at the Foundation were contacted by AFA regarding
22 scheduling a private event at the California Science Center IMAX Theater. (Sion Decl., ¶ 4.) Over
23 the course of the next few days, the Foundation and the AFA arranged, in a very rushed manner, for
24 the booking of the California Science Center IMAX Theater for a private event on October 25, 2009.

25
26
27
28
¹ Although both the actual exhibit halls and the state agency that owns the museum property are called the California Science Center, any reference to the California Science Center in this brief refers to the actual physical location (exhibit halls and other features like the IMAX Theater) and not to the state agency unless otherwise specified.

1 (*Id.*, ¶¶ 4-6.) On October 5, 2009, the Foundation received a signed Price Estimate from AFA, which
2 confirmed the booking and AFA's agreement to abide by the Policies and Procedures. (*Id.*, ¶ 10 &
3 Ex. C.) That same day, the Foundation was notified by the Smithsonian Institution with concerns
4 about the content of a press release obtained from the PR Newswire concerning the October 25, 2009
5 event. (*Id.*, ¶ 11; Rudolph Decl., ¶¶ 9-10.) This press release improperly implied that the California
6 Science Center and the Smithsonian Institution played some role in sponsoring the event. (Sion
7 Decl., ¶ 11; Rudolph Decl., ¶¶ 11-14.) The press release was never submitted to the Foundation or
8 the Event Services Office in direct violation of the provisions within the Event Services' Policies and
9 Procedures, with which the AFA had agreed to follow. (Sion Decl., ¶ 12.) As a result of this
10 violation of the AFA's contractual commitments, the Foundation notified AFA on October 6, 2009
11 that they were cancelling the October 25, 2009 event. (*Id.*, ¶ 13.) Additional promotional materials
12 related to the October 25, 2009 event have also been discovered, none of which were ever submitted
13 to the Event Services Office for approval. (Zelenay Decl., Exs. B & C; Sion Decl., ¶ 12.)

14 III. ARGUMENT

15 AFA cannot show that the extraordinary remedy requested is appropriate in this action. By
16 this action, AFA seeks the issuance of a mandatory, and temporary, injunction compelling the
17 Foundation to hold an event on October 25, 2009, which it has already decided would be harmful to
18 its self-interest and which it has publicly cancelled. Mandatory injunctions are disfavored by the
19 courts. (*Perez v. Hastings College* (1996) 45 Cal.App.4th 453, 456-457 ["where the preliminary
20 injunction mandates an affirmative act changing the status quo, we exercise greater scrutiny to
21 determine whether an abuse of discretion occurred"].) Moreover, a "preliminary mandatory
22 injunction is rarely granted, and is subject to a stricter review on appeal. Several cases reversing
23 orders granting mandatory preliminary injunctions make this clear." (6 Witkin, Cal. Proc. 5th (2008)
24 Prov Rem, § 360, p. 309.)

25 Further, because AFA claims that it is entitled to have a private event held on October 25,
26 2009 (although it has provided no evidence to the Foundation as to why it cannot postpone this event
27 to a different time and location), AFA cannot satisfy the statutory notice requirements for a
28 preliminary injunction before the October 25, 2009 deadline. Thus, AFA seeks to compel the

1 Foundation to take affirmative actions pursuant to a temporary restraining order (“TRO”) with no
2 opportunity for any sort of noticed hearing or opportunity for the Foundation to respond to AFA’s
3 specific arguments.

4 It is not appropriate for AFA to compel the Foundation’s specific performance of this contract
5 by means of a TRO. A TRO is intended to preserve the status quo until a hearing on the merits may
6 be held. (*Landmark Holding Group v. Superior Court* (1987) 193 Cal.App.3d 525, 529 [“All that is
7 determined [at an *ex parte* hearing on a TRO] is whether the TRO is necessary to maintain the status
8 quo pending the noticed hearing on the application for preliminary injunction”].) By this action,
9 AFA seeks a TRO which will disrupt the status quo and force the Foundation to renege on its prior
10 decisions already broadcast to the public, to ignore the egregious violations committed by AFA, and
11 to potentially damage the Foundation’s important and valuable relationship with the Smithsonian
12 Institution.

13 In order to successfully seek a TRO, AFA must make several evidentiary showings. First,
14 AFA must show that it will suffer irreparable harm should a temporary restraining order not be
15 issued. (Cal. Code Civ. Proc. § 526(a)(2); *People ex rel. Gow v. Mitchell Brothers’ Santa Ana*
16 *Theater* (1981) 118 Cal.App.3d 863, 870-871.) Second, AFA must show that it has no adequate legal
17 remedy. (Cal. Code Civ. Proc. § 526(a)(4)-(5).) Third, AFA must show a “reasonable probability”
18 that it will prevail on the merits should its claims go to trial. (Cal. Code Civ. Proc. § 526(a)(1); see
19 also *San Francisco Newspaper Printing Co., Inc., v. Sup.Ct. (Miller)* (1985) 170 Cal.App.3d 438,
20 442.) Finally, AFA must show that a balancing of the equities support issuance of an injunction.
21 (See *King v. Meese* (1987) 43 Cal.3d 1217, 1227.) On all counts, AFA cannot satisfy any of these
22 factors, and therefore its application must be denied.

23 **A. AFA Cannot Show That It Was Irreparably Harmed by the Cancellation**

24 A TRO may not be granted without a showing of irreparable harm. (Cal. Code Civ. Proc.
25 § 526(a)(2).) “It would appear an irreparable injury is one for which either (1) its pecuniary value is
26 not susceptible to monetary valuation, or (2) the item is so unique its loss deprives the possessor of
27 intrinsic values not replacable by money or in kind.” (*Jessen v. Keystone Savings & Loan Assn.*
28 (1983) 142 Cal.App.3d 454, 457.) There is no basis to argue that either factor exists in this case.

1 While AFA may possibly be able to show that it has incurred some monetary damage from
2 the cancellation,² there is no basis for AFA to argue that irreparable harm would occur unless it is
3 able to hold its event at the California Science Center location on October 25, 2009. AFA will likely
4 argue that it is unable to locate another IMAX theater for that date, but the IMAX film that it
5 intended to show at the October 25, 2009 event is only 11 minutes long. (Zelenay Decl., ¶ 5 & Ex.
6 D.) In addition, AFA intended to show a 71-minute DVD, along with a reception and panel
7 discussion. (*Id.*, ¶ 6 & Ex. E; Sion Decl, Ex. C.) Thus, the showing of the IMAX film plays only a
8 small role in the total event. While other IMAX theaters are available within the Los Angeles area,
9 AFA could also simply show the IMAX film on a standard movie screen, especially given the short
10 run-time of the IMAX film. There is no indication that an IMAX theater is a critical component of
11 the event intended to be held by AFA, given the small role that the IMAX film has in the event.

12 AFA cannot argue that its loss of the IMAX Theater at the California Science Center is so
13 unique that it could not be replaced. Rather, several IMAX theaters are available in the Los Angeles
14 area, and the cost of booking another theater is readily obtainable. AFA has provided no evidence
15 that its inability to hold the event on the specific date of October 25, 2009 constitutes irreparable
16 harm. In fact, AFA had already postponed the event by a week when it initially contacted the
17 Foundation near the end of September. (Sion Decl., ¶ 4.) Indeed, given the very limited amount of
18 time in which AFA initiated contact with the Foundation and began to plan for the October 25, 2009
19 event, it is difficult to believe that AFA had any formal plan in place for public notice of the event, or
20 that it would be incrementally prejudiced by moving the planned event to another location. For these
21 reasons, AFA cannot show that any irreparable harm would result from its inability to hold an event

22
23 ² While not strictly relevant for purposes of determining a TRO, it is likely that AFA has not
24 reasonably incurred any damage as a result of the cancellation. AFA has paid no money to the
25 Foundation, or its Event Services Department, in relation to the October 25, 2009 event. (Sion
26 Decl., ¶ 8.) Meanwhile, the Foundation cancelled the AFA event on October 6th, one day after
27 AFA sent the Foundation a signed price estimate. Any costs incurred by AFA prior to October 5,
28 2009 were not reasonably incurred given the absence of any contract. The Event Price Estimate
and the Event Policies and Procedures specify that the Event Services Department must receive
the signed Price Estimate in order to confirm the booking of a date. (Sion Decl., Ex. B at p. 1 &
Ex. C.) While AFA could potentially have incurred some costs during the one day that it held a
confirmed date, it would likely be a limited amount. Of course, the Foundation denies that it has
any liability for such damages.

1 on October 25, 2009 at the California Science Center, and thus a TRO is inappropriate based on its
2 failure to satisfy this factor alone.

3 **B. AFA Has An Adequate Legal Remedy In This Action**

4 In order to obtain a TRO, AFA must show that legal relief is not adequate. "Specific
5 performance of a contract will not be compelled when an adequate remedy exists at law, and if
6 monetary damages afford adequate relief and are not extremely difficult to ascertain, an injunction
7 cannot be granted." (*Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d
8 300, 306.) Given the lack of any serious or irreparable harm suffered by AFA, an action for legal
9 damages, if any can be shown, is more than adequate to protect AFA's interests. AFA has shown no
10 justification as to why this particular date or location cannot be substituted, and thus an equitable
11 remedy is unnecessary and overly disruptive.

12 **C. AFA Is Not Likely To Succeed On The Merits**

13 AFA's request for a TRO should also be denied because AFA is not likely to succeed on the
14 merits. AFA claims that the Foundation breached the contract by cancelling the October 25, 2009
15 Event (or engaged in anticipatory breach). But the fact of the matter is that the Foundation cancelled
16 the event because of *AFA's material breach of contract* and failure to comply with the Policies and
17 Procedures that it agreed to.³ AFA's breach of the pre-approval provision in the Event Services'
18 Policies and Procedures is a complete defense to AFA's claims, precludes AFA from proceeding
19 further, and demonstrates that AFA is not likely to succeed on the merits.

20 **1. AFA Completely Ignored Its Duty To Submit All Promotional Materials To The**
21 **Event Services Office**

22 The Policies and Procedures governing AFA's booking of the California Science Center
23 location on October 25, 2009 required that the Event Services Office approve all promotional
24 materials mentioning the California Science Center produced for this event prior to printing or
25 broadcast. (Sion Decl., Ex. B.) Although numerous press releases were distributed relating to the
26

27
28 ³ By returning the signed Price Estimate, AFA agreed to the Policies and Procedures sent by the
Event Services Department. (Sion Decl., Ex. C.)

1 October 25, 2009 event, none of these press releases were ever submitted to the Event Services
2 Office or to the Foundation for prior approval. (Sion Decl., ¶ 12.) AFA's failure to ensure that all
3 press releases were submitted to the Event Services Office constitutes a material breach of the terms
4 governing the contract between the Foundation and AFA and merited cancellation of the contract.
5 (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 ["California
6 courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.'"])

7 Given the importance of this provision to the Foundation, the contractual term regarding pre-
8 approval of all promotional materials must be considered material. (Rudolph Decl., ¶¶ 8-14.) In
9 addition, AFA's immediate failure to comply with the terms of the Event Policies & Procedures
10 further supports a finding of material breach:

11 In these circumstances, plaintiffs' failure from the outset to perform certain of the
12 specific promises could have been found to be a material breach and ground for
13 termination of the contract. The timing of a breach is a relevant consideration in
14 determining its materiality; a slight breach at the outset may justify termination
15 whereas a like breach later in performance may be deemed insubstantial.
16 (*Whitney Inv. Co. v. Westview Development Co.* (1969) 273 Cal.App.2d 594, 602; see also *Pennel v.*
17 *Pond Union School Dist.* (1973) 29 Cal.App.3d 832, 838 ["a slight breach of the contract at the outset
18 may justify termination if it indicates future difficulty in obtaining performance"].) Thus AFA's
19 immediate breach of this provision allowed for the termination of the contract by the Foundation.
20 (*Ibid.* ["A breach does not terminate a contract as a matter of course but is a ground for termination at
21 the option of the injured party."].)

22 2. The Press Releases At Issue Are Factually Inaccurate And Misleading

23 As discussed above, AFA's complete failure to comply with this provision constitutes a
24 material breach of its contract regardless of the content of the press releases. However, the
25 Foundation's cancellation of the October 25, 2009 event is further justified by the multiple
26 inaccuracies within the numerous press releases issued in relation to the event. Some of the press
27 releases improperly refer to the California Science Center in the opening lines as "the Smithsonian
28 Institution's west coast affiliate". (Rudolph Decl., Ex. 1.) This reference is inaccurate as the

1 California Science Center is not the sole west coast affiliate of the Smithsonian, but is one of 20
2 Smithsonian affiliates in California. (Randolph Decl., ¶ 11.) Contrary to the implication of this
3 language, the Smithsonian is not directly involved in the operation of the California Science Center
4 or its internal decisions regarding private events. (*Id.*)

5 Further, the press releases imply that the California Science Center is acting in the role of the
6 sponsor or host for the October 25, 2009 screening. In particular, one of the press releases states that
7 “[t]he debate over Darwin will come to California on October 25th, when the Smithsonian
8 Institution's west coast affiliate premieres *Darwin's Dilemma: The Mystery of the Cambrian Fossil*
9 *Record*, a new intelligent design film which challenges Darwinian evolution.” (Rudolph Decl.,
10 Ex. 1.) In addition to improperly referring to the California Science Center museum as “the
11 Smithsonian Institution's west coast affiliate”, the press release states that it is the Science Center that
12 “premieres” the movie at the October 25, 2009 event. (*Id.*) This language creates the impression that
13 the Foundation has played some role in deciding to show this movie, as opposed to simply renting the
14 theater to a private group who may then play any movie of its choosing. The “promotional materials”
15 provision in the Policies and Procedures agreement is specifically intended to prevent third parties
16 from issuing public statements like these, which attempt to commandeer the scientific credibility and
17 strong reputation of the California Science Center in support of their own private cause. (See
18 Rudolph Decl., ¶¶ 8-10.)

19 If these press releases had been submitted for approval as required by the Event Policies and
20 Procedures, the Event Services Department would have been able to reject any language attempting
21 to bolster AFA’s reputation by relying on the reputation of the California Science Center or the
22 Smithsonian. (*Id.*, ¶ 13.) As a Smithsonian affiliate, the Foundation would also have been required
23 to obtain approval from the Smithsonian Institution for any use of its name, which would have been
24 rejected for the same reasons expressed above. (*Id.*, ¶ 12.) The unauthorized use of the Smithsonian
25 name could damage the California Science Center’s relationship with the Smithsonian, which could
26 have significant effects on the future operational success of the Foundation. (*Id.*, ¶ 14.) For these
27 reasons, AFA was in material breach of its contract, and the Foundation properly cancelled the event.
28

1 **3. AFA Was Properly Held Responsible For The Press Releases Published by**
2 **Discovery Institute**

3 It is expected that AFA will respond to this argument by claiming that it is not responsible for
4 the press release because it was issued by Discovery Institute, who was involved in the October 25,
5 2009 event. This argument bears no resemblance to the facts. The "Promotional Materials"
6 provision, agreed to by AFA, a sophisticated party, is not limited to materials printed or broadcast by
7 AFA. (Sion Decl., Ex. B at p. 4.) Rather, it applies to all parties, especially those with whom AFA
8 may communicate, and it is intended to prevent any damage to the reputation and scientific
9 credibility of the California Science Center. (Rudolph Decl., ¶ 8.) Indeed, it would destroy the
10 whole purpose behind this provision if a contracting party could evade the effect of this contractual
11 term by simply providing all information to a third party and then allowing this third party to release
12 numerous press releases without any prior approval.⁴ AFA has provided no indication that it took
13 any steps to ensure that no promotional materials were broadcast to the public without prior approval
14 by the Event Services Office. The terms of the contract clearly impose upon AFA a responsibility to
15 prevent unchecked spread of public information about this event. AFA made no attempt to comply
16 with this duty and thus was properly reprimanded by the Foundation. There is no reason why the
17 AFA should not be held responsible for this breach even if engaged in by a third party. (*Hensler v.*
18 *Los Angeles* (1954) 124 Cal.App.2d 71, 83 ["One who binds himself to a contract which cannot be
19 performed without the consent or cooperation of a third person is not relieved of liability because of
20 his inability to secure the required consent or cooperation"].)

21 **D. Balancing The Equities Does Not Support Issuance Of A TRO In This Action**

22 Finally, as discussed above, AFA has not provided any indication that a balancing of the
23 hardships justifies issuance of a TRO in this action. A balancing-of-hardships analysis provides that
24 "the more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they
25

26

27 ⁴ The close relationship between AFA and the Discovery Institute is evidenced by the October 1,
28 2009 press release which names AFA in the by-line as the author. This press release was
 published on the Discovery Institute's website, and it was published four days before AFA event
 provided a signed agreement to the Foundation. (Zelenay Decl., Ex. C.)

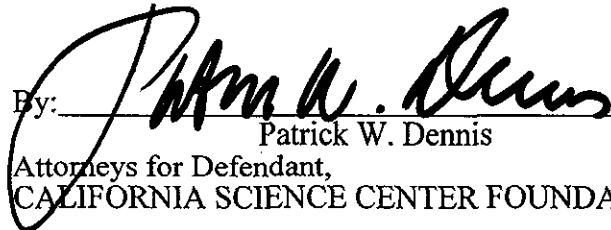
1 allege will occur if the injunction does not issue.” (*King v. Meese, supra*, 43 Cal.3d at p. 1227.) In
2 this case, AFA cannot show either that it is likely to ultimately prevail or that it will suffer any
3 irreparable harm if a TRO does not issue. An equitable consideration of these factors does not aid the
4 plaintiff, and the application should simply be denied.

5 **IV. CONCLUSION**

6 For the foregoing reasons, the Foundation respectfully requests that the Court deny AFA’s
7 request for emergency, extraordinary relief.

8 DATED: October 14, 2009

GIBSON, DUNN & CRUTCHER LLP

9
10 By:  _____
11 Patrick W. Dennis
12 Attorneys for Defendant,
13 CALIFORNIA SCIENCE CENTER FOUNDATION
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28