

1 GIBSON, DUNN & CRUTCHER LLP
2 PATRICK W. DENNIS, SBN 106796
3 JAMES L. ZELENAY, JR., SBN 237339
4 MATTHEW C. WICKERSHAM, SBN 241733
5 333 South Grand Avenue, 46th Floor
6 Los Angeles, California 90071-3197
7 Telephone: (213) 229-7000
8 Facsimile: (213) 229-7520

9 Attorneys for Defendants,
10 CALIFORNIA SCIENCE CENTER
11 FOUNDATION and JEFFREY RUDOLPH in his
12 official capacity as President of the California
13 Science Center Foundation

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

17 AMERICAN FREEDOM ALLIANCE, a
18 nonprofit corporation;
19
20 Plaintiff,

21 v.

22 CALIFORNIA SCIENCE CENTER, a legal
23 entity of the State of California; CALIFORNIA
24 SCIENCE CENTER FOUNDATION, a
25 nonprofit corporation; JEFFREY RUDOLPH, an
26 individual; and DOES 1 through 50, inclusive;
27
28 Defendants.

CASE NO. BC 423687

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

**DEFENDANTS CALIFORNIA SCIENCE
CENTER FOUNDATION'S AND JEFFREY
RUDOLPH'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
THEIR DEMURRER TO PLAINTIFF
AMERICAN FREEDOM ALLIANCE'S
FIRST AMENDED COMPLAINT**

**[Notice of Demurrers and Demurrers; and
Appendix of Non-California Authorities, filed
concurrently herewith]**

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I. INTRODUCTION

Plaintiff American Freedom Alliance (“AFA” or “Plaintiff”) has brought the instant action against defendants (1) the California Science Center (the “State Center”), a department of the State of California; (2) the California Science Center Foundation (the “Foundation”), a private non-profit organization; and (3) Jeffrey Rudolph, in his official capacity as President of the Foundation and as President and CEO of the State Center (collectively “Defendants”).

This action arose after the Foundation cancelled a private event scheduled to be held by Plaintiff on October 25, 2009 at the California Science Center (the “Event”). The Foundation cancelled the Event after it learned of unauthorized press releases implying that the Smithsonian Institution and the California Science Center were co-sponsoring the Event, which was incorrect because it was a private event. These press releases were not submitted to the Foundation for its advance approval in accordance with the terms of the contract between Plaintiff and the Foundation. Based on this material breach of the contract between the Foundation and Plaintiff, which had the potential to cause significant damage to the Foundation and its relationship with the Smithsonian Institution, on October 6, 2009 the Foundation advised Plaintiff that the Event was cancelled.

On October 14, 2009, Plaintiff filed its original complaint in this action and appeared *ex parte* in Department 85 of the Los Angeles County Superior Court, Central District, seeking a temporary restraining order requiring that Defendants allow Plaintiff to hold its Event on October 25, 2009 at the California Science Center. The Court denied this request, ruling that Plaintiff had not shown that it would suffer irreparable injury if a temporary restraining order was not granted. Plaintiff filed its First Amended Complaint (“FAC”) on November 19, 2009.

By this demurrer, the Foundation and Jeffrey Rudolph, in his capacity as the President of the Foundation, respectfully request that the Court dismiss Plaintiff’s Second, Third, Fourth, and Fifth Causes of Action of its FAC for the reasons discussed below.

II. ARGUMENT

A. Legal Standard

A demurrer must be granted if the complaint is legally insufficient as a matter of law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 21-22 [sustaining demurrer where a reasonable interpretation

1 of the facts as pleaded, as well as facts judicially noticed, did not support a proper cause of action];
2 Cal. Civ. Proc. Code § 430.30.) In evaluating the legal sufficiency of a complaint, the Court must
3 assume that the plaintiff's factual allegations are true, but it need not accept its "contentions,
4 deductions, or conclusions of fact or law." (*Moore v. Regents of Univ. of Calif.* (1990) 51 Cal.3d
5 120, 125 .)

6 Leave to amend should be granted only when a plaintiff has sufficiently demonstrated that
7 there is a reasonable possibility that it can cure the defect by amendment. (*See Schnall v. Hertz Corp.*
8 (2000) 78 Cal.App.4th 1144, 1151 .) "[W]here the nature of plaintiff's claim is clear, and under
9 substantive law no liability exists, a court should deny leave to amend because no amendment could
10 change the result." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.* (1998) 68
11 Cal.App.4th 445, 459 .) A plaintiff bears the burden of establishing that leave to amend should be
12 granted. (*Ibid.*)

13 **B. Plaintiff's Fourth Cause Of Action For Fraud Should Be Dismissed Because**
14 **Plaintiff Has Not And Cannot State That It Relied Upon Or Was Induced To**
15 **Rely Upon Any Alleged Misrepresentation**

16 In the Fourth Cause of Action, Plaintiff attempts to allege a claim for fraud against all
17 Defendants. In this claim, Plaintiff alleges that Defendants engaged in a "conspiracy to suppress the
18 true reason for canceling the EVENT and to deceive Plaintiff into believing that Plaintiff had issued
19 press releases containing inaccurate and damaging information concerning the EVENT[.]" (FAC
20 ¶ 69.) Thus, Plaintiff alleges that Defendants misrepresented the true reason for canceling the Event,
21 and induced Plaintiff to rely on those misrepresentations by Plaintiff accepting the false basis for the
22 cancellation. (FAC ¶ 67.) Plaintiff's claim for fraud is facially invalid and should be dismissed.

23 "The elements of fraud . . . are (a) misrepresentation (false representation, concealment, or
24 nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance;
25 (d) justifiable reliance; and (e) resulting damage." (*OCM Principal Opportunities Fund v. CIBC*
26 *World Markets Corp.* (2007) 157 Cal.App.4th 835, 845, citations and internal quotation marks
27 omitted.) "The absence of any one of these required elements will preclude recovery." (*Wilhelm v.*
28 *Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331.) In addition, "fraud must be

1 specifically pleaded.” (*Ibid.*) “This means: (1) general pleading of the legal conclusion of fraud is
2 insufficient; and (2) every element of the cause of action for fraud must be alleged in full, factually
3 and specifically, and the policy of liberal construction of pleading will not usually be invoked to
4 sustain a pleading that is defective in any material respect.” (*Ibid.*)

5 Plaintiff’s claim for fraud cannot satisfy many of the required elements for fraud, most
6 notably the element of actual reliance, which is a component of justifiable reliance. (*Buckland v.*
7 *Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 808.) “Actual reliance occurs when a
8 misrepresentation is an immediate cause of [a plaintiff’s] conduct, which alters his legal relations[.]”
9 (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 299, internal citation quotation
10 marks omitted.). “Actual reliance is also an element of fraud claims based on omission: the plaintiff
11 must establish that ‘had the omitted information been disclosed, [he or she] would have been aware
12 of it and behaved differently.’” (*Buckland v. Threshold Enterprises, Ltd., supra*, 155 Cal.App.4th at
13 p. 807, quoting *Mirkin v. Wasserman* (1983) 5 Cal.4th 1082, 1093.)

14 A plaintiff must not simply rely on the fact that a misrepresentation was made, but must rely
15 on the *truth or material completeness* of the misrepresentation. (*Id.* at p. 808 [“In the case of
16 fraudulent misrepresentation, actual reliance occurs only when the plaintiff reposes confidence in the
17 *truth [or material completeness]* of the relevant representation, and acts upon this confidence”].)
18 “The plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona
19 fide claim of actual reliance.” (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.)

20 Here, Plaintiff did not actually rely on any of the Defendants’ alleged misrepresentations or
21 omissions, and cannot allege that it did so, because immediately after receiving the October 6
22 cancellation email, Plaintiff filed a legal action alleging that Defendants misrepresented the true
23 reason for cancellation of the Event. As part of their filed legal action, Plaintiff sought to compel the
24 Foundation to hold the Event at the California Science Center, via a motion for temporary restraining
25 order filed over a week prior to the scheduled Event date. As shown by Plaintiff’s statements filed in
26 this action, Plaintiff admitted that it did not rely upon the alleged misrepresentations concerning the
27 reasons for the cancellation of the Event. For instance, Plaintiff’s President, Avi Davis, stated in a
28 declaration, filed simultaneously with the Complaint and request for temporary restraining order on

1 October 14, 2009, that: "It is AFA's belief and contention that contractual issues were not at the root
2 of the cancellation of its contract with Defendants." (Declaration of Adrian (Avi) Davis in Support of
3 Application and Order to Show Cause and Temporary Restraining Order at 12:18-13:1.) Based on
4 this evidence, Plaintiff cannot allege that it was ever misled by the alleged misrepresentations.

5 Further, Plaintiff could not have acted in reliance because the Foundation cancelled the Event
6 at the same time that the alleged misrepresentations were made. Once the Event was cancelled,
7 Plaintiff had no further relationship with any of the Defendants and thus there was simply no action
8 with respect to the Event that Plaintiff could have taken in reliance upon the Defendants' alleged
9 statements or actions. In other words, regardless of any stated rationale for the cancellation, the
10 Event was cancelled and there was nothing further that Plaintiff did other than seek to have it put
11 back on schedule. Plaintiff cannot and has not alleged that it actually relied on any of the claimed
12 misrepresentations and therefore the demurrer as to the Fourth Cause of Action should be sustained.

13 **1. Plaintiff Was Not Misled By Any Of The Alleged Misrepresentations**

14 Plaintiff's fraud claim fails because Plaintiff cannot allege that it relied upon the truth or
15 material completeness of any of Defendants' alleged misrepresentations. (*Buckland v. Threshold*
16 *Enterprises, Ltd., supra*, 155 Cal.App.4th at p. 808.) Instead, as shown by the pleadings and
17 affidavits filed in this action,¹ Plaintiff immediately questioned the reasons given by the Foundation
18 for why it cancelled the Event and Plaintiff immediately sought legal action against the Defendants
19 after the Event was cancelled, claiming that it did not believe Defendants' basis for the cancellation.
20 Plaintiff cannot now try to plead otherwise.

21
22
23 ¹ The Court may take judicial notice of statements made by Plaintiff in affidavits or in pleadings
24 filed previously in this matter. (Cal. Evid. Code § 452(d).) While the Court must accept as true
25 the allegations in Plaintiff's FAC, "[t]he courts, however, will not close their eyes to situations
26 where a complaint contains allegations of fact inconsistent with attached documents, or
27 allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural*
28 *Materials Co.* (1981) 123 Cal.App.3d 593, 605.) "Thus, a pleading valid on its face may
nevertheless be subject to demurrer when matters judicially noticed by the court render the
complaint meritless." (*Ibid.*) "In this regard the court passing upon the question of the demurrer
may look to affidavits filed on behalf of plaintiff[.]" (*Ibid.*)

1 As the basis for its cause of action of fraud, Plaintiff alleged the existence of a “conspiracy to
2 suppress the true reason for canceling the EVENT and to deceive Plaintiff into believing that Plaintiff
3 had issued press releases containing inaccurate and damaging information concerning the EVENT[.]”
4 (FAC ¶¶ 69-70.) Because the alleged misrepresentations and omissions all concern allegedly
5 improper reasons behind the Foundation’s cancellation of the Event, (FAC ¶¶ 66-70), Plaintiff’s
6 claim for fraud fails because Plaintiff cannot allege that it ever believed the reasons given by the
7 Foundation for its cancellation of the Event. Instead, the prior filings in this action show that Plaintiff
8 never believed the truth or material completeness of any of Defendants’ statements concerning the
9 reason for the cancellation.

10 The original Complaint in this action was filed on October 14, 2009, long before the
11 contracted date of October 25, 2009 for the proposed Event and shortly after the Foundation
12 cancelled the Event on October 6th. Even in this Complaint, Plaintiff repeatedly alleged that the
13 Defendants acted pretextually in canceling the Event based on Plaintiff’s failure to submit the press
14 releases for authorization. (*See, e.g.*, Compl., ¶ 23 [“the pretext upon which the event was cancelled
15 (failure to submit promotional materials for review)”]; ¶ 35 [“Defendants violated their duty to act
16 fairly and in good faith by canceling the contract under the false pretext that Plaintiff had breached
17 the contract when the Discovery Institute publicized the event and thereby damaged the [STATE]
18 CENTER’s reputation and relationship with the Smithsonian Institut[ion]”]; ¶ 51 [“the anti-intelligent
19 design Smithsonian was monitoring publicity about the AFA’s event and placed pressure on the
20 [STATE] CENTER to silence AFA’s message by canceling the contract”].) These admissions by
21 Plaintiff make clear that it never relied on the Foundation’s explanation for the cancellation.

22 Plaintiff also moved for a temporary restraining order on October 14, 2009 based in part on
23 the argument that the cancellation violated Plaintiff’s constitutional rights. (*See* Plaintiff’s
24 Memorandum of Points and Authorities in Support of its Application and Order to Show Cause and
25 Temporary Restraining Order at 3:23-25 [“Plaintiff further contends that the explanations given for
26 the cancellation of the event are pretextual in nature and made for the purpose of disguising a hidden
27 motive to suppress the message of the speakers invited to attend the post-screening panel
28

1 discussion.”.) In a Declaration signed on October 13, 2009 in support of this request for a
2 temporary restraining order, Plaintiff’s President, Avi Davis, stated on behalf of Plaintiff, that:

3 It is AFA’s belief and contention that contractual issues were not at the root of the
4 cancellation of its contract with Defendants. Rather, the [STATE] CENTER, taking
5 its cue from the Smithsonian Institut[ion] in Washington D.C., with which it is
6 affiliated (and which, it now appears, maintains a significant and long running dispute
7 with Seattle’s Discovery Institute over life’s origins) canceled the contract because it
8 does not agree with “Darwin’s Dilemma’s” basic premise - that Darwinism cannot
9 adequately explain certain phenomena in the fossil record - and does not want to give
10 AFA or anyone else the opportunity to publicly debate the issue. ... **Evidence of this
11 is amply demonstrated by Christina Sion’s first communication of the
12 cancellation on the afternoon of October 6[.] . . . Christina Sion’s email notice of
13 cancellation to me of October 6 in which she clearly indicates that the relations
14 between the two institutions have been ruptured, is a very strong suggestion that
15 it was not the publicity of the event that was of concern to the [STATE]
16 CENTER, but the maintenance of a positive relationship with the Smithsonian.**

17 (Declaration of Adrian (Avi) Davis in Support of Application and Order to Show Cause and
18 Temporary Restraining Order at 12:18-13:1, emphasis added.) Further, Mr. Davis attached to this
19 declaration an article dated October 8, 2009 – a mere two days after the cancellation – which states:
20 “[AFA] claims the cancellation was an act of censorship, made after the center was pressured by the
21 Smithsonian Institution[.]” (Davis Declaration, Ex. G; *see also id.* [“Avi Davis said the cancellation
22 had nothing to do with contract issues”].) These statements by Plaintiff in Mr. Davis’s declaration
23 are conclusive proof that when Plaintiff first received the cancellation email on October 6, 2009, it
24 believed that the Foundation had made misrepresentations and omissions concerning the “the true
25 reason for canceling the EVENT” and cannot claim that it somehow acted “in reliance” upon the
26 “truthfulness” of the statements given by the Foundation for cancellation. (FAC ¶¶ 69-70.) From the
27 moment that Plaintiff received the email canceling the Event, it believed that Defendants acted with
28 ulterior motives. There is no basis to argue that Plaintiff was defrauded by somehow “relying” upon
what Defendants stated in connection with cancellation of the Event.

Because Plaintiff cannot allege that it has taken any action in reliance upon the truth or
material completeness of any alleged misrepresentation or omission made by the Defendants, the
cause of action for fraud cannot stand. (*Buckland v. Threshold Enterprises, Ltd., supra*, 155
Cal.App.4th at p. 807-808 [sustaining demurer where plaintiff “concedes she suspected respondents’

1 packaging and marketing was false or misleading, and she bought respondents' products solely to
2 pursue litigation upon the vindication of her suspicions"].) "California does not sanction lawsuits for
3 fraudulent misrepresentations brought by persons who, rather than having been deceived, act for the
4 sole purpose of bringing a lawsuit against 'potential targets for litigation.'" (*Starbucks Corp. v.*
5 *Superior Court* (2008) 168 Cal.App.4th 1436, 1446, quoting *Buckland v. Threshold Enterprises, Ltd.*,
6 *supra*, 155 Cal.App.4th at p. 807.)

7 **2. Even If Plaintiff Could Show That It Was Misled, Plaintiff Has Not Taken**
8 **Any Action In Reliance Upon the Alleged Misrepresentations**

9 While Plaintiff includes conclusory allegations concerning reliance in the FAC, these
10 statements are inadequate to support a claim of fraud. Plaintiff states that:

11 In reliance on these representations and without knowledge of the concealed and
12 suppressed information and deceptive acts, Plaintiff was induced to, and did, cancel
13 the EVENT and expend time, money and additional resources to locate a new venue
and produce the EVENT at the new location with[in] a matter of a few days.

14 (FAC ¶ 74.) These statements are legally irrelevant to the element of reliance.

15 First, Plaintiff could not have canceled the Event as claimed by Paragraph 74. Plaintiff
16 already alleged in the FAC that the October 6, 2009 email from the Foundation cancelled the Event.
17 (FAC ¶ 21.) The misrepresentations allegedly made by Defendants do not relate to whether the event
18 was actually cancelled by Defendants, but only whether there were additional or underlying reasons
19 for this cancellation that were not communicated to Plaintiff. (FAC ¶¶ 66-70.) Given that the
20 October 6, 2009 email had already cancelled the Event, Plaintiff had no discretion as to whether or
21 not the Event could still be held at the California Science Center.² "To 'cancel' a contract means to
22 abrogate so much of it as remains unperformed." (*Young v. Flickinger* (1925) 75 Cal.App. 171, 174.)

23 ² In addition, because the Foundation cancelled the Event by the October 6, 2009 email, without
24 any need for the consent or agreement of Plaintiff, Plaintiff has not and cannot allege that any
25 statement was made by Defendants with the intention to induce reliance. And because Plaintiff
26 has not properly alleged grounds showing actual reliance, it also has not alleged that any reliance
27 upon these statements or omissions was justified or reasonable. (*Goodman v. Kennedy* (1976) 18
28 Cal.3d 335, 348 ["There is also an utter failure to allege any facts indicating that plaintiffs'
claimed reliance upon the omissions inducing their purchase of the stock was justifiable or
reasonable."].) Nor could any reliance be justified given the statements made in Plaintiff's
original Complaint and the declaration of Avi Davis.

1 The October 6th email contained unambiguous language canceling the Event, which was effective
2 and final regardless of the reasons given for the cancellation. (*Ibid.*) Thus, at the time that Plaintiff
3 received the allegedly fraudulent statements, the Event was already cancelled and so Plaintiff could
4 not have subsequently “alter[ed its] legal relations” in reliance on these statements. (*Hinesley v.*
5 *Oakshade Town Center, supra*, 135 Cal.App.4th at p. 299.)

6 Second, Plaintiff’s actions in holding an event at an alternative venue were not taken in
7 reliance upon Defendants’ alleged misrepresentations or omissions. They were taken in reliance on
8 the fact that the Event was cancelled, which is not a fact that Plaintiff alleges was misrepresented.
9 Even if Defendants were not justified in canceling the Event as alleged by the FAC, Plaintiff would
10 still have a duty to mitigate any damages and find an alternative venue. “A party injured by a breach
11 of contract is required to do everything reasonably possible to negate his own loss and thus reduce the
12 damages for which the other party has become liable.” (*Brandon & Tibbs v. George Kevorkian*
13 *Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460.) Therefore, Plaintiff’s actions in finding an
14 alternative venue were not taken in reliance upon the alleged misrepresentations or omissions.

15 In sum, the alleged facts do not support a claim of fraud. “The claim is merely a breach of
16 contract claim dressed in the language of fraud.” (*Unterberger v. Red Bull North America, Inc.*
17 (2008) 162 Cal.App.4th 414, 423 [stating that plaintiff’s “declaration is merely a series of conclusory
18 allegations without the specificity necessary to survive a demurrer, much less raise triable issues of
19 fact”].) Therefore, the demurrer as to Plaintiff’s Fourth Cause of Action should be sustained.

20 **C. Plaintiff’s Third Cause of Action Under Section 1983 Fails As A Matter Of Law**

21 The Third Cause of Action in Plaintiff’s FAC contends that Defendants violated Plaintiff’s
22 freedom of speech when they cancelled the Event, “thereby discriminating against Plaintiff for the
23 content of expressions concerning intelligent design...” (FAC ¶ 46.) In order to prove a violation
24 under 42 U.S.C. § 1983 (“Section 1983”), Plaintiff must demonstrate that (1) a person subjected the
25 plaintiff to conduct that occurred *under color of state law* and (2) that this conduct deprived the
26 plaintiff of “rights, privileges or immunities secured by the Constitution and [federal] laws.” (*Gomez*
27 *v. Toledo* (1980) 446 U.S. 635, 638.) When a plaintiff seeks recovery under this statute, it “must
28 plead more than constitutional ‘buzzwords’ to survive demurrer.” (*Breneric Associates v. City of Del*

1 Mar (1998) 69 Cal.App.4th 166, 180.) In particular, “the plaintiff must allege *specific and*
2 *nonconclusory facts* showing the defendant’s acts deprived him of a right, privilege or immunity
3 secured by the federal Constitution or federal laws.” (*Ibid*, emphasis added.)

4 **1. A Section 1983 Claim Cannot Be Pled Against The Foundation Or**
5 **Rudolph In His Capacity As President Of The Foundation Because They**
6 **Did Not Act Under Color of State Law**

7 For a Section 1983 claim, a plaintiff must plead that the defendants acted under color of state
8 law.³ Plaintiff is unable to satisfy this element for the Foundation and Rudolph in his official
9 capacity as President of the Foundation. Plaintiff alleges in the FAC that the Foundation is a “non-
10 profit corporation” that “raises funds to support exhibits and education programs featured at the
11 [STATE] CENTER, and manage [sic] exhibitions and programs of scientific, educational and
12 industrial interest.” (FAC ¶¶ 3, 9.) As the court explained in *Robbins v. Hamburger Home for Girls*
13 (1995) 32 Cal.App.4th 671, “private parties ordinarily are not subject to suit under . . . section 1983,
14 unless . . . the state has so significantly involved itself in the private conduct that the private parties
15 may fairly be termed state actors.” (*Id.* at p. 683.) Thus, as a general rule, the Foundation and
16 Rudolph, in his capacity as President of the Foundation, are not state actors and so are not subject to
17 suit under Section 1983.

18 In order for Plaintiff to show that an exception to the general rule applies, it must “show that
19 ‘there is a sufficiently close nexus between the State and the challenged action of the regulated entity
20 so that the action of the latter may be fairly treated as that of the State itself.’” (*Blum v. Yaretsky*
21 (1982) 457 U.S. 991, 1004, quoting *Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 350.)
22 “The purpose of this requirement is to assure that constitutional standards are invoked only when it
23 can be said that the State is responsible for the *specific conduct* of which the plaintiff complains.”
24 (*Ibid.*, emphasis added.) In short, a challenged private activity may be state action only when the

25 _____
26 ³ “Conduct that is actionable under the Fourteenth Amendment as State action is also action under
27 color of State law supporting a suit under § 1983.” (*Lee v. Katz* (9th Cir. 2002) 276 F.3d 550,
28 554, citing *Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 935.) Thus, this demurrer will
follow the example of the courts and will cite to cases applying the two standards
interchangeably.

1 State “has exercised coercive power or has provided such significant encouragement, either overt or
2 covert, that the choice must in law be deemed to be that of the State.” (*Ibid.*; see also *Rendell-Baker*
3 *v. Kohn* (1982) 457 U.S. 830, 841 [holding that a private school, even though it was heavily regulated
4 and received almost all its funds from public sources, was not a state actor in its decision to terminate
5 employees because “the decisions to discharge the petitioners were not compelled or even influenced
6 by any state regulation”].) Plaintiff here has not alleged that the State Center was involved in the
7 Foundation’s decision to cancel the Event.

8 While Plaintiff has included some conclusory language in the FAC concerning this issue, it
9 cannot sufficiently allege that the State Center has so significantly involved itself in the Foundation’s
10 conduct at issue in this case that the Foundation should be deemed to have acted under color of state
11 law. The FAC alleges a “contractual agreement between the [STATE] CENTER and the
12 FOUNDATION”, (FAC ¶ 47), but the acts of private organizations “do not become acts of
13 government by reason of their significant or even total engagement in performing public contracts.”
14 (*Rendell-Baker v. Kohn, supra*, 457 U.S. at p. 832.) Plaintiff also pleads the presence of “significant
15 regulation and control over the EVENT that was exercised by the [STATE] CENTER”, (FAC ¶ 47),
16 even though “it is well-established that state regulation, even if it is extensive, does not justify a
17 finding of nexus between the state and private actors.” (*Lansing v. City of Memphis* (6th Cir. 2000)
18 202 F.3d 821, 830; see also *American Mfrs. Mut. Ins. Co. v. Sullivan* (1999) 526 U.S. 40, 52, 119
19 S.Ct. 977, 986 [“In cases involving extensive state regulation of private activity, [the Supreme Court]
20 ha[s] consistently held that ‘[t]he mere fact that a business is subject to state regulation does not by
21 itself convert its action into that of the State for purposes of the Fourteenth Amendment’” (quoting
22 *Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 350)].) “It equally is well-established that
23 neither public funding nor private use of public property is enough to create liability.” (*Lansing v.*
24 *City of Memphis, supra*, 202 F.3d at p. 830.)

25 Finally, Plaintiff alleges in the FAC that the “FOUNDATION’S actions are attributable to the
26 State of California in that the [STATE] CENTER and the FOUNDATION engaged in a symbiotic
27 relationship in providing public access to the CENTER for events.” (FAC ¶ 47.) It further alleges
28 that “[t]he State of California has so insinuated itself into a position of interdependence with the

1 FOUNDATION that the [STATE] CENTER and the FOUNDATION are joint participants in the
2 cancellation of the EVENT, which, because the EVENT was to be open to the general public, the
3 FOUNDATION's actions in canceling the EVENT were not private in nature." (*Ibid.*) However, in
4 order to allege that a symbiotic relationship between a state agency and a private entity merits a
5 finding of state action, Plaintiff must allege that "the state knowingly accepts the benefits derived
6 from unconstitutional behavior." (*Parks Sch. of Business v. Symington* (9th Cir. 1995) 51 F.3d 1480,
7 1486 [no joint action exists where "benefits of [state-law designated loan guarantor] flow directly to
8 students, not to the state itself," even while "in a broad sense" conferring public benefits]; *see also*
9 *Stark v. Seattle Seahawks* (W.D. Wash. June 22, 2007) 2007 U.S. Dist. LEXIS 45510, *19 [rejecting
10 application of the symbiotic relationship test because "[t]he Stadium Authority did not participate in
11 the original decision to conduct pat-down searches of ticket-holders, nor did it control, profit, or
12 directly benefit from the pat-down searches conducted by the private entities at Qwest Field."].)
13 Plaintiff has not, and cannot, allege that the State Center coerced the Foundation to cancel the Event.
14 Plaintiff also has not alleged that the State Center directly benefited from the decision to cancel the
15 Event. There are no allegations that any of Defendants profited from the decision to cancel the
16 Event, and, if anything, Defendants lost money as a result of the interaction with Plaintiff.

17 Plaintiff cannot sufficiently allege that the Foundation acted under color of state law based
18 simply on conclusory allegations of contracts with public entities, governing regulations by the State,
19 or the Foundation's use of public property. In short, there are no factual allegations that the State
20 Center has exercised sufficient control or influence over the Foundation's decision to cancel the
21 Event so as to warrant a finding that the challenged decision represents state action.

22 **2. Even If The Foundation Or Mr. Rudolph Were State Actors, They Are**
23 **Absolutely Immune From Suit Under Section 1983**

24 Even if the Foundation is viewed as a state actor, state agencies and officers sued their in
25 official capacity have absolute immunity from suit under Section 1983. This statute only applies
26 when a *person* subjected the plaintiff to particular conduct and, as explicitly held by the Supreme
27 Court, "the State is not a 'person' within the meaning of Section 1983." (*Will v. Michigan Dept. of*
28 *State Police* (1989) 491 U.S. 58, 65.) "[T]he State and arms of the State ... are not subject to suit

1 under [section] 1983 in either federal court or state court.” (*Brunius v. Parrish* (2005) 132
2 Cal.App.4th 838, 850, citations omitted.) “Since [the Supreme] Court has construed the word
3 ‘person’ in § 1983 to exclude States, neither a federal court nor a state court may entertain a § 1983
4 action against such a defendant, regardless of whether a state has otherwise waived sovereign
5 immunity.” (*Howlett By and Through Howlett v. Rose* (1990) 496 U.S. 356, 376.)

6 Plaintiff specifically pleads that the State Center “is a department of the State of California,”
7 acknowledging that this is a state agency. (FAC ¶ 2.) The State Center then has absolute immunity
8 from a Section 1983 cause of action because it is not a “person” as required in a Section 1983 action.
9 Even if, as Plaintiff alleges, the Foundation is a joint venture with the State Center and thus should be
10 considered an arm of the State, the Foundation also cannot be sued under Section 1983 because it is
11 not a “person” within the meaning of Section 1983. (*See Will v. Michigan Dept. of State Police*,
12 *supra*, 491 U.S. at p. 65.)

13 Additionally, although Plaintiff names Jeffrey Rudolph as a Defendant in the FAC and
14 specifically within the Third Cause of Action, Mr. Rudolph has only been sued in his official capacity
15 in the FAC. An examination of the FAC shows that the allegations against Mr. Rudolph only
16 concern actions taken in his official capacity as either the President of the Foundation, or President
17 and CEO of the State Center, or both.⁴ (*Reed v. Molony* (1940) 38 Cal.App.2d 405, 411 [“The
18 language of the complaint leaves no doubt that the defendants are each charged in [their] official
19 capacity, only, with the tort of illegally seizing and retaining the property in question.”].) As the
20 claims against Mr. Rudolph seek recovery against him in his official capacity, he has absolute
21 immunity from suit under Section 1983 as explained above. (*See Will v. Michigan Dept. of State*
22 *Police, supra*, 491 U.S. at p. 65.) “While state officials literally are ‘persons,’ a suit against a state
23 official in his or her official capacity is not a suit against the official but rather is a suit against the
24 official’s office, and therefore it is no different from a suit against the state itself.” (*Brunius v.*
25 *Parrish, supra*, 132 Cal.App.4th at pp. 850-51, citations omitted.)

26
27 ⁴ Plaintiff’s counsel confirmed to Defendants’ counsel that Mr. Rudolph is named in the FAC only
28 in his official capacity as the President and CEO of the State Center as well as the President of the
Foundation. (FAC ¶ 4.)

1 In addition, Plaintiff has not shown “in a specific and nonconclusory way, that the alleged acts
2 [of Mr. Rudolph] deprived [Plaintiff] of rights, privileges, or immunities secured by the federal
3 Constitution and laws.” (*Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352, 1360.) Without
4 any allegations stating how Mr. Rudolph’s conduct directly deprived Plaintiff of its First Amendment
5 rights, Plaintiff fails to allege a cause of action against Mr. Rudolph under Section 1983.

6 As Plaintiff has failed to identify any “person who subjected the plaintiff to conduct that
7 occurred under color of state law” on the face of the FAC, the Third Cause of Action for Violation of
8 the First Amendment should be dismissed.

9 **D. The Demurrer As To The Second Cause Of Action For Breach Of Covenant Of**
10 **Good Faith And Fair Dealing Should Be Sustained Because There Is No Special**
11 **Relationship Alleged**

12 The demurrer as to Plaintiff’s claim for breach of the implied covenant of good faith and fair
13 dealing should also be sustained. “In essence the covenant is implied as a *supplement* to the express
14 contractual covenants, to prevent a contracting party from engaging in conduct which (while not
15 technically transgressing the express covenants) frustrates the other party’s right to the benefits of the
16 contract.” (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1153, emphasis in
17 original.) However, Plaintiff has no basis to bring an action for breach of this implied covenant,
18 either in tort or in contract.

19 Under California law, there is generally no cause of action for tortious breach of an implied
20 covenant of good faith and fair dealing unless the parties are in a special relationship with fiduciary
21 characteristics. (*Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 687-92 [affirming dismissal
22 because the Court was “not convinced that a ‘special relationship’ analogous to that between insurer
23 and insured should be deemed to exist in the usual employment relationship which would warrant
24 recognition of a tort action for breach of the implied covenant”].) While this claim may have some
25 viability in the context of insurance, employment, and bank/depositor relationships, “the courts have
26 consistently declined to expand liability for this tort into other types of contract-based disputes.”
27 (*Martin v. U-Haul Company of Fresno* (1988) 204 Cal.App.3d 396, 413.) Plaintiff does not allege
28 that there is any special relationship between the parties sufficient to justify a tort claim for breach of

1 the implied covenant of good faith and fair dealing. (*Wallis v. Superior Court* (1984) 160 Cal.App.3d
2 1109, 1118 [stating that parties must be in inherently unequal bargaining position, and contracts need
3 a “nonprofit motivation, i.e., to secure peace of mind, security, future protection”].) This contract
4 was simply an arms-length transaction to secure a venue for a private event. There is no basis to
5 allege that any type of special relationship exists between these parties sufficient to justify tort
6 liability.

7 “If the allegations do not go beyond the statement of a mere contract breach and, relying on
8 the same alleged acts, simply seek the same damages or other relief already claimed in a companion
9 contract cause of action, they may be disregarded as superfluous as no additional claim is actually
10 stated.” (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.)
11 “Thus, absent those limited cases where a breach of a consensual contract term is not claimed or
12 alleged, the only justification for asserting a separate cause of action for breach of the implied
13 covenant is to obtain a tort recovery.” (*Ibid.*) Because Plaintiff is alleging a breach of the contract
14 and has not alleged that there is any special relationship between the parties (and cannot allege that
15 any such relationship exists), there is no justification to maintain a separate claim for breach of the
16 covenant of good faith and fair dealing. For this reason, the demurrer as to the Second Cause of
17 Action for Breach of the Implied Covenant of Good Faith and Fair Dealing should be sustained.

18 **E. Plaintiff’s Claim For Injunctive Relief Has Not Been, And Cannot Be,**
19 **Adequately Alleged**

20 A claim for injunctive relief requires allegations showing that no adequate legal remedy exists
21 and that irreparable harm would result if an injunction was not granted. (*Writers Guild of America,*
22 *West, Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th 475, 479.) While the FAC contains
23 conclusory allegations concerning irreparable harm and an inadequate legal remedy, “[a] complaint
24 for a injunction which alleges only general conclusions, not warranted by any pleading of facts, does
25 not state a cause of action to enjoin the acts complained of.” (*E.H. Renzel Co. v. Warehousemen’s*
26 *Union I.L.A.* 38-44 (1940) 16 Cal.2d 369, 373.)

27 “Facts concerning the irreparable injury which, it is asserted, will result to the complainant
28 unless protection is extended to him *must be pleaded* in order that the court may consider whether his

1 apprehensions are well founded.” (*Ibid.*, emphasis added.) “A mere allegation that such injury will
2 result is not sufficient.” (*Ibid.*) Plaintiff here has not pled any facts showing why a legal remedy
3 would be inadequate or why irreparable injury would result if an injunction was not granted. Instead,
4 the facts alleged in the FAC set forth a straight-forward claim for breach of contract, which should be
5 adequately compensated through contract damages if liability is found. Plaintiff has not alleged how
6 it could be irreparably harmed through the cancellation of the Event, and since the parties were only
7 associated for one contract, which has subsequently been cancelled, there is no risk that any alleged
8 breach or other violation could continue. “In other words, there was no evidence that any of the
9 alleged illegal activities were likely to recur.” (*Choice-in-Education League v. Los Angeles Unified*
10 *School Dist.* (1993) 17 Cal.App.4th 415, 431 [reversing injunctive relief on ground that “[t]here was
11 simply no showing in this case that appellants intended to repeat the activities claimed by respondents
12 to be illegal, i.e., to rebroadcast the March 2, 1992, meeting”].) For these reasons, the Court should
13 dismiss Plaintiff’s Fifth Cause of Action for Injunctive Relief.

14 **III. CONCLUSION**

15 For the foregoing reasons, the Foundation and Mr. Rudolph, in his official capacity as
16 President of the California Science Center Foundation, respectfully request that the Court grant the
17 instant Demurrer and dismiss the Second, Third, Fourth, and Fifth Causes of Action included within
18 Plaintiff’s FAC.

19 DATED: January 19, 2010

GIBSON, DUNN & CRUTCHER LLP

20
21 By:  _____

Patrick W. Dennis

22
23 Attorneys for Defendants,
24 CALIFORNIA SCIENCE CENTER FOUNDATION
and JEFFREY RUDOLPH in his official capacity as
25 President of the California Science Center Foundation
26
27
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