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

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

16 Plaintiff,

17 vs.

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

24 Defendants.

Case No. BC423687

*Assigned to: The Hon. Terry A. Green
Dept. 14*

**OPPOSITION TO DEMURRER OF
CALIFORNIA SCIENCE CENTER AND
JEFFREY RUDOLPH; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF; REQUEST FOR
JUDICIAL NOTICE; EXHIBITS;
[PROPOSED] ORDER**

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Amended Complaint 11/19/09

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

2 COMES NOW Plaintiff AMERICAN FREEDOM ALLIANCE and responds to Defen-
3 dants' Demurrer to the First Amended Complaint as follows:

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 I. INTRODUCTION

6 Plaintiff AMERICAN FREEDOM ALLIANCE (hereinafter referred to as "AFA" or
7 "Plaintiff") in this action challenges prior restraint restrictions Defendants placed on Plaintiff's
8 protected speech based on viewpoint/content discrimination. The First Amended Complaint al-
9 leges causes of action for (1) Breach of Contract; (2) Breach of Implied Covenant of Good Faith
10 and Fair Dealing; (3) Violation of the First Amendment to the United States Constitution (42
11 U.S.C. § 1983) (4) Fraud (Intentional Misrepresentation, Concealment and Deceit); (5) Injunc-
12 tive Relief; and (6) Declaratory Relief. Defendants California Science Center and Jeffrey Ru-
13 dolph in his official capacity¹ as President of the California Science Center, ("collectively re-
ferred to herein as "Defendants" or "CENTER") have demurred to the Second, Third, Fourth and
Fifth causes of action.

14 II. LEGAL STANDARD

15 The function of a demurrer is to test the sufficiency of a pleading by raising questions of
16 law. *Code of Civil Procedure* §589(a); *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 90;
17 *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994. A demurrer is directed to the
18 face of the pleading to which objection is made (*Sanchez v Truck Ins. Exch.* (1994) 21
19 Cal.App.4th 1778, 1787) and to matters subject to judicial notice (*Code of Civil Procedure*
20 §430.30(a); *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6
21 Cal.App.4th 157, 160). The only issue the Court may resolve on a demurrer to a complaint is
22 whether the complaint, standing alone, states a cause of action. *Gervase v Superior Court* (1995)
23 31 Cal.App.4th 1218, 1224. On a demurrer, the Court should rule only on matters disclosed in
24 the challenged pleading. *Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881. The other
25 parties' pleadings cannot dictate the outcome.

26 ¹ The FAC appears to sue RUDOLPH in his individual capacity. All counsel agreed that RUDOLPH would be sued
27 in his official capacity, and RUDOLPH has demurred to the FAC in his official capacities in connection with his
28 roles at the California Science Center and the California Science Center Foundation. Plaintiff is seeking leave to
amend the FAC to sue RUDOLPH in both his official and individual capacities for both entities.

1 A demurrer does not test the sufficiency of the evidence or other matters outside the
2 pleading to which it is directed. *Four Star Elect. V. F & H Constr.* (1992) 7 Cal.App.4th 1375,
3 1379. It challenges only the legal sufficiency of the affected pleading, not the truth of the factual
4 allegations in the pleading or the pleader's ability to prove those allegations. *Cundiff v. GTE*
5 *Cal., Inc.* (2002) 101 Cal.App.4th 1395, 1404-1405. A demurrer is not the proper procedure for
6 determining the truth of disputed facts, such as the correct interpretation of the parties' agree-
7 ment or its enforceability (*Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th
8 97, 114-115). The Court may not make factual findings on a demurrer, including "implicit" find-
9 ings. *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 839.

9 III. ARGUMENT

10 A. Plaintiff's Second Cause Of Action For Breach Of Implied Covenant Of
11 Good Faith And Fair Dealing States Sufficient Facts.

12 Plaintiff's Second Cause of Action alleges Breach of the Implied Covenant of Good Faith
13 and Fair Dealing. Defendants contend that Plaintiff is required to plead a special relationship
14 between the contracting parties. Although in *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d
15 654, 687, cited by Defendants, the Supreme Court declared that the breach of the implied cove-
16 nant of good faith and fair dealing could be pleaded as an independent tort in very few situations
17 where there is a special relationship, such as in the insurance contract context, in *Kransco v.*
18 *American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400, the Court restated the set-
19 tled principle that the covenant of good faith and fair dealing is implied *in every contract*. ["It
20 has long been recognized in California that '[t]here is an implied covenant of good faith and fair
21 dealing in every contract that neither party will do anything which will injure the right of the
22 other to receive the benefits of the agreement.'"]

23 In 2009, the Court of Appeal in *Spinks v. Equity Residential Briarwood Apartments*
24 (2009) 171 Cal.App.4th 1004, 1033, stated the "prerequisite for any action for breach of the im-
25 plied covenant of good faith and fair dealing is the existence of a contractual relationship be-
26 tween the parties, since the covenant is an implied term in the contract." *Id.* at 1032; internal
27 quotation and citation omitted. "The implied covenant of good faith and fair dealing is limited to
28 assuring compliance with the express terms of the contract, and cannot be extended to create ob-
ligations not contemplated by the contract." (*Id.*, internal quotation and citation omitted). In
2004, the Court of Appeal followed the same rule and sustained a cause of action of breach of

1 implied covenant of good faith and fair dealing in a case involving a dispute between a produc-
2 tion company and a city's theater company. *See Pasadena Live v. City of Pasadena* (2004) 114
3 Cal.App.4th 1089, 1094. "In essence, the covenant is implied as a supplement to the express con-
4 tractual covenants, to prevent a contracting party from engaging in conduct which (while not
5 technically transgressing the express covenants) frustrates the other party's rights to the benefits
6 of the contract." *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11
7 Cal.App.4th 1026, 1031-1032, cited and quoted in *McClain v. Octagon Plaza, LLC* (2008) 159
8 Cal.App.4th 784, 806.

9 The implied covenant imposes upon each contracting party both "the duty to refrain from
10 doing anything which would render performance of the contract impossible by any act of his
11 own" and "the duty to do everything that the contract presupposes that he will do to accomplish
12 its purpose." *Pasadena Live, supra*, 114 Cal.App.4th at 1093, cited and quoted in *McClain, su-
13 pra*, 159 Cal.App.4th at 806. The covenant protects only the express terms of the agreement and
14 cannot impose substantive duties or limits on the contracting parties beyond those incorporated
15 in the specific terms of their agreement. *McClain, supra*, 159 Cal.App.4th at 806 (citing
16 precedent). "The precise nature and extent of the duties imposed under the implied covenant
17 thus depend upon the purposes of the contract." *Id.* (citing precedent).

18 A cause of action for breach of the covenant can be and often is pleaded separately but is
19 essentially a species of breach of contract. In *Pasadena Live*, the plaintiff production company
20 alleged breach of the covenant of good faith and fair dealing in its complaint against the city for
21 breach of contract, based on allegations that their written agreement provided the company
22 would advance \$114,550 to the city for improvements to the city's amphitheater, and would have
23 the opportunity to submit proposals for its productions in order to recoup its investment. The city
24 later sent a letter to the company, however, barring the company from submitting any proposals.
25 By sending the letter, the city failed to consider proposals submitted by the company, and there-
26 fore the city failed to do everything that the contract presupposed the city would do to accom-
27 plish the contract's purpose. The court held the complaint pleading these facts would survive
28 demurrer as adequately pleading breach of the implied covenant of good faith and fair dealing.
Here, the contract contemplated that Plaintiff's fundraising event would take place at the IMAX
Theater. Cancellation of the contract by Defendants on the preposterously flimsy pretext that

1 publicity had harmed Defendants' reputation with the Smithsonian frustrated Plaintiff's right to
2 the financial benefit it hoped to realize through the IMAX event.

3 B. Plaintiff's Third Cause Of Action For Violation Of The First Amendment To
4 The United States Constitution States Sufficient Facts.

5 1. *Summary of Argument*

6 Although a state generally enjoys Eleventh Amendment immunity from 42 U.S.C. § 1983
7 liability, courts have denied immunity to state-created entities, such as the California Science
8 Center, when they do not perform "central government functions" (or "vital public functions")
9 or satisfy other criteria relevant to designating them "arms of the state." In this case, the Court
10 cannot properly perform the required arm-of-the-state analysis without having to rely on extrin-
11 sic evidence. RUDOLPH, as a person sued in both his individual and official capacities, is en-
12 titled to limited immunity (money damages, but not prospective relief).

13 2. *State Entities Are Not Absolutely Immune Under The Eleventh Amendment*
14 *From Liability Under 42. U.S.C. § 1983.*

15 42 U.S.C. § 1983 provides as follows: "Every person who, under color of any statute,
16 ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be sub-
17 jected, any citizen of the United States or other person within the jurisdiction thereof to the de-
18 privation of any rights, privileges, or immunities secured by the Constitution and laws, shall be
19 liable to the party injured in an action at law, suit in equity, or other proper proceeding for re-
20 dress." An essential element of a § 1983 claim is that the Defendants acted under color of state
21 law. *Flagg Bros. v. Brooks* (1978) 436 U.S. 149, 155. To state a claim under 42 U.S.C. § 1983,
22 a plaintiff must allege that (1) the defendant was acting under color of state law at the time the
23 acts complained of were committed, and that (2) the defendant deprived plaintiff of a right, privi-
24 lege, or immunity secured by the Constitution or laws of the United States. *Briley v. State of Cal.*
25 (9th Cir. 1977) 564 F.2d 849, 853.

26 Defendants baldly argue that, as a matter of law, all state-created entities enjoy absolute
27 immunity from constitutional liability under the Eleventh Amendment, erroneously asserting that
28 "the United States Supreme Court has *squarely* ruled that ... state entities (*like* the California
Science Center) and their employees (*like* Jeffrey Rudolph) are not 'persons' within the meaning
of Section 1983, and thus cannot be sued under the statute." (Demurrer, 9:10-13, citing *Will v.*
Michigan Department of State Police (1989) 491 U.S. 58, 71) (Emphasis added). Defendants

1 misconstrue – or at least overly simplify – the holding in *Will*. That case stands for the general
2 proposition that a state is not a “person” under § 1983, and therefore enjoys Eleventh Amend-
3 ment immunity. Other decisions by the Court have recognized a distinction between the state
4 itself and its political subdivisions in determining whether state agencies, i.e., “arms of the state,”
5 have sufficient attributes to also claim Eleventh Amendment immunity. In fact, the Supreme
6 Court has acknowledged that it “has consistently refused to construe the [Eleventh] Amendment
7 to afford protection to political subdivisions such as counties and municipalities, even though
8 such entities exercise a ‘slice of state power.’” *Lake Country Estates, Inc. v. Tahoe Regional
Planning Agency* (1979) 440 U.S. 391, 401.

9 Analogizing the state’s police power to the role a science center plays as a state-created
10 entity, Defendants suggest that a state police department and a science center are functionally
11 equivalent entities that by virtue of the sole factor that they are state-created entities enjoy im-
12 munity. However “[U]nder *Will*, an Eleventh Amendment arm-of-the-state analysis must be ap-
13 plied to determine whether a state-created entity is a ‘person’ under § 1983....” *Kirchmann v.
14 Lake Elsinore Unified School District* (2000) 83 Cal.App.4th 1098, 1104. “The decision to ex-
15 tend sovereign immunity to a public entity turns on whether the entity is to be treated as
16 an arm of the State partaking of the State’s Eleventh Amendment immunity, or is instead to be
17 treated as a municipal corporation or other political subdivision to which the Eleventh Amend-
18 ment does not extend.” *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* (1977) 429 U.S. 274,
19 280. This rule is followed in the Ninth Circuit. *See, e.g., Beentjes v. Placer County Air Pollution
20 Control Dist.* (2005) 397 F.3d 775, 777-778. To determine whether the entity is an immune state
21 entity or not the court must examine the relationship between the state and the entity in question.
22 *Kirchmann, supra*, 83 Cal.App.4th at 1106.

23 Acting under color of state law, a state agency loses Eleventh Amendment immunity pro-
24 tection if it is not deemed an arm of the state or state agent in a § 1983 action. In *Kirchmann*,
25 Plaintiff, an employee of the school district, was suspended for 30 days after anonymously com-
26 municating to bidders on a district construction management contract her view that a conflict of
27 interest existed in the selection process. *Kirchmann*, 83 Cal.App.4th at 1100. On petition for a
28 writ of mandate to overturn the suspension, the court determined that her communications were
protected by the First Amendment. She sued the school district under § 1983 for violation of her
First Amendment speech rights. As in this case, the school district demurred to the complaint,

1 arguing that it was an “arm of the state” and therefore immune under the Eleventh Amendment.
2 The demurrer was sustained and the plaintiff appealed. Finding that “[l]abeling an entity as a
3 ‘state agency’ in one context does not compel treatment of that entity as a ‘state agency’ in all
4 contexts,” (*id.*, at 1113, citing *Lynch v. San Francisco Housing Authority* (1997) 55 Cal.App.4th
5 527, 534) the Fourth District scrupulously analyzed federal and state law to determine whether
6 the school district could properly be classified an “arm of the state.”²

7 The court employed a multi-factored balancing test first summarized in *Mitchell v. Los*
8 *Angeles Community College Dist.* (9th Cir.1988) 861 F.2d 198, 201, *cert. denied*, (1989) 490
9 U.S. 1081, 109, and again in *Belanger v. Madera Unified School Dist.* (9th Cir. 1992) 963 F.2d
10 248, 254. As explained in *Kirchmann*, the test for determining whether a state entity should
11 have immunity can be grouped into two categories: (1) the degree of state involvement in the
12 entity’s fiscal affairs, and (2) the political status which state law affords the entity. *Id.* at 1106.
13 The first category may consist of the following criteria: (1) whether a money judgment against
14 the entity would be satisfied out of state funds; (2) the degree of funding the entity receives from
15 the state; (3) whether the entity has independent authority to raise funds; and (4) the extent of
16 state control over the entity’s fiscal affairs. *Kirchmann*, 83 Cal.App.4th at 1106, citing *Lynch*,
17 *supra*, 55 Cal.App.4th 527 at 533. The second category may consist of the following criteria: (1)
18 whether the entity performs central government functions; (2) whether the entity may sue, be
19 sued, and hold property in its own name; (3) the corporate status of the entity under state law; (4)
20 the degree of autonomy enjoyed by the entity; and (5) the entity’s immunity from state taxation
21 and the geographic scope of the entity’s operation. *Id.*

22 3. *Defendants Do Not Serve A Central Government Or Vital Public Function*
23 *And Are Not Presumptive “Arms Of The State” For Purposes Of Demur-*
24 *rer.*

25 Defendant CENTER is not a state entity immune under the Eleventh Amendment because
26 it does not serve a central government function. The Complaint alleges that Defendants acted
27 under color of state law. (FAC, 14:11-13, 20:7-8). Unlike the state police department in *Will*,
28 Defendant CENTER’s facilities perform no central government function. Created by statute, the
CENTER’S purpose is to “represent historical, cultural, and tourist attractions of statewide signi-

² The Court stated that the term “arm of the state” used in federal cases is synonymous with the terms “state agency” and “agency of the state” used in state cases. *Kirchmann*, 83 Cal.App.4th at 1102, fn.2.

1 ficance.” California *Food & Agric. Code* § 4101. Its mission is “to stimulate curiosity and in-
2 spire science learning in everyone by creating fun, memorable experiences....” ([http://www.
3 californiasciencecenter.org/GenInfo/AboutUs/AboutUs.php](http://www.californiasciencecenter.org/GenInfo/AboutUs/AboutUs.php), accessed April 26, 2010.) The
4 CENTER’S only functions are to own and maintain the physical property where its facilities are
5 located. (Request for Judicial Notice, Exhibit “B,” Decl. Jeffrey N. Rudolph, ¶ 6, 2:13-14, sub-
6 mitted in support of the Defendant California Science Center Foundation’s Opposition to the
7 Emergency Relief Request by American Freedom Alliance [“The State of California owns the
8 buildings and the land upon which they are built, and is responsible for the operation and main-
9 tenance of the physical facilities.”]). The CENTER is not responsible for managing its exhibits,
10 programs or events. Those and all other functions performed by the Defendant California
11 Science Center Foundation under contract. (See Decl. Jeffrey N. Rudolph, *passim*.) Indeed, it is
12 precisely because the CENTER’S purpose is extrinsic to any central government function that it
13 partnered with a private charitable foundation to finance and operate it in order to relieve the
14 State treasury of these burdens.

15 Defendants have cited no case holding that the CENTER is an arm of the state in order to
16 qualify for Eleventh Amendment immunity. They have simply asserted that because they are
17 creatures of the state, they are immune under § 1983. For the Court to determine whether the
18 CENTER is an arm of the state, it would need to consider the criteria developed and identified in
19 the *Mitchell-Lynch-Kirchmann* line of decisions. However, the decision on these facts is not for
20 demurrer. Any such analysis to be effective as a matter of law would require extrinsic evidence.
21 A demurrer, however, can be used only to challenge defects that appear on the face of the plead-
22 ing under attack, or from matters outside the pleading that are judicially noticeable. *Blank v.*
23 *Kirwan* (1985) 39 Cal.3d 311, 318; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th
24 968, 994. No other extrinsic evidence can be considered. *Ion Equip. Corp. v. Nelson, supra*, 110
25 Cal.App.3d 868,881 [error for court to consider facts asserted in memorandum supporting de-
26 murrer]; *Afuso v. United States Fid. & Guar. Co., Inc.* (1985) 169 Cal.App.3d 859, 862, (disap-
27 proved on other grounds in *Moradi-Shalal v. Fireman’s Fund Ins. Cos.* (1988) 46 Cal.3d 287
28 [error for court to consider contents of release which was not part of any court record]. In fact,
such an analysis must be reserved for summary judgment.

Here, Defendants cannot conclude as a matter of law that a science center possesses the
functional equivalency of a police agency, which performs a central government function, and

1 therefore receives Eleventh Amendment immunity protection. For purposes of demurrer, howev-
2 er, it can be demonstrated as a matter of law that Defendants do not perform a central govern-
3 ment or vital public function and thus would be unlikely to claim a right to immunity. In *Furu-*
4 *moto v. Lyman* (D.C. Cal., 1973) 362 F.Supp. 1267, 1279, a private university's grant of corpo-
5 rate powers and privileges by the State was held not to be evidence of State control where the
6 university did not perform a "vital public function" by supporting higher education: "[P]laintiffs'
7 argument that Stanford (University) performs a vital public function, which, if Stanford did not
8 exist, the State would have to fulfill, could be extended to virtually all private endeavors." Even
9 where an educational service is provided by the entity, that factor – standing alone – does not
10 establish that the entity performs a vital public function. As the *Furumoto* court aptly noted,
11 while it may be correct "in a trivial way" to say that education is "impressed with a public inter-
12 est, ... [m]any things are." *Id.* This Court must be bound by the four corners of the complaint in
13 its determination that Plaintiff has or has not sufficiently alleged state action, which it has.
14 Whether Defendants are entitled to immunity cannot be fully determined on these facts, and the
15 facts on which a determination might be reached argue against such a result.

14 4. *Rudolph, Whether In His Official Capacity Or Individual Capacity, Can-*
15 *not Establish Immunity Under The Eleventh Amendment.*

16 The Eleventh Amendment to the Constitution provides protection only from suits against
17 a state officer in his or her official capacity; suits against state officials in their individual capaci-
18 ties are afforded no such protection. *Scheuer v. Rhoades* (1974) 416 U.S. 232, 238. To avail
19 himself of Eleventh Amendment immunity in his *official capacity* as to *money damages*,
20 RUDOLPH is subject to a determination that the CENTER is not an arm of the state for purposes
21 of § 1983 liability. Therefore, as argued above, since no extrinsic evidence can be offered to es-
22 tablish the criteria needed to prove that the CENTER is protected by Eleventh Amendment im-
23 munity, and no central government function is performed, the demurrer must be overruled as to
24 RUDOLPH acting in an official capacity as well as to money damages. However, no such test is
25 needed to deny him Eleventh Amendment immunity as to prospective relief while acting in his
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1 official capacity, nor as to either money damages or prospective relief while acting in his indi-
2 vidual capacity.³

3 “Will recognized one vital exception to this general rule: When sued for prospective in-
4 junctive relief, a state official in his official capacity is considered a ‘person’ for § 1983 purpos-
5 es.” *Flint v. Dennison* (2007) 488 F.3d 816, 825, citing *Will*, 491 U.S. at 71 n. 10. “Of course a
6 state official in his or her official capacity, when sued for injunctive relief, would be a person
7 under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions
8 against the State.’” *Id.*, quoting *Kentucky v. Graham* (1985) 473 U.S. 159, 167 fn. 14. “This ex-
9 ception recognizes the doctrine of *Ex Parte Young* (1908) 209 U.S. 123, that a suit for prospec-
10 tive injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment
11 immunity.” *Id.*, quoting *Rounds v. Or. State Bd. of Higher Educ.* (9th Cir.1999) 166 F.3d 1032,
12 1036 (“*Ex Parte Young* provided a narrow exception to Eleventh Amendment immunity for cer-
13 tain suits seeking declaratory and injunctive relief against unconstitutional actions taken by state
14 officers in their official capacities.”); *Doe v. Lawrence Livermore Nat’l Lab.* (9th Cir.1997) 131
15 F.3d 836, 840 (“[T]he Eleventh Amendment allows only prospective injunctive relief to prevent
16 an ongoing violation of federal law.”).

17 With respect to § 1983 claims against a state official acting in his individual capacity, the
18 Ninth Circuit follows the *Scheur* rule, *supra*. Claims against state officers in their official capaci-
19 ties are, in effect, claims against the entity of which the officer is an agent. But “[p]ersonal-
20 capacity suits ... seek to impose individual liability upon a government officer for actions taken
21 under color of state law. Thus, ‘[o]n the merits, to establish personal liability in a § 1983 action,
22 it is enough to show that the official, acting under color of state law, caused the deprivation of a
23 federal right.’” *Hafer v. Melo* (1991) 502 U.S. 21, 25, quoting *Kentucky v. Graham* (1985) 473
24 U.S. 159, 166. Officers sued in their individual capacities are liable under § 1983 for damages
25 resulting from deprivations of an individual’s federally-protected rights. *Hafer*, 502 U.S. at 30-
26 31.

27 ³ Although the FAC alleges that Defendant RUDOLPH violated § 1983 in his individual capacity, the parties agreed
28 that he would respond to the FAC in his official capacity. Plaintiff will seek leave to amend the FAC to allege the
violation against RUDOLPH in both his individual and official capacities as to his roles with the California Science
Center and the California Science Center Foundation at the hearing on Defendants’ Demurrers by way of separate
motion. In his individual protection, the Eleventh Amendment provides no RUDOLPH no immunity.

1 "If the act which the state (official) seeks to enforce be a violation of the Federal Consti-
2 tution, the officer in proceeding under such enactment comes into conflict with the superior au-
3 thority of that Constitution, and he is in that case stripped of his official or representative charac-
4 ter and is subjected in his person to the consequences of his individual conduct." *Ybarra v. Los*
5 *Altos Hills* (9th Cir. 1974) 503 F.2d 250, citing *Ex parte Young* (1908) 209 U.S. 123, 159-160.
6 See also *Greenlow v. California Dept. of Benefit Payments* (D.C. Cal. 1976) 413 F.Supp. 420,
7 426 (quoting *Ybarra*) and *Construction Industry Association v. City of Petaluma* (9th Cir. 1975)
8 522 F.2d 897.

9 The fact that RUDOLPH may have acted in the scope and course of his employment in
10 causing the deprivation of the Plaintiff's rights does not transform these claims into "official-
11 capacity" claims. "[S]tate officials, sued in their individual capacities, are 'persons' within the
12 meaning of § 1983. The Eleventh Amendment does not bar such suits, nor are state officers ab-
13 solutely immune from personal liability under § 1983 solely by virtue of the 'official' nature of
14 their acts." *Hafer*, 502 U.S. at 31. Thus, RUDOLPH can be held personally liable for damages
15 resulting from any deprivation of federal rights he caused. It does not matter that he was acting
16 as a state official in doing so; if he acted under color of state law and caused a deprivation of
17 rights, he is answerable for that under § 1983. A state official does not have to be acting in his
18 own personal interest in order to be sued and held liable in his individual capacity. Plaintiff is
19 entitled to amend the Complaint to allege liability on the basis of RUDOLPH's individual and
20 official activities.

21 C. Plaintiff's Fourth Cause Of Action For Fraud States Sufficient Facts.

22 1. *Plaintiff Has Sufficiently Alleged Facts Showing Reasonable Reliance Re-*
23 *lated To Defendants Deceit And Concealment.*

24 "The loss of First Amendment freedoms, for even minimal periods of time, unquestiona-
25 bly constitutes irreparable injury." *Elrod v. Burns* (1976) 427 U.S. 347, 373. The issue presented
26 under Plaintiff's Fourth Cause of Action for Fraud is whether the loss of AFA's First Amend-
27 ment freedom by entities and individuals acting under color of law is attributable to Defendants'
28 scheme to deceive Plaintiff into believing that it had committed a contractual breach when it had
not (and thus conceal its civil rights violation) and to conceal their true reason for cancelling the
event. Plaintiff was deceived when it was told that it had breached the contract by failing to ob-

1 tain Defendants' approval prior to issuing a press release that appeared on a third party's web
2 site. In essence, Defendants rescinded the contract on the basis of facts they knew to be false.

3 Fraud is either actual or constructive. *Civil Code* § 1571. One who willfully deceives
4 another with intent to induce him to alter his position to his injury or risk, is liable for *any dam-*
5 *age* which he thereby suffers. *Civil Code* § 1709. A deceit is either: (1) The suggestion, as a fact,
6 of that which is not true, by one who does not believe it to be true; (2) The assertion, as a fact, of
7 that which is not true, by one who has no reasonable ground for believing it to be true; (3) The
8 suppression of a fact, by one who is bound to disclose it, or who gives information of other facts
9 which are likely to mislead for want of communication of that fact (concealment); or, (4) A
10 promise, made without any intention of performing it. *Civil Code* § 1710.

11 By its terms, deceit may be characterized by any one these definitions, not by a combination of
12 them. The plain language of §§ 1709 and 1710 do not require evidence of reliance in a civil
13 rights action where fraud is committed to deprive the Plaintiff of its First Amendment right of
14 free speech. Where one party to a contract falsely represents to another party to the contract –
15 for the purpose of justifying the contract's rescission – that the other party has breached the con-
16 tract, all the while concealing facts that formed the true basis for rescinding the contract, and the
17 other party is forced to alter its position to its detriment, reliance is properly alleged.

18 In interpreting statutory language, courts first look to the plain meaning of the statutory
19 language, then to its legislative history and finally to the reasonableness of a proposed construc-
20 tion. *MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal.App.4th
21 1076, 1082. In the first step of the interpretive process, courts look to the words of the statute
22 themselves. *Id.* Courts give the words of the statute “a plain and commonsense meaning” unless
23 the statute specifically defines the words to give them a special meaning. *Id.* “If the statutory
24 language is clear and unambiguous, *our task is at an end*, for there is no need for judicial con-
25 struction.” *Id.* at 1083. “In such a case, there is nothing for the court to interpret or construe.” *Id.*
26 Here, Defendants willfully deceived Plaintiff with the intent of inducing it to *alter its position to*
27 *its injury* (loss of First Amendment freedom to present its message concerning Intelligent Design
28 in a public forum) *and risk* (loss of money it expected to generate through donations from major
donors at the fundraising event and requirement that it locate on short notice an alternative venue
suitable to show the 3-D IMAX film). *Civil Code* § 1709.

1 One definition of deceit is “[t]he suggestion, as a fact, of that which is not true, by one
2 who does not believe it to be true.” *Civil Code* § 1710(1). Here, the Complaint alleges that De-
3 fendants represented as fact that Plaintiff had breached the contract, knowing that to be false,
4 when the truth was that Defendants did not wish to be associated with an Intelligent Design event
5 once informed of the nature of the event and Defendants had been admonished by Smithsonian
6 officials for entering into the agreement. (*See, e.g.*, FAC, ¶¶ 32-39.) Another definition of deceit
7 is “[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for
8 believing it to be true.” *Civil Code* § 1710(2). The Complaint alleges that Defendants cancelled
9 the event based on a provision of the contract requiring Plaintiff to obtain prior approval of pub-
10 licity while objecting to the content of publicity Plaintiff did not prepare or publish. Defendants
11 had no reasonable ground for believing that their assertion was true. (*See, e.g.*, FAC, ¶¶ 18-23,
12 32-39.) A third definition of deceit is “[the] suppression of a fact, by one who ... gives informa-
13 tion of other facts which are likely to mislead for want of communication of that fact.” *Civil*
14 *Code* § 1710(3). The Complaint alleges that Defendants suppressed the fact that it had received
15 complaints from numerous parties, including the Smithsonian, about the event’s them, which
16 they were acting on. (*e.g.*, FAC, ¶¶ 24-26).

15 2. *Plaintiff Has Sufficiently Alleged Facts Showing Forbearance Related To*
16 *Defendants Deceit And Concealment.*

17 “California law has long recognized the principle that induced forbearance can be the ba-
18 sis for tort liability.” *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 174. Notably,
19 “[f]orbearance -- the decision not to exercise a right or power ... [is sufficient] to fulfill the ele-
20 ment of reliance necessary to sustain a cause of action for fraud or negligent misrepresentation.”
21 *Id.* at 174 (citations omitted). This concept derives from the principle, declared by the Restate-
22 ment of Torts (Second) section 525, that “One who fraudulently makes a misrepresentation of
23 fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action
24 in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by
25 his justifiable reliance upon the misrepresentation.” Defendants’ representations containing false
26 reasons for cancelling the event and rescinding the contract, which Defendants hoped Plaintiff
27 would believe were being seriously proposed, had the effect of deterring Plaintiff from taking
28 further action, such as appealing to the president, RUDOLPH, directly or petitioning the board,

1 to secure the venue. Defendants made the false statements to cause Plaintiff to *not* attempt to ex-
2 hibit the film and to *not* take other steps to persuade Defendants to fulfill its promise.

3 Plaintiff is unable to mitigate the loss of its First Amendment right of free speech consti-
4 tuting irreparable injury. Plaintiff suffered an immediate loss of this right and irreparable injury
5 as a direct result of Defendants' deception and the concealment of their ulterior basis for backing
6 out of the contract. As alleged in the Complaint, Defendants sought to cancel the contract only
7 after it had been contacted by the Smithsonian Institution about concerns that the event was be-
8 ing promoted as one sponsored by Defendants, thus associating the subject of Intelligent Design
9 with the Smithsonian, which had previously sought to distance itself from a similar event. (FAC,
10 ¶¶ 21, 51, 54-59). Once it learned of the Smithsonian's objection to an Intelligent Design film
11 being shown at its affiliate science center, Defendant refused to perform under the contract.

12 D. Plaintiff's Fifth Cause Of Action For Injunctive Relief States Sufficient
13 Facts.

14 To obtain a permanent injunction, a party must show: (1) that he has prevailed in estab-
15 lishing the violation of the right asserted in his complaint; (2) there is no adequate remedy for the
16 violation of this right; and (3) irreparable harm will result if the court does not order injunctive
17 relief. *Alabama v. U.S. Army Corps of Engineers* (11th Cir. 2005) 424 F.3d 1117, 1128. The
18 standard for a permanent injunction is essentially the same as for a preliminary injunction, except
19 that the plaintiff must show actual success on the merits instead of a likelihood of success. *Amo-*
20 *co Production Co. v. Village of Gambell* (1987) 480 U.S. 531, 546 fn.12, citing *Univ. of Texas v.*
21 *Camenisch* (1981) 451 U.S. 390, 392.

22 "The loss of First Amendment freedoms, for even minimal periods of time, unquestiona-
23 bly constitutes irreparable injury." *Elrod v. Burns, supra*, 427 U.S. 347 at 373. In this case,
24 Plaintiff has alleged a violation of its First Amendment rights due to efforts by Defendants to
25 censor its program relating to Intelligent Design. Plaintiff can allege, but is not required to, addi-
26 tional facts to support its claim. For example, e-mails exchanged between Defendants' em-
27 ployees suggest that they believed Plaintiff's event should be cancelled due to the perception that
28 it was a "creationist" event: "A science center should not even be asked to partner with any
group associated with debating Darwinism - it's not our place." (Exhibit "A," Request for Judi-
cial Notice, attached as Exhibit "A" to Plaintiff's Motion for Leave to Amend Complaint, Bates
Nos. CSCF0000229-231.) In *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 61, 66-67, the

1 United States Supreme Court concluded that letters from a state commission on morality advis-
2 ing book distributors that the commission's members considered certain books objectionable for
3 sale to youths constituted "informal censorship" in violation the First Amendment even though
4 the books were not banned and the commission lacked authority to apply legal sanctions. The
5 court concluded that the practice amounted to a "system of prior administrative restraints, since
6 the Commission is not a judicial body and its decisions to list particular publications as objec-
7 tionable do not follow judicial determinations that such publications may lawfully be banned."
8 *Bantam* at 70, quoted in *Smith v. Novato Unified School District* (2007) 150 Cal.App.4th 1439,
9 1463. Here, Plaintiff believes it has sufficiently alleged entitlement to relief under § 1983 for
10 violation of its First Amendment rights. Nevertheless, if the Court should disagree, then Plaintiff
11 should be granted leave to amend to incorporate additional facts that have become known to it
12 through discovery.

13 While it is true that injunctive relief is, by its very terms, a form of relief sought, as is
14 declaratory relief, to which Defendants inconsistently have not demurred, it is common in a case
15 alleging violation of the First Amendment to assert it as a cause of action in order to focus the
16 Court's attention on the prospective relief being sought. Where the form of a pleading does not
17 prejudice the opposing party, courts will view it as harmless "form over substance." See, e.g.,
18 *See, e.g., Weiss v. Chevron, U.S.A., Inc.* (2d Dist.1988) 204 Cal.App.3d 1094, 251 (trial court
19 could consider evidence not initially included in defendant's motion for summary judgment, but
20 submitted together with its reply to plaintiff's opposition); *Motor City Sales v. Superior Court*
21 (1973) 31 Cal.App.3d 342, 346 (relating to fictitious party pleading). It is only necessary that
22 Plaintiff assert a cause of action that gives rise to injunctive relief and to pray for such relief, yet
23 as a matter of form, no harm and no prejudice to the moving party results from separating it into
24 a section labeled "Cause of Action." Holding Plaintiff to a requirement that equitable relief
25 sought may not be expressed in the form of a cause of action would "exact form over substance."
26 *Id.*

27 If not permanently enjoined, Defendants will continue to engage in the practice of prior
28 restraint relating to Intelligent Design and other topics of which it is ignorant or to which it oth-
erwise objects. Plaintiff has adequately alleged the injunctive relief sought, and presenting it in
the form of a Cause of Action does not prejudice Defendants.

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IV. CONCLUSION

The Court should overrule the demurrer in its entirety. Plaintiff is entitled to amend the Complaint should the Court sustain any portion of the demurrer.

DATED: April _____, 2010

THE BECKER LAW FIRM

By: _____

WILLIAM J. BECKER, JR., ESQ.
Attorneys for Plaintiff,
AMERICAN FREEDOM ALLIANCE


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IV. CONCLUSION

The Court should overrule the demurrer in its entirety. Plaintiff is entitled to amend the Complaint should the Court sustain any portion of the demurrer.

DATED: April 27, 2010

THE BECKER LAW FIRM

By: 
WILLIAM J. BECKER, JR., ESQ.
Attorneys for Plaintiff,
AMERICAN FREEDOM ALLIANCE

PROOF OF SERVICE

1
2 **STATE OF CALIFORNIA**)
3 **COUNTY OF LOS ANGELES**) **SS:**

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18
5 and not a party to the within action; my business address is: 11500 Olympic Blvd., Suite 400,
6 Los Angeles, California 90064. On May 27, 2010, I served the foregoing documents:

7 **OPPOSITION TO DEMURRER OF CALIFORNIA SCIENCE CENTER AND JEFFREY
8 RUDOLPH; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THE-
9 REOF; REQUEST FOR JUDICIAL NOTICE; EXHIBITS; [PROPOSED] ORDER**

10 The above-referenced document was served on:

11 **Allan S. Ono, Esq.**
12 **Deputy Attorney General**
13 **Natural Resources Law Section**
14 **OFFICE OF THE ATTORNEY GENERAL**
15 **300 S. Spring Street, 11th Floor**
16 **North Tower**
17 **Los Angeles, CA 90013**
18 **E-mail: allan.ono@doj.ca.gov**

**Attorneys for Defendants, California
Science Center and Jeffrey Rudolph in his
official capacity as president and CEO of
the California Science Center**

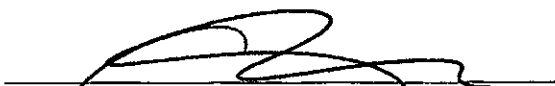
19 **Patrick W. Dennis, Esq.**
20 **James Zelaney, Esq.**
21 **GIBSON, DUNN & CRUTCHER**
22 **Los Angeles Office**
23 **333 South Grand Avenue**
24 **Los Angeles, CA 90071-3197**
25 **E-mails: PDennis@gibsondunn.com;**
26 **JZelenay@gibsondunn.com**

**Attorneys for Defendants, California
Science Center Foundation and Jeffrey
Rudolph in his official capacity as Presi-
dent of the California Science Center
Foundation**

27 **BY E-MAIL:** I caused such document to be e-mailed as pdf attachments pursuant to
28 agreement of counsel to the addressees shown above.

(State) I declare under penalty of perjury under the laws of the State of California that
the above is true and correct.

Executed on May 27, 2009, at Los Angeles, California.


William J. Becker, Jr.