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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  
FOUNDATION AND JEFFREY  
RUDOLPH; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF; REQUEST FOR  
JUDICIAL NOTICE; EXHIBITS;  
[PROPOSED] ORDER**

Complaint Filed: 10/14/09

Amended Complaint Filed: 11/19/09

Filed:

Trial Date: 2/14/2011

Date: 5/12/2010

Time: 8:45 a.m.

Dept.: 14

**BY FAX**

**FILED**  
LOS ANGELES SUPERIOR COURT

APR 28 2010

JOHN A. GLANKE, CLERK  
BY RAUL SANCHEZ, DEPUTY

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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. section 1983) (4) Fraud (Intentional Misrepresentation, Concealment and Deceit); (5) In-  
12 junctive Relief; and (6) Declaratory Relief. Defendants California Science Center Foundation  
13 ("FOUNDATION") and Jeffrey Rudolph ("RUDOLPH") in his official capacity<sup>1</sup> as President  
14 and CEO of the California Science Center Foundation ("collectively referred to herein as "De-  
15 fendants" or "FOUNDATION") have demurred to the Second, Third, Fourth and Fifth causes of  
16 action.

17 II. LEGAL STANDARD

18 The function of a demurrer is to test the sufficiency of a pleading by raising questions of  
19 law. *Code of Civil Procedure* §589(a); *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 90;  
20 *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994. A demurrer is directed to the  
21 face of the pleading to which objection is made (*Sanchez v Truck Ins. Exch.* (1994) 21  
22 Cal.App.4th 1778, 1787) and to matters subject to judicial notice (*Code of Civil Procedure*  
23 §430.30(a); *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6  
24 Cal.App.4th 157, 160). The only issue the Court may resolve on a demurrer to a complaint is  
25 whether the complaint, standing alone, states a cause of action. *Gervase v Superior Court* (1995)  
26 31 Cal.App.4th 1218, 1224. On a demurrer, the Court should rule only on matters disclosed in  
27 the challenged pleading. *Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881. The other  
28 parties' pleadings cannot dictate the outcome.

<sup>1</sup> The FAC appears to sue RUDOLPH in his individual capacity. All counsel agreed that RUDOLPH would be sued in his official capacity, and RUDOLPH has demurred to the FAC in his official capacities in connection with his 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 Cal.,*  
5 *Inc.* (2002) 101 Cal.App.4th 1395, 1404-1405. A demurrer is not the proper procedure for de-  
6 termining the truth of disputed facts, such as the correct interpretation of the parties' agreement  
7 or its enforceability (*Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97,  
8 114-115). The Court may not make factual findings on a demurrer, including "implicit" findings.  
9 *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 Defendants acted under color of state law when they violated Plaintiff's constitutional  
7 right of free speech. Under virtually all of the six tests the United States Supreme Court has  
8 formulated for finding state action (action under color of state law), the complaint is sufficiently  
9 pled to show a symbiotic relationship, a close nexus, joint participation and entwinement be-  
10 tween the state and the CENTER and the FOUNDATION.<sup>2</sup> Neither the FOUNDATION nor  
11 RUDOLPH, in his private official and individual capacities, is protected by Eleventh Amend-  
12 ment immunity.

13 2. *Defendants Were Engaged In State Action Under Color Of Law When  
14 They Terminated The Contract With Plaintiff, Thereby Cancelling The  
15 IMAX Event Involving Intelligent Design.*

16 An essential requirement of a 42 U.S.C. § 1983 claim is that the Defendant acted under  
17 color of state law. *Flagg Bros. v. Brooks* (1978) 436 U.S. 149, 155. To state a claim under §  
18 1983, a plaintiff must allege: (1) the defendant was acting under color of state law at the time the  
19 acts complained of were committed; and (2) the defendant deprived plaintiff of a right, privilege,  
20 or immunity secured by the Constitution or laws of the United States. *Briley v. State of Cal.* (9th  
21 Cir. 1977) 564 F.2d 849, 853. Conduct that is actionable under the Fourteenth Amendment as  
22 State action is also action under color of State law supporting a suit under § 1983. *Lugar v. Ed-*  
23 *mondson Oil Co.* (1982) 457 U.S. 922, 935. Although state action may be found in cases where  
24 "there is such a 'close nexus between the State and the challenged action' that seemingly private  
25 behavior 'may be fairly treated as that of the State itself'" (*Brentwood Acad. v. Tennessee Sec-*  
26 *ondary Sch. Athletic Ass'n.* (2001) 531 U.S. 288, 295 (quoting *Jackson v. Metropolitan Edison*  
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<sup>2</sup> Although the FAC alleges that Defendant RUDOLPH violated § 1983 in his individual capacity, the parties agreed 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 Co. (1974) 419 U.S. 345, 351)), generally referred to as the Close or Joint Nexus Test, the Su-  
2 preme Court has advanced the following additional tests for finding state action by a private par-  
3 ty: (1) Symbiotic Relationship (See, e.g., *Burton v. Wilmington Parking Authority* (1961) 365  
4 U.S. 715); (2) Public Function (See, e.g., *West v. Atkins* (1988) 487 U.S. 42); (3) Joint Participa-  
5 tion (see e.g., *Lugar v. Edmondson Oil Co.*, *supra*, 457 U.S. 922; *Dennis v. Sparks* (1980) 449  
6 U.S. 24, 27-28); and (4) Pervasive Entanglement (see, e.g. *Brentwood Acad. v. Tennessee Sec-  
ondary Sch. Athletic Ass'n.*, *supra*, 531 U.S. 288.

7 Defendants acknowledge that the CENTER and FOUNDATION form a public-private  
8 partnership. (Request for Judicial Notice (“RJN”), Exhibit “B,” Decl. Jeffrey N. Rudolph, ¶ 6,  
9 2:9-10, submitted in support of the Defendant California Science Center Foundation’s Opposi-  
10 tion to the Emergency Relief Request by American Freedom Alliance [“The California Science  
11 Center and the Foundation is one of the oldest and most successful public-private partnerships in  
12 the State of California.”]) In *People for the Ethical Treatment of Animals v. Guiliani* (S.D.N.Y.  
13 2000) 105 F.Supp.2d 294 (“PETA Decision”), a First Amendment case containing particularly  
14 apposite facts and analysis, the City of New York formed a public-private partnership with orga-  
15 nizers of a public art exhibit called the CowParade New York City 2000 (“CowParade”) in  
16 which approximately 500 life-size fiberglass sculptures of cows painted, decorated or otherwise  
17 altered artistically, were placed throughout the city. Individuals and businesses were solicited to  
18 become sponsors of CowParade by “adopting” a cow. Plaintiff, the animal advocacy organiza-  
19 tion People for the Ethical Treatment of Animals (“PETA”), submitted two cow designs, one of  
20 which was rejected by a committee set up to screen inappropriate designs submitted for the  
21 event. The cow design submitted by PETA that was rejected by the committee divided the cow  
22 into sections in a manner intended to resemble a butcher shop chart showing the cuts of meat de-  
23 rived from a cow. Within each section was a statement or quotation concerning the health and  
24 ethical problems associated with the killing of cows for food. In its suit for a preliminary injunc-  
25 tion, PETA alleged that defendants violated 42 U.S.C. § 1983 and PETA's free speech rights un-  
26 der the First and Fourteenth Amendments of the United States Constitution as well as the New  
27 York Constitution, claiming that CowParade breached its agreement with PETA by not allowing  
28 it to display both cows and that the breach should be remedied by specific performance and dam-  
ages.

1 The PETA Decision relied on *Burton v. Wilmington Parking Auth.* (1961) 365 U.S. 715,  
2 and applied the Symbiotic Test to determine whether the relationship between the city and the  
3 event partner in its public-private partnership was sufficient to attribute state action to the event's  
4 organizers. 105 F.Supp.2d at 304. Under the *Burton* test, where "[t]he State has so far insinuated  
5 itself into a position of interdependence with [a private entity] ... it must be recognized as a joint  
6 participant in the challenged activity, which, on that account, cannot be considered to have been  
7 ... purely private...." In the PETA case, the city and the event organizers conceded they formed a  
8 public-private partnership giving rise to a symbiotic relationship. The PETA Decision found the  
9 "contractual agreement between the City and the CowParade Organizers, coupled with the sig-  
10 nificant regulation and control over the event that was exercised by the City, created a sufficient  
11 link between the public and private entities, placing the CowParade activities under the umbrella  
12 of state action sufficient to satisfy the requirements of 42 U.S.C. § 1983." *Id.* Once the Symbiotic  
13 Test was satisfied, the court moved on to analyze whether PETA's First Amendment rights were  
14 violated.<sup>3</sup>

15 The gravamen of Defendants' argument is that Plaintiff has failed to sufficiently allege a  
16 close enough relationship between the CENTER and FOUNDATION to establish under any  
17 facts that FOUNDATION/RUDOLPH acted under color of state law. Defendants' argument falls  
18 under the weight of tortured reasoning and RUDOLPH'S own contradicting admissions: "The  
19 Science Center includes an IMAX theater, *which is leased by and operated by the Foundation.*"  
20 (RJN, Exhibit "B." ¶ 4, 1:26-27, emphasis added.) "The Foundation funds design and develop-  
21 ment of exhibitions and education programs at the California Science Center. *The Foundation*  
22 *also manages and arranges for the use of areas within the Science Center for private events.*"  
23 (RJN, Exhibit "B." ¶ 6, 10-13, emphasis added.) "The California Science Center and California  
24 Science Center Foundation *have a number of agreements that govern the relationship, including*  
25 *a lease relating to the IMAX Theater and a Joint Operation Agreement.*" (RJN, Exhibit "B." ¶ 6,  
26 18-21, emphasis added.) "*Because the Foundation and the California Science Center have spent*

27 <sup>3</sup> Defendants here have not challenged the sufficiency of the First Amendment allegations. Indeed, they have neither  
28 argued that the CENTER and/or its IMAX Theater are not public fora for purposes of establishing a requirement of  
viewpoint neutrality enforcement, nor that they are exempt from the requirement of providing public access to ex-  
pressive activity at the CENTER or the IMAX Theater here at issue. Accordingly, it must be conceded here that  
Plaintiff's First Amendment claims have been sufficiently alleged, and that the Court is not required to perform a  
First Amendment forum analysis.

1 considerable resources to build a reputation as a highly regarded and respected scientific insti-  
2 tution, we are very attentive to ensure that private groups do not appropriate the reputation of the  
3 California Science Center for their own benefit.” (RJN, Exhibit “B.” ¶ 8, 3-6, emphasis added.)

4 Plaintiff has alleged facts supporting a symbiotic relationship.<sup>4</sup> Yet Defendants have the  
5 temerity to suggest that Plaintiff has failed to allege that the CENTER knowingly accepted the  
6 benefits derived from unconstitutional behavior (Demurrer, 11:3-6). Defendants stretch mightily  
7 to claim first that RUDOLPH, wearing the hats of president of the CENTER and president/CEO  
8 of the FOUNDATION, did *not* act for the benefit of the CENTER in executing the decision to  
9 cancel the event as alleged in the complaint and as acknowledged by RUDOLPH himself (“I de-  
10 cided to cancel the event scheduled for October 25, 2009 and Chris Sion sent an email to the  
11 AFA with that direction.” (RJN, Exhibit “B.” ¶ 13, 4:14-15)), but then to claim the  
12 FOUNDATION did not act under color of law.

13 *Lebron v. National Railroad Passenger Corp* (1995) 513 U.S. 374 analogizes here. In  
14 *Lebron*, the Supreme Court held Amtrak could be deemed a federal entity for purposes of the  
15 First Amendment regardless of its statutory designation as a “private” corporation. Amtrak was  
16 held to be a government agency or instrumentality for the purpose of individual rights guaranteed  
17 against the Government by the Constitution. *Id.* at 400. Like Amtrak, the CENTER was created  
18 by a special statute, explicitly for the furtherance of governmental goals. California *Food &*  
19 *Agric. Code* § 4101 (“The Sixth District Agricultural Association shall be known as the Califor-  
20 nia Science Center. It is in the State and Consumer Services Agency and is deemed to be ... an  
21 instrumentality of this state ....”); see *Lebron*, 513 U.S. 374 at 397. In *Brentwood Academy, su-*  
22 *pra*, the Supreme Court held that a nominally private interscholastic athletic association com-  
23 prised primarily of public schools was a state actor for purposes of claims under § 1983 due to a

24 <sup>4</sup> Paragraphs 21-26 of the FAC allege the foundational facts, too lengthy to import here, and paragraph 47 alleges the  
25 legal conclusions: “Defendant FOUNDATIONS’s actions are attributable to the State of California in that the  
26 CENTER and the FOUNDATION engaged in a symbiotic relationship in providing public access to the CENTER  
27 for events. The State of California has so insinuated itself into a position of interdependence with the  
28 FOUNDATION that the CENTER and the FOUNDATION are joint participants in the cancellation of the EVENT,  
which, because the EVENT was to be open to the general public, the FOUNDATION’s actions in cancelling the  
EVENT were not private in nature. The contractual agreement between the CENTER and the FOUNDATION,  
coupled with the significant regulation and control over the EVENT that was exercised by the CENTER, created a  
sufficient link between the CENTER and the FOUNDATION, placing the FOUNDATION’s activities under the  
umbrella of state action sufficient to satisfy the requirements of 42 U.S.C. § 1983. Thus, Defendant  
FOUNDATION also acted under color of law when it cancelled the EVENT and breached its contract with Plaintiff,  
thereby discriminating against Plaintiff for the content of expressions concerning intelligent design to have been  
presented at its EVENT and viewpoints regarding intelligent design to have been expressed at the EVENT.”

1 “substantial entwinement” with state regulatory functions. 531 U.S. 288, 302-03. FOUNDA-  
2 TION cannot possibly expect, like Obi-Wan Kenobi, to wave its hand and pass through this  
3 Court’s sense of the obvious simply by proclaiming that *these are not the droids you are looking*  
4 *for*. In other words, notwithstanding the force of its seductive claim to the contrary, under *Bur-*  
5 *ton, Brentwood Academy, Lebron* and host of other cases, the FOUNDATION is a state actor  
6 subject to liability under § 1983 for violating Plaintiff’s rights.

6 3. Defendants Are Not Entitled To Invoke Eleventh Amendment Immunity  
7 Protection.

8 The Ninth Circuit recently made it clear that private entities and their officers enjoy no  
9 Eleventh Amendment immunity. In *Del Campo v. Kennedy* (2008) 517 F.3d 1070, a district at-  
10 torney’s office<sup>5</sup> contracted with a private entity to enforce collections on bad checks. The court  
11 held that “Under the law of this circuit, an entity invoking Eleventh Amendment immunity bears  
12 the burden of asserting and proving those matters necessary to establish its defense.” *Id.* at 1075.  
13 “[O]ur cases confirm that private entities have no place within the sovereign immunity legal  
14 framework.” *Id.* at 1076. “[W]e should be extremely hesitant to extend this fundamental and  
15 carefully limited immunity to private parties whose only relationship to the sovereign is by con-  
16 tract.” *Id.* “Although we hold that private entities cannot be arms of the state, we emphatically  
17 do not hold that they cannot act under color of state law for the purposes of 42 U.S.C. § 1983 and  
18 similar statutes.” *Id.* at 1081, fn. 16. “The usual issue in our cases has been whether a govern-  
19 mental entity is an arm of the state or is better characterized as part of another level of govern-  
20 ment. Our inquiry has been careful, and we have often declined to extend immunity even to go-  
21 vernmental entities.” *Id.* at 1076-1077.

22 The *Del Campo* court referred to a 7th Circuit decision, *Takle v. Univ. of Wisconsin*  
23 *Hosp. and Clinics Auth.* (7<sup>th</sup> Cir. 2005) 402 F.3d 768, concerning a privatized state hospital orig-  
24 inally created by statute. *Id.* at 1079. “The hospital still had many ties to the state, which owned  
25 its buildings and provided funds for its medical school, *among other things.* *Id.*, citing *Takle*, 402  
26 F.3d 768 at 770-71 (emphasis added). “*Even such public/private ‘hybrid entities’ ... [are] not*  
27 *entitled to sovereign immunity.*” *Id.* (Emphasis added.)

28 <sup>5</sup> “DAs serve both state and county functions: They act as state officials, and so possess Eleventh Amendment im-  
munity, when “acting in [their] prosecutorial capacity.” *Del Campo v. Kennedy*, 517 F.3d 1070 at 1073.

1 This language from *Del Campo* reflecting on the *Takle* case could not be more revealing  
2 in showing the court's disdain for the argument, similar to the one Defendants make here, that a  
3 private entity is entitled to sovereign immunity from constitutional liability though not a gov-  
4 ernment agency:

5 "Connections to the state *even as substantial as those* of the University of Wisconsin  
6 Hospital's did not require that privatization be treated as a farce in which the privatized  
7 entity enjoys the benefits both of not being the state and so being freed from the regula-  
8 tions that constrain state agencies, and of being the state and so being immune from suit  
9 in federal court."

10 *Id.* (Internal quote marks omitted; emphasis added.) As stated in *Del Campo*, the public-private  
11 partnership form does not allow Defendants to have it both ways.

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

13 1. *Plaintiff Has Sufficiently Alleged Facts Showing Reasonable Reliance*  
14 *Related To Defendants Deceit And Concealment.*

15 "The loss of First Amendment freedoms, for even minimal periods of time, unquestiona-  
16 bly constitutes irreparable injury." *Elrod v. Burns* (1976) 427 U.S. 347, 373. The issue presented  
17 under Plaintiff's Fourth Cause of Action for Fraud is whether the loss of AFA's First Amend-  
18 ment freedom by entities and individuals acting under color of law is attributable to Defendants'  
19 scheme to deceive Plaintiff into believing that it had committed a contractual breach when it had  
20 not (and thus conceal its civil rights violation) and to conceal their true reason for cancelling the  
21 event. Plaintiff was deceived when it was told that it had breached the contract by failing to ob-  
22 tain Defendants' approval prior to issuing a press release that appeared on a third party's web  
23 site. In essence, Defendants rescinded the contract on the basis of facts they knew to be false.

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

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

8 In interpreting statutory language, courts first look to the plain meaning of the statutory  
9 language, then to its legislative history and finally to the reasonableness of a proposed construc-  
10 tion. *MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal.App.4th  
11 1076, 1082. In the first step of the interpretive process, courts look to the words of the statute  
12 themselves. *Id.* Courts give the words of the statute “a plain and commonsense meaning” unless  
13 the statute specifically defines the words to give them a special meaning. *Id.* “If the statutory  
14 language is clear and unambiguous, *our task is at an end*, for there is no need for judicial con-  
15 struction.” *Id.* at 1083. “In such a case, there is nothing for the court to interpret or construe.” *Id.*  
16 Here, Defendants willfully deceived Plaintiff with the intent of inducing it to *alter its position to*  
17 *its injury* (loss of First Amendment freedom to present its message concerning Intelligent Design  
18 in a public forum) *and risk* (loss of money it expected to generate through donations from major  
19 donors at the fundraising event and requirement that it locate on short notice an alternative venue  
20 suitable to show the 3-D IMAX film). *Civil Code* § 1709.

21 One definition of deceit is “[t]he suggestion, as a fact, of that which is not true, by one  
22 who does not believe it to be true.” *Civil Code* § 1710(1). Here, the Complaint alleges that De-  
23 fendants represented as fact that Plaintiff had breached the contract, knowing that to be false,  
24 when the truth was that Defendants did not wish to be associated with an Intelligent Design event  
25 once informed of the nature of the event and Defendants had been admonished by Smithsonian  
26 officials for entering into the agreement. (*See, e.g., FAC*, ¶¶ 32-39.) Another definition of deceit  
27 is “[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for  
28 believing it to be true.” *Civil Code* § 1710(2). The Complaint alleges that Defendants cancelled  
the event based on a provision of the contract requiring Plaintiff to obtain prior approval of pub-  
licity while objecting to the content of publicity Plaintiff did not prepare or publish. Defendants  
had no reasonable ground for believing that their assertion was true. (*See, e.g., FAC*, ¶¶ 18-23,

1 32-39.) A third definition of deceit is “[the] suppression of a fact, by one who ... gives informa-  
2 tion of other facts which are likely to mislead for want of communication of that fact.” *Civil*  
3 *Code* § 1710(3). The Complaint alleges that Defendants suppressed the fact that it had received  
4 complaints from numerous parties, including the Smithsonian, about the event’s them, which  
5 they were acting on. (e.g., FAC, ¶¶ 24-26).

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

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

22 Plaintiff is unable to mitigate the loss of its First Amendment right of free speech consti-  
23 tuting irreparable injury. Plaintiff suffered an immediate loss of this right and irreparable injury  
24 as a direct result of Defendants’ deception and the concealment of their ulterior basis for backing  
25 out of the contract. As alleged in the Complaint, Defendants sought to cancel the contract only  
26 after it had been contacted by the Smithsonian Institution about concerns that the event was be-  
27 ing promoted as one sponsored by Defendants, thus associating the subject of Intelligent Design  
28 with the Smithsonian, which had previously sought to distance itself from a similar event. (FAC,  
29 ¶¶ 21, 51, 54-59). Once it learned of the Smithsonian’s objection to an Intelligent Design film  
30 being shown at its affiliate science center, Defendant refused to perform under the contract.

1 D. Plaintiff's Fifth Cause Of Action For Injunctive Relief States Sufficient  
2 Facts.

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

11 "The loss of First Amendment freedoms, for even minimal periods of time, unquestiona-  
12 bly constitutes irreparable injury." *Elrod v. Burns, supra*, 427 U.S. 347 at 373. In this case,  
13 Plaintiff has alleged a violation of its First Amendment rights due to efforts by Defendants to  
14 censor its program relating to Intelligent Design. Plaintiff can allege, but is not required to, addi-  
15 tional facts to support its claim. For example, e-mails exchanged between Defendants' em-  
16 ployees suggest that they believed Plaintiff's event should be cancelled due to the perception that  
17 it was a "creationist" event: "A science center should not even be asked to partner with any  
18 group associated with debating Darwinism - it's not our place." (Exhibit "A," Request for Judi-  
19 cial Notice, attached as Exhibit "A" to Plaintiff's Motion for Leave to Amend Complaint, Bates  
20 Nos. CSCF0000229-231.) In *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 61, 66-67, the  
21 United States Supreme Court concluded that letters from a state commission on morality advis-  
22 ing book distributors that the commission's members considered certain books objectionable for  
23 sale to youths constituted "informal censorship" in violation the First Amendment even though  
24 the books were not banned and the commission lacked authority to apply legal sanctions. The  
25 court concluded that the practice amounted to a "system of prior administrative restraints, since  
26 the Commission is not a judicial body and its decisions to list particular publications as objec-  
27 tionable do not follow judicial determinations that such publications may lawfully be banned."  
28 *Bantam* at 70, quoted in *Smith v. Novato Unified School District* (2007) 150 Cal.App.4th 1439,  
1463. Here, Plaintiff believes it has sufficiently alleged entitlement to relief under § 1983 for  
violation of its First Amendment rights. Nevertheless, if the Court should disagree, then Plaintiff

1 should be granted leave to amend to incorporate additional facts that have become known to it  
2 through discovery.

3 While it is true that injunctive relief is, by its very terms, a form of relief sought, as is  
4 declaratory relief, to which Defendants inconsistently have not demurred, it is common in a case  
5 alleging violation of the First Amendment to assert it as a cause of action in order to focus the  
6 Court's attention on the prospective relief being sought. Where the form of a pleading does not  
7 prejudice the opposing party, courts will view it as harmless "form over substance." See, e.g.,  
8 *See, e.g., Weiss v. Chevron, U.S.A., Inc.* (2d Dist.1988) 204 Cal.App.3d 1094, 251 (trial court  
9 could consider evidence not initially included in defendant's motion for summary judgment, but  
10 submitted together with its reply to plaintiff's opposition); *Motor City Sales v. Superior Court*  
11 (1973) 31 Cal.App.3d 342, 346 (relating to fictitious party pleading). It is only necessary that  
12 Plaintiff assert a cause of action that gives rise to injunctive relief and to pray for such relief, yet  
13 as a matter of form, no harm and no prejudice to the moving party results from separating it into  
14 a section labeled "Cause of Action." Holding Plaintiff to a requirement that equitable relief  
15 sought may not be expressed in the form of a cause of action would "exact form over substance."  
16 *Id.*

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

#### 21 IV. CONCLUSION

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

24 DATED: April \_\_\_\_\_, 2010

25 THE BECKER LAW FIRM

26 By:

27 See Last Page for Signature  
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Attorneys for Plaintiff,  
AMERICAN FREEDOM ALLIANCE

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. section 1983) (4) Fraud (Intentional Misrepresentation, Concealment and Deceit); (5) In-  
12 junctive Relief; and (6) Declaratory Relief. Defendants California Science Center Foundation  
13 ("FOUNDATION") and Jeffrey Rudolph ("RUDOLPH") in his official capacity<sup>1</sup> as President  
14 and CEO of the California Science Center Foundation ("collectively referred to herein as "De-  
15 fendants" or "FOUNDATION") have demurred to the Second, Third, Fourth and Fifth causes of  
16 action.

15 II. LEGAL STANDARD

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

26 <sup>1</sup> 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 Cal.,*  
5 *Inc.* (2002) 101 Cal.App.4th 1395, 1404-1405. A demurrer is not the proper procedure for de-  
6 termining the truth of disputed facts, such as the correct interpretation of the parties' agreement  
7 or its enforceability (*Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97,  
8 114-115). The Court may not make factual findings on a demurrer, including "implicit" findings.  
9 *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 839.

### 10 III. ARGUMENT

#### 11 A. Plaintiff's Second Cause Of Action For Breach Of Implied Covenant Of 12 Good Faith And Fair Dealing States Sufficient Facts.

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

24 In 2009, the Court of Appeal in *Spinks v. Equity Residential Briarwood Apartments*  
25 (2009) 171 Cal.App.4th 1004, 1033, stated the "prerequisite for any action for breach of the im-  
26 plied covenant of good faith and fair dealing is the existence of a contractual relationship be-  
27 tween the parties, since the covenant is an implied term in the contract." *Id.* at 1032; internal  
28 quotation and citation omitted. "The implied covenant of good faith and fair dealing is limited to  
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 Defendants acted under color of state law when they violated Plaintiff's constitutional  
7 right of free speech. Under virtually all of the six tests the United States Supreme Court has  
8 formulated for finding state action (action under color of state law), the complaint is sufficiently  
9 pled to show a symbiotic relationship, a close nexus, joint participation and entwinement be-  
10 tween the state and the CENTER and the FOUNDATION.<sup>2</sup> Neither the FOUNDATION nor  
11 RUDOLPH, in his private official and individual capacities, is protected by Eleventh Amend-  
12 ment immunity.

13 2. *Defendants Were Engaged In State Action Under Color Of Law When*  
14 *They Terminated The Contract With Plaintiff, Thereby Cancelling The*  
15 *IMAX Event Involving Intelligent Design.*

16 An essential requirement of a 42 U.S.C. § 1983 claim is that the Defendant acted under  
17 color of state law. *Flagg Bros. v. Brooks* (1978) 436 U.S. 149, 155. To state a claim under §  
18 1983, a plaintiff must allege: (1) the defendant was acting under color of state law at the time the  
19 acts complained of were committed; and (2) the defendant deprived plaintiff of a right, privilege,  
20 or immunity secured by the Constitution or laws of the United States. *Briley v. State of Cal.* (9th  
21 Cir. 1977) 564 F.2d 849, 853. Conduct that is actionable under the Fourteenth Amendment as  
22 State action is also action under color of State law supporting a suit under § 1983. *Lugar v. Ed-*  
23 *mondson Oil Co.* (1982) 457 U.S. 922, 935. Although state action may be found in cases where  
24 "there is such a 'close nexus between the State and the challenged action' that seemingly private  
25 behavior 'may be fairly treated as that of the State itself'" (*Brentwood Acad. v. Tennessee Sec-*  
26 *ondary Sch. Athletic Ass'n.* (2001) 531 U.S. 288, 295 (quoting *Jackson v. Metropolitan Edison*

27 <sup>2</sup> 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 Co. (1974) 419 U.S. 345, 351)), generally referred to as the Close or Joint Nexus Test, the Su-  
2 preme Court has advanced the following additional tests for finding state action by a private par-  
3 ty: (1) Symbiotic Relationship (See, e.g., *Burton v. Wilmington Parking Authority* (1961) 365  
4 U.S. 715); (2) Public Function (See, e.g., *West v. Atkins* (1988) 487 U.S. 42); (3) Joint Participa-  
5 tion (see e.g., *Lugar v. Edmondson Oil Co., supra*, 457 U.S. 922; *Dennis v. Sparks* (1980) 449  
6 U.S. 24, 27-28); and (4) Pervasive Entanglement (see, e.g. *Brentwood Acad. v. Tennessee Sec-  
ondary Sch. Athletic Ass'n., supra*, 531 U.S. 288.

7 Defendants acknowledge that the CENTER and FOUNDATION form a public-private  
8 partnership. (Request for Judicial Notice ("RJN"), Exhibit "B," Decl. Jeffrey N. Rudolph, ¶ 6,  
9 2:9-10, submitted in support of the Defendant California Science Center Foundation's Opposi-  
10 tion to the Emergency Relief Request by American Freedom Alliance ["The California Science  
11 Center and the Foundation is one of the oldest and most successful public-private partnerships in  
12 the State of California."]) In *People for the Ethical Treatment of Animals v. Guiliani* (S.D.N.Y.  
13 2000) 105 F.Supp.2d 294 ("PETA Decision"), a First Amendment case containing particularly  
14 apposite facts and analysis, the City of New York formed a public-private partnership with orga-  
15 nizers of a public art exhibit called the CowParade New York City 2000 ("CowParade") in  
16 which approximately 500 life-size fiberglass sculptures of cows painted, decorated or otherwise  
17 altered artistically, were placed throughout the city. Individuals and businesses were solicited to  
18 become sponsors of CowParade by "adopting" a cow. Plaintiff, the animal advocacy organi-  
19 zation People for the Ethical Treatment of Animals ("PETA"), submitted two cow designs, one of  
20 which was rejected by a committee set up to screen inappropriate designs submitted for the  
21 event. The cow design submitted by PETA that was rejected by the committee divided the cow  
22 into sections in a manner intended to resemble a butcher shop chart showing the cuts of meat de-  
23 rived from a cow. Within each section was a statement or quotation concerning the health and  
24 ethical problems associated with the killing of cows for food. In its suit for a preliminary injunc-  
25 tion, PETA alleged that defendants violated 42 U.S.C. § 1983 and PETA's free speech rights un-  
26 der the First and Fourteenth Amendments of the United States Constitution as well as the New  
27 York Constitution, claiming that CowParade breached its agreement with PETA by not allowing  
28 it to display both cows and that the breach should be remedied by specific performance and dam-  
ages.

1 The PETA Decision relied on *Burton v. Wilmington Parking Auth.* (1961) 365 U.S. 715,  
2 and applied the Symbiotic Test to determine whether the relationship between the city and the  
3 event partner in its public-private partnership was sufficient to attribute state action to the event's  
4 organizers. 105 F.Supp.2d at 304. Under the *Burton* test, where "[t]he State has so far insinuated  
5 itself into a position of interdependence with [a private entity] ... it must be recognized as a joint  
6 participant in the challenged activity, which, on that account, cannot be considered to have been  
7 ... purely private...." In the PETA case, the city and the event organizers conceded they formed a  
8 public-private partnership giving rise to a symbiotic relationship. The PETA Decision found the  
9 "contractual agreement between the City and the CowParade Organizers, coupled with the sig-  
10 nificant regulation and control over the event that was exercised by the City, created a sufficient  
11 link between the public and private entities, placing the CowParade activities under the umbrella  
12 of state action sufficient to satisfy the requirements of 42 U.S.C. § 1983." *Id.* Once the Symbiotic  
13 Test was satisfied, the court moved on to analyze whether PETA's First Amendment rights were  
14 violated.<sup>3</sup>

15 The gravamen of Defendants' argument is that Plaintiff has failed to sufficiently allege a  
16 close enough relationship between the CENTER and FOUNDATION to establish under any  
17 facts that FOUNDATION/RUDOLPH acted under color of state law. Defendants' argument falls  
18 under the weight of tortured reasoning and RUDOLPH'S own contradicting admissions: "The  
19 Science Center includes an IMAX theater, *which is leased by and operated by the Foundation.*"  
20 (RJN, Exhibit "B." ¶ 4, 1:26-27, emphasis added.) "The Foundation funds design and develop-  
21 ment of exhibitions and education programs at the California Science Center. *The Foundation*  
22 *also manages and arranges for the use of areas within the Science Center for private events.*"  
23 (RJN, Exhibit "B." ¶ 6, 10-13, emphasis added.) "The California Science Center and California  
24 Science Center Foundation *have a number of agreements that govern the relationship, including*  
25 *a lease relating to the IMAX Theater and a Joint Operation Agreement.*" (RJN, Exhibit "B." ¶ 6,  
26 18-21, emphasis added.) "*Because the Foundation and the California Science Center have spent*

27 <sup>3</sup> Defendants here have not challenged the sufficiency of the First Amendment allegations. Indeed, they have neither  
28 argued that the CENTER and/or its IMAX Theater are not public fora for purposes of establishing a requirement of  
viewpoint neutrality enforcement, nor that they are exempt from the requirement of providing public access to ex-  
pressive activity at the CENTER or the IMAX Theater here at issue. Accordingly, it must be conceded here that  
Plaintiff's First Amendment claims have been sufficiently alleged, and that the Court is not required to perform a  
First Amendment forum analysis.

1 considerable resources to build a reputation as a highly regarded and respected scientific insti-  
2 tution, we are very attentive to ensure that private groups do not appropriate the reputation of the  
3 California Science Center for their own benefit.” (RJN, Exhibit “B.” ¶ 8, 3-6, emphasis added.)

4 Plaintiff has alleged facts supporting a symbiotic relationship.<sup>4</sup> Yet Defendants have the  
5 temerity to suggest that Plaintiff has failed to allege that the CENTER knowingly accepted the  
6 benefits derived from unconstitutional behavior (Demurrer, 11:3-6). Defendants stretch mightily  
7 to claim first that RUDOLPH, wearing the hats of president of the CENTER and president/CEO  
8 of the FOUNDATION, did *not* act for the benefit of the CENTER in executing the decision to  
9 cancel the event as alleged in the complaint and as acknowledged by RUDOLPH himself (“I de-  
10 cided to cancel the event scheduled for October 25, 2009 and Chris Sion sent an email to the  
11 AFA with that direction.” (RJN, Exhibit “B.” ¶ 13, 4:14-15)), but then to claim the  
12 FOUNDATION did not act under color of law.

13 *Lebron v. National Railroad Passenger Corp* (1995) 513 U.S. 374 analogizes here. In  
14 *Lebron*, the Supreme Court held Amtrak could be deemed a federal entity for purposes of the  
15 First Amendment regardless of its statutory designation as a “private” corporation. Amtrak was  
16 held to be a government agency or instrumentality for the purpose of individual rights guaranteed  
17 against the Government by the Constitution. *Id.* at 400. Like Amtrak, the CENTER was created  
18 by a special statute, explicitly for the furtherance of governmental goals. California *Food &*  
19 *Agric. Code* § 4101 (“The Sixth District Agricultural Association shall be known as the Califor-  
20 nia Science Center. It is in the State and Consumer Services Agency and is deemed to be ... an  
21 instrumentality of this state ...”); see *Lebron*, 513 U.S. 374 at 397. In *Brentwood Academy, su-*  
22 *pra*, the Supreme Court held that a nominally private interscholastic athletic association com-  
23 prised primarily of public schools was a state actor for purposes of claims under § 1983 due to a

24 <sup>4</sup> Paragraphs 21-26 of the FAC allege the foundational facts, too lengthy to import here, and paragraph 47 alleges the  
25 legal conclusions: “Defendant FOUNDATIONS’s actions are attributable to the State of California in that the  
26 CENTER and the FOUNDATION engaged in a symbiotic relationship in providing public access to the CENTER  
27 for events. The State of California has so insinuated itself into a position of interdependence with the  
28 FOUNDATION that the CENTER and the FOUNDATION are joint participants in the cancellation of the EVENT,  
which, because the EVENT was to be open to the general public, the FOUNDATION’s actions in cancelling the  
EVENT were not private in nature. The contractual agreement between the CENTER and the FOUNDATION,  
coupled with the significant regulation and control over the EVENT that was exercised by the CENTER, created a  
sufficient link between the CENTER and the FOUNDATION, placing the FOUNDATION’s activities under the  
umbrella of state action sufficient to satisfy the requirements of 42 U.S.C. § 1983. Thus, Defendant  
FOUNDATION also acted under color of law when it cancelled the EVENT and breached its contract with Plaintiff,  
thereby discriminating against Plaintiff for the content of expressions concerning intelligent design to have been  
presented at its EVENT and viewpoints regarding intelligent design to have been expressed at the EVENT.”

1 “substantial entwinement” with state regulatory functions. 531 U.S. 288, 302-03. FOUNDA-  
2 TION cannot possibly expect, like Obi-Wan Kenobi, to wave its hand and pass through this  
3 Court’s sense of the obvious simply by proclaiming that *these are not the droids you are looking*  
4 *for*. In other words, notwithstanding the force of its seductive claim to the contrary, under *Bur-*  
5 *ton, Brentwood Academy, Lebron* and host of other cases, the FOUNDATION is a state actor  
6 subject to liability under § 1983 for violating Plaintiff’s rights.

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3. Defendants Are Not Entitled To Invoke Eleventh Amendment Immunity Protection

The Ninth Circuit recently made it clear that private entities and their officers enjoy no Eleventh Amendment immunity. In *Del Campo v. Kennedy* (2008) 517 F.3d 1070, a district attorney’s office<sup>5</sup> contracted with a private entity to enforce collections on bad checks. The court held that “Under the law of this circuit, an entity invoking Eleventh Amendment immunity bears the burden of asserting and proving those matters necessary to establish its defense.” *Id.* at 1075. “[O]ur cases confirm that private entities have no place within the sovereign immunity legal framework.” *Id.* at 1076. “[W]e should be extremely hesitant to extend this fundamental and carefully limited immunity to private parties whose only relationship to the sovereign is by contract.” *Id.* “Although we hold that private entities cannot be arms of the state, we emphatically do not hold that they cannot act under color of state law for the purposes of 42 U.S.C. § 1983 and similar statutes.” *Id.* at 1081, fn. 16. “The usual issue in our cases has been whether a governmental entity is an arm of the state or is better characterized as part of another level of government. Our inquiry has been careful, and we have often declined to extend immunity even to governmental entities.” *Id.* at 1076-1077.

The *Del Campo* court referred to a 7th Circuit decision, *Takle v. Univ. of Wisconsin Hosp. and Clinics Auth.* (7<sup>th</sup> Cir. 2005) 402 F.3d 768, concerning a privatized state hospital originally created by statute. *Id.* at 1079. “The hospital still had many ties to the state, which owned its buildings and provided funds for its medical school, *among other things*. *Id.*, citing *Takle*, 402 F.3d 768 at 770-71 (emphasis added). “*Even such public/private ‘hybrid entities’ ... [are] not entitled to sovereign immunity.*” *Id.* (Emphasis added.)

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<sup>5</sup> “DAs serve both state and county functions: They act as state officials, and so possess Eleventh Amendment immunity, when “acting in [their] prosecutorial capacity.” *Del Campo v. Kennedy*, 517 F.3d 1070 at 1073.

1 This language from *Del Campo* reflecting on the *Takle* case could not be more revealing  
2 in showing the court's distain for the argument, similar to the one Defendants make here, that a  
3 private entity is entitled to sovereign immunity from constitutional liability though not a gov-  
4 ernment agency:

5 "Connections to the state *even as substantial as those* of the University of Wisconsin  
6 Hospital's did not require that privatization be treated as a farce in which the privatized  
7 entity enjoys the benefits both of not being the state and so being freed from the regula-  
8 tions that constrain state agencies, and of being the state and so being immune from suit  
9 in federal court."

10 *Id.* (Internal quote marks omitted; emphasis added.) As stated in *Del Campo*, the public-private  
11 partnership form does not allow Defendants to have it both ways.

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

13 1. *Plaintiff Has Sufficiently Alleged Facts Showing Reasonable Reliance*  
14 *Related To Defendants Deceit And Concealment.*

15 "The loss of First Amendment freedoms, for even minimal periods of time, unquestiona-  
16 bly constitutes irreparable injury." *Elrod v. Burns* (1976) 427 U.S. 347, 373. The issue presented  
17 under Plaintiff's Fourth Cause of Action for Fraud is whether the loss of AFA's First Amend-  
18 ment freedom by entities and individuals acting under color of law is attributable to Defendants'  
19 scheme to deceive Plaintiff into believing that it had committed a contractual breach when it had  
20 not (and thus conceal its civil rights violation) and to conceal their true reason for cancelling the  
21 event. Plaintiff was deceived when it was told that it had breached the contract by failing to ob-  
22 tain Defendants' approval prior to issuing a press release that appeared on a third party's web  
23 site. In essence, Defendants rescinded the contract on the basis of facts they knew to be false.

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

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

8 In interpreting statutory language, courts first look to the plain meaning of the statutory  
9 language, then to its legislative history and finally to the reasonableness of a proposed construc-  
10 tion. *MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal.App.4th  
11 1076, 1082. In the first step of the interpretive process, courts look to the words of the statute  
12 themselves. *Id.* Courts give the words of the statute “a plain and commonsense meaning” unless  
13 the statute specifically defines the words to give them a special meaning. *Id.* “If the statutory  
14 language is clear and unambiguous, *our task is at an end*, for there is no need for judicial con-  
15 struction.” *Id.* at 1083. “In such a case, there is nothing for the court to interpret or construe.” *Id.*  
16 Here, Defendants willfully deceived Plaintiff with the intent of inducing it to *alter its position to*  
17 *its injury* (loss of First Amendment freedom to present its message concerning Intelligent Design  
18 in a public forum) *and risk* (loss of money it expected to generate through donations from major  
19 donors at the fundraising event and requirement that it locate on short notice an alternative venue  
20 suitable to show the 3-D IMAX film). *Civil Code* § 1709.

21 One definition of deceit is “[t]he suggestion, as a fact, of that which is not true, by one  
22 who does not believe it to be true.” *Civil Code* § 1710(1). Here, the Complaint alleges that De-  
23 fendants represented as fact that Plaintiff had breached the contract, knowing that to be false,  
24 when the truth was that Defendants did not wish to be associated with an Intelligent Design event  
25 once informed of the nature of the event and Defendants had been admonished by Smithsonian  
26 officials for entering into the agreement. (*See, e.g., FAC*, ¶¶ 32-39.) Another definition of deceit  
27 is “[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for  
28 believing it to be true.” *Civil Code* § 1710(2). The Complaint alleges that Defendants cancelled  
the event based on a provision of the contract requiring Plaintiff to obtain prior approval of pub-  
licity while objecting to the content of publicity Plaintiff did not prepare or publish. Defendants  
had no reasonable ground for believing that their assertion was true. (*See, e.g., FAC*, ¶¶ 18-23,

1 32-39.) A third definition of deceit is “[the] suppression of a fact, by one who ... gives informa-  
2 tion of other facts which are likely to mislead for want of communication of that fact.” *Civil*  
3 *Code* § 1710(3). The Complaint alleges that Defendants suppressed the fact that it had received  
4 complaints from numerous parties, including the Smithsonian, about the event’s them, which  
5 they were acting on. (e.g., FAC, ¶¶ 24-26).

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

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

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

1 D. Plaintiff's Fifth Cause Of Action For Injunctive Relief States Sufficient  
2 Facts.

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

11 "The loss of First Amendment freedoms, for even minimal periods of time, unquestiona-  
12 bly constitutes irreparable injury." *Elrod v. Burns, supra*, 427 U.S. 347 at 373. In this case,  
13 Plaintiff has alleged a violation of its First Amendment rights due to efforts by Defendants to  
14 censor its program relating to Intelligent Design. Plaintiff can allege, but is not required to, addi-  
15 tional facts to support its claim. For example, e-mails exchanged between Defendants' em-  
16 ployees suggest that they believed Plaintiff's event should be cancelled due to the perception that  
17 it was a "creationist" event. "A science center should not even be asked to partner with any  
18 group associated with debating Darwinism - it's not our place." (Exhibit "A," Request for Judi-  
19 cial Notice, attached as Exhibit "A" to Plaintiff's Motion for Leave to Amend Complaint, Bates  
20 Nos. CSCF0000229-231.) In *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 61, 66-67, the  
21 United States Supreme Court concluded that letters from a state commission on morality advis-  
22 ing book distributors that the commission's members considered certain books objectionable for  
23 sale to youths constituted "informal censorship" in violation the First Amendment even though  
24 the books were not banned and the commission lacked authority to apply legal sanctions. The  
25 court concluded that the practice amounted to a "system of prior administrative restraints, since  
26 the Commission is not a judicial body and its decisions to list particular publications as objec-  
27 tionable do not follow judicial determinations that such publications may lawfully be banned."  
28 *Bantam* at 70, quoted in *Smith v. Novato Unified School District* (2007) 150 Cal.App.4th 1439,  
1463. Here, Plaintiff believes it has sufficiently alleged entitlement to relief under § 1983 for  
violation of its First Amendment rights. Nevertheless, if the Court should disagree, then Plaintiff

1 should be granted leave to amend to incorporate additional facts that have become known to it  
2 through discovery.

3 While it is true that injunctive relief is, by its very terms, a form of relief sought, as is  
4 declaratory relief, to which Defendants inconsistently have not demurred, it is common in a case  
5 alleging violation of the First Amendment to assert it as a cause of action in order to focus the  
6 Court's attention on the prospective relief being sought. Where the form of a pleading does not  
7 prejudice the opposing party, courts will view it as harmless "form over substance." See, e.g.,  
8 *See, e.g., Weiss v. Chevron, U.S.A., Inc.* (2d Dist.1988) 204 Cal.App.3d 1094, 251 (trial court  
9 could consider evidence not initially included in defendant's motion for summary judgment, but  
10 submitted together with its reply to plaintiff's opposition); *Motor City Sales v. Superior Court*  
11 (1973) 31 Cal.App.3d 342, 346 (relating to fictitious party pleading). It is only necessary that  
12 Plaintiff assert a cause of action that gives rise to injunctive relief and to pray for such relief, yet  
13 as a matter of form, no harm and no prejudice to the moving party results from separating it into  
14 a section labeled "Cause of Action." Holding Plaintiff to a requirement that equitable relief  
15 sought may not be expressed in the form of a cause of action would "exact form over substance."  
16 *Id.*

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

#### 21 IV. CONCLUSION

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

24 DATED: April 27, 2010

25 THE BECKER LAW FIRM

26 By:

27   
28 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 FOUNDATION**  
8 **AND JEFFREY RUDOLPH; MEMORANDUM OF POINTS AND AUTHORITIES IN**  
9 **SUPPORT THEREOF; REQUEST FOR JUDICIAL NOTICE; EXHIBITS; [PROPOSED]**  
10 **ORDER**

11 The above-referenced document was served on:

12 Allan S. Ono, Esq.  
13 Deputy Attorney General  
14 Natural Resources Law Section  
15 OFFICE OF THE ATTORNEY GENERAL  
16 300 S. Spring Street, 11th Floor  
17 North Tower  
18 Los Angeles, CA 90013  
19 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

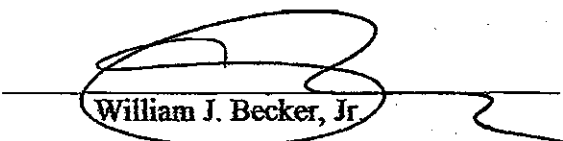
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Science Center Foundation and Jeffrey  
Rudolph in his official capacity as Presi-  
dent of the California Science Center  
Foundation

28  **BY E-MAIL:** I caused such document to be e-mailed as pdf attachments pursuant to  
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