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**FILED**  
LOS ANGELES SUPERIOR COURT

FEB 14 2011

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BY RACEL SANCHEZ, DEPUTY

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; **CALIFOR-**  
20 **NIA SCIENCE CENTER FOUNDATION**,  
21 a nonprofit corporation; **JEFFREY RU-**  
22 **DOLPH**, an Individual, and **DOES 1** through  
23 **50**, inclusive;

24 Defendants.

Case No. BC423687

**BY FAX**

*Hon. Terry A. Green, Department. 14*

**REQUEST FOR JUDICIAL NOTICE**  
**[REPLY RE: DEMURRER TO CROSS-**  
**COMPLAINT]**

[Reply Brief Filed Concurrently Herewith]

Complaint Filed: 10/14/2009  
TAC Filed: 10/8/2010  
Cross-Complaint Filed: 11/8/2010

Hearing Date: 2/23/2011  
Hearing Time: 8:45 a.m.  
Hearing Dept.: 14

Trial: 6/13/2011

25 Pursuant to Section 430.30 of the California Code of Civil Procedure, sections 452 and  
26 453 of the California Evidence Code and California Rules of Court, rules 3.1113(l) and  
27 3.1306(c), Plaintiff American Freedom Alliance requests that the Court take judicial notice of the

1 following document, which is attached as an exhibit hereto, in ruling on Plaintiff's Demurrer to  
2 Defendant California Science Center Foundation's Amended Complaint.

3 No.

Exhibit

4 1 Pl.Opp.to Demurrer filed July 6, 2010, p.7, lns. 8-11

5 **I. THE COURT MAY TAKE JUDICIAL NOTICE OF COURT RECORDS IN THIS**  
6 **CASE.**

7 When ruling on a demurrer, the trial court must consider not only the complaint itself, but  
8 also, "any matter of which the court is required to or may take judicial notice[.]" (Cal. Code. Civ.  
9 Proc. § 430.30(a).) Further, "a pleading valid on its face may nevertheless be subject to demurrer  
10 when matters judicially noticed by the court render the complaint meritless." (Del E. Webb Corp.  
11 v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604.) Section 452 of the Evidence Code  
12 provides that it is appropriate for a court to take judicial notice of "[r]ecords of ... any court in  
13 this state" as well as "[f]acts and propositions that are not reasonably subject to dispute and are  
14 capable of immediate and accurate determination by resort to sources of reasonably indisputable  
15 accuracy." (Cal. Evid. Code§ 452(d) & (h).) Judicial notice is mandated for matters that comport  
16 with the requirements of Evid. Code§§ 452 and 453, provided that the requesting party: (1) gives  
17 adequate notice to the adverse party; and (2) includes sufficient information to enable the Court  
18 to take judicial notice. (See Cal. Evid. Code §§ 452, 453.)

19 Plaintiff's Opposition to the Demurrer of the Defendant California Science Center Foun-  
20 dation, filed on July 6, 2010, is contained within the Court's record on file in this lawsuit and is  
21 in every respect subject to judicial notice.

22 **II. CONCLUSION**

23 For the above reasons, the Court is respectfully requested to take judicial notice of the  
24 document identified.

25 DATED: February 12, 2011

**THE BECKER LAW FIRM**

26 By:

/s/

27 WILLIAM J. BECKER, JR., ESQ.

Attorneys for Plaintiff,

28 AMERICAN FREEDOM ALLIANCE

# EXHIBIT 1

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8 **AMERICAN FREEDOM ALLIANCE and ADRIAN (AVI) DAVIS**

9 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
10 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

11 **AMERICAN FREEDOM ALLIANCE**, a  
12 nonprofit corporation;

13 Plaintiff,

14 vs.

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

21 Defendants.

Case No. BC423687

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

**OPPOSITION TO DEMURRER TO  
SECOND AMENDED COMPLAINT OF  
CALIFORNIA SCIENCE CENTER  
FOUNDATION AND JEFFREY  
RUDOLPH; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF; REQUEST FOR  
JUDICIAL NOTICE; EXHIBIT**

Complaint Filed: 10/14/09  
Amended Complaint 11/19/09  
Filed:

Trial Date: 2/14/2011

Date: 7/19/2010  
Time: 8:45 a.m.  
Dept.: 14

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1 TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD HEREIN:  
2 COME NOW Plaintiffs AMERICAN FREEDOM ALLIANCE and ADRIAN (AVI)  
3 DAVIS) and respond to Defendants' Demurrer to the Second Amended Complaint ("SAC") as  
4 follows:

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. INTRODUCTION**

7 "The First Amendment to the United States Constitution provides that 'Congress shall  
8 make no law ... abridging the freedom of speech....' " *Balboa Island Village Inn, Inc. v.*  
9 *Lemen* (2007) 40 Cal.4th 1141, 1147. "This fundamental right to free speech is 'among the fun-  
10 damental personal rights and liberties which are protected by the Fourteenth Amendment from  
11 invasion by state action.' " *Id.* (citation omitted.) "Numerous decisions have recognized our 'pro-  
12 found national commitment to the principle that debate on public issues should be uninhibited,  
13 robust, and wide-open.' " *Id.* (citation omitted.) Plaintiffs, a non-profit educational 501(c)(3)  
14 organization and its president, entered into an agreement to lease the California Science Center's  
15 IMAX theater to screen the documentary science film *Darwin's Dilemma*, a film exploring the  
16 "Cambrian Explosion," described as the geologically-sudden appearance of dozens of major  
17 complex animal types in the fossil record without any trace of the gradual transitional steps  
18 Charles Darwin had predicted. The gravamen of this action is Plaintiffs' claim that, responding  
19 to pressure from their parent affiliate, the Smithsonian Institution, and activists opposed to intel-  
20 ligent design, Defendants engaged in an unconstitutional deprivation of Plaintiffs' First Amend-  
21 ment right of expression in a public forum by terminating the contract and cancelling the event.

22 Defendants California Science Center Foundation ("Foundation") and Jeffrey Rudolph,  
23 individually and in his official capacity<sup>1</sup> as President and CEO of the California Science Center  
24 Foundation ("Rudolph") ("collectively referred to herein as "Defendants" or "Foundation") have  
25 demurred to all causes of action asserted by Plaintiff Adrian (Avi) Davis ("Davis") on the ground  
26 that he lacks standing. Defendants have additionally demurred to the First Cause of Action

27 <sup>1</sup> Rudolph is also sued individually and in his official capacity as President and CEO of the Defendant California  
28 Science Center Foundation.

1 against Rudolph and the, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Elev-  
2 enth causes of action.<sup>2</sup>

3 **II. ARGUMENT**

4 **A. Plaintiff Adrian (Avi) Davis Has Standing To Pursue The Claims In This**  
5 **Case.**

6 1. *Davis Has Standing To Assert Constitutional And Statutory Civil Rights*  
7 *Claims.*

8 Standing jurisprudence contains two strands: Article III standing, which enforces the  
9 Constitution's case or controversy requirement; and prudential standing, which embodies judi-  
10 cially self-imposed limits on the exercise of federal jurisdiction. *Elk Grove Unified School Dist.*  
11 *v. Newdow* (2004) 542 U.S. 1, 11-12. In recognition that "the First Amendment needs breathing  
12 space," the Supreme Court has relaxed the prudential requirements of standing in the First  
13 Amendment context. *See Broadrick v. Oklahoma* (1973) 413 U.S. 601, 612. Where, for exam-  
14 ple, a plaintiff raises an overbreadth challenge to a statute under the First Amendment, standing  
15 arises "not because [the plaintiff's] own rights of free expression are violated, but because of a  
16 judicial prediction or assumption that the [challenged statute's] very existence may cause others  
17 not before the court to refrain from constitutionally protected speech or expression." *Broadrick,*  
18 413 U.S. at 612.

19 Indeed, the Supreme Court has acknowledged that "in First Amendment cases we have  
20 relaxed our rules of standing without regard to the relationship between the litigant and those  
21 whose rights he seeks to assert precisely because application of those rules would have an intol-  
22 erable, inhibitory effect on freedom of speech." *Eisenstadt v. Baird* (1972) 405 U.S. 438, 446.  
23 For example, in *Moose Lodge No. 107 v. Iris* (1965) 407 U.S. 163, 168, the Court held that  
24 where a system of screening applicants for admission to the bar had a chilling effect upon the  
25 free exercise of the rights of speech and association of students who would be required to antici-

---

26 <sup>2</sup> The Second Amended Complaint alleges causes of action for (1) Breach of Contract; (2) Breach of Implied Cove-  
27 nant of Good Faith and Fair Dealing; (3) Tortious Interference with Contract; (4) Violation of the First Amendment  
28 to the United States Constitution (Speech) (42 U.S.C. § 1983); (5) Violation of the First Amendment To The United  
States Constitution (Association) (42 U.S.C. § 1983); (6) Conspiracy (42 U.S.C. § 1985(3)); (7) Failure to Prevent  
Violations and Civil Conspiracy (42 U.S.C. § 1986); (8) Violation of the Fourteenth Amendment's Equal Protection  
Clause; (9) Violation of the Unruh Civil Rights Act (Civil Code §§ 51 and 51.5); (10) Violation of the California  
Constitution, Art. 1, §§ 2, 3 and 4; (11) Fraud (Intentional Misrepresentation, Deceit, Concealment); (12) Injunctive  
Relief; and (13) Declaratory Relief. The causes of action were inadvertently misnumbered. For purposes of the De-  
murrer, all references to the numbered causes of action are based on the numbering found on the caption page.

1 pate having to meet its requirements, the doctrine of “overbreadth” accorded standing to any in-  
2 dividual potentially affected by the policy.

3 Ninth Circuit holdings in other First Amendment and civil rights contexts tend to extend  
4 standing to persons similarly situated with the actual victim of the rights deprivation. In *Maldo-*  
5 *nado v. Morales* (9th Cir. 2009) 556 F.3d 1037, 1044, a billboard owner filed a § 1983 action  
6 alleging that California's Outdoor Advertising Act, prohibiting all billboard advertising, except  
7 for on-premises advertising, violated his First Amendment and equal protection rights. The Ninth  
8 Circuit observed that “[a]lthough plaintiffs are generally limited to enforcing their own rights,  
9 standing is broader for facial First Amendment challenges.” *Id.* Similarly, a plaintiff alleging  
10 that a statute is void for vagueness and overbreadth resulting in a chilling effect on speech has  
11 standing even if the law is constitutional as applied to him. *See S.O.C., Inc. v. County of Clark*  
12 (9th Cir. 1998) 152 F.3d 1136, 1142-43.

13 In *Canatella v. State of California* (9th Cir. 2002) 304 F.3d 843, an attorney sued the  
14 state of California, the state bar’s board of governors, and related entities and individuals under §  
15 1983, challenging the constitutionality of state bar statutes and a state rule of professional con-  
16 duct on the ground that they violated his First Amendment right of expression and Fourteenth  
17 Amendment right of due process. The district court concluded that the attorney lacked standing  
18 because he could show no imminent threat of injury and would suffer harm by the threat of bar  
19 disciplinary sanctions in the future. The appellate court, however, concluded that he was affected  
20 by “continuing, present adverse effects” in his relationship with the bar which potentially would  
21 chill his constitutionally protected speech. *Id.*, at p. 853.

22 An analogous rule appears in the holding of *Allee v. Medrano* (1974) 416 U.S. 802, 820.  
23 In *Allee*, a labor union had standing as a named plaintiff to raise claims that a member of the un-  
24 ion would have standing to raise. The Supreme Court stated unions may sue under § 1983 “as  
25 persons deprived of their rights secured by the Constitution and laws” and observed that “it has  
26 been implicitly recognized that protected First Amendment rights flow to unions *as well as to*  
27 *their members and organizers.*” (Emphasis added.) The SAC alleges that Davis, as president of  
28 the AFA, entered into the contract at issue on behalf of AFA and himself (SAC, ¶ 9, 4:7-8) and  
thus was intimately involved in arranging the IMAX theater presentation. In fact, Davis would  
have been present at the event expressing his views, whether via the films he chose, or the com-  
munications to the public about the showing, or by comments he would make on site at the time.

1 AFA is the organization that contracted the IMAX theater, and it has First Amendment speech  
2 and expression rights. Davis, an officer and director of the AFA, is a person whose interests in  
3 presenting the films were and are identical to AFA's interests. Following the logic of *Allee*, AFA  
4 would have standing to assert the constitutional rights of its member and officer, Davis. The  
5 same rule would apply symmetrically: Davis can assert the rights of the AFA organization that  
6 he actively leads, especially where both he and the organization were intertwined at the same  
7 event. Accordingly, Davis is entitled to the same standing to vindicate the First Amendment  
8 rights of speech and assembly as the organization that he leads, in an event that he personally  
9 organized for the organization, and which he would have moderated.

2. *Davis Has Standing To Assert Contract Claims.*

10 In addition to claiming that Davis lacks standing in relationship to constitutional and stat-  
11 utory civil rights claims, Defendants assert that he was not a party to the contract and therefore  
12 lacks standing to sue for breach of contract and breach of the implied covenant of good faith and  
13 fair dealing. However, "[t]he rule is well settled that where a reading of a simple contract, how-  
14 ever inartfully it may be drawn, discloses that it is executed for and on behalf of a principal, or  
15 discloses an intent to bind such principal, or even leaves the matter one of doubt, parol evidence  
16 may be employed to determine whose contract it is, and this even in cases where the instrument  
17 is sufficiently clear to bind the agent." *Eddy v. American Amusement Co.* (1908) 9 Cal.App. 624,  
18 627, 99 P. 1115, 1116. "It is no contradiction of a contract, which is silent as to the fact, to prove  
19 by parol that a party is acting therein, not on his own behalf, but for another. It does not release  
20 the agent, but *binds the principal in addition to the agent.*" (Emphasis added.) Davis was AFA's  
21 agent in executing the contract for its behalf as well as for his. However, on the facts pleaded,  
22 Davis has standing to assert contract claims against the Defendants, and any parol evidence is a  
23 matter for summary judgment, not demurrer. The function of a demurrer is to test the sufficiency  
24 of a pleading by raising questions of law. *Code of Civil Procedure* §589(a); *Andal v. City of*  
25 *Stockton* (2006) 137 Cal.App.4th 86, 90; *Donabedian v. Mercury Ins. Co.* (2004) 116  
26 Cal.App.4th 968, 994. A demurrer is directed to the face of the pleading to which objection is  
27 made (*Sanchez v Truck Ins. Exch.* (1994) 21 Cal.App.4th 1778, 1787) and to matters subject to  
28 judicial notice (*Code of Civil Procedure* §430.30(a); *Ricard v. Grobstein, Goldman, Stevenson,*  
*Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157, 160). The only issue the Court may resolve  
on a demurrer to a complaint is whether the complaint, standing alone, states a cause of action.

1 *Gervase v Superior Court* (1995) 31 Cal.App.4th 1218, 1224. On a demurrer, the Court should  
2 rule only on matters disclosed in the challenged pleading. *Ion Equip. Corp. v. Nelson* (1980) 110  
3 Cal.App.3d 868, 881. The other parties' pleadings cannot dictate the outcome.

4 3. *Davis Has Standing To Assert A Claim For Violation Of The Unruh Act.*

5 As argued below, Defendants discriminated against AFA on the basis of their perceived  
6 belief that the fundraising event involved a religious message (creationism). For the reasons ex-  
7 plained above, Davis' individual rights were therefore violated as well because he was prevented  
8 from hosting the event and expressing himself in connection with its topic. In light of the pruden-  
9 tial standing rule that the First Amendment must be given breathing space, Davis possesses  
10 standing to assert a violation of his individual rights under state discrimination laws regardless of  
11 whether he possessed contractual rights. Defendants grossly inflate their argument by asserting  
12 that because Davis was not a party to the contract, he is prevented from asserting other claims  
13 (Demurrer, 4:8-9). Clearly, Davis, the president of AFA, a non-profit 501(c)(3) organization,  
14 was an intended beneficiary of the event's fundraising effort and enjoyed the same right to be  
15 free of governmental censorship as AFA.

16 Defendants' reliance on *Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, is  
17 misplaced. *Surrey* involved an individual who sued an online dating service individually and on  
18 behalf of the general public alleging that the service's differential pricing practices violated the  
19 Unruh Act and the Gender Tax Repeal Act. However, the plaintiff was not a subscriber to the  
20 dating service and therefore possessed no personal right upon which to allege discrimination.  
21 Unlike the *Surrey* plaintiff, Davis was a specific beneficiary of the contract with the California  
22 Science Center. His rights were neither remote nor abstract, but concrete and actual since he and  
23 his organization, unlike potential ticket-purchasers, were guaranteed to enjoy the benefit of the  
24 contract had it not been frustrated by Defendants' discriminatory actions and policies.

25 **B. Plaintiffs' Second Cause Of Action For Breach Of Implied Covenant Of  
26 Good Faith And Fair Dealing States Sufficient Facts.**

27 Plaintiffs' Second Cause of Action alleges Breach of the Implied Covenant of Good Faith  
28 and Fair Dealing. Defendants contend that Plaintiffs are required to plead a special relationship  
between the contracting parties. Defendants cite *Foley v. Interactive Data Corp.* (1988) 47 Cal.  
3d 654, 687, as requiring the pleading of a special relationship to support the independent tort of  
breach of the implied covenant of good faith and fair dealing. In the contract context as pleaded  
here, the Supreme Court has nevertheless restated the settled principle that the covenant is im-

1 plied *in every contract*. “It has long been recognized in California that “[t]here is an implied cov-  
2 enant of good faith and fair dealing in every contract that neither party will do anything which  
3 will injure the right of the other to receive the benefits of the agreement.” *Kransco v. American*  
4 *Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400.

5 In 2009, the Court of Appeal in *Spinks v. Equity Residential Briarwood Apartments*  
6 (2009) 171 Cal.App.4th 1004, 1033, stated the “prerequisite for any action for breach of the im-  
7 plied covenant of good faith and fair dealing is the existence of a contractual relationship be-  
8 tween the parties, since the covenant is an implied term in the contract.” *Id.* at 1032; internal  
9 quotation and citation omitted. “The implied covenant of good faith and fair dealing is limited to  
10 assuring compliance with the express terms of the contract, and cannot be extended to create ob-  
11 ligations not contemplated by the contract.” (*Id.*, internal quotation and citation omitted). In  
12 2004, the Court of Appeal followed the same rule and sustained a cause of action of breach of  
13 implied covenant of good faith and fair dealing in a case involving a dispute between a produc-  
14 tion company and a city’s theater company. *See Pasadena Live v. City of Pasadena* (2004) 114  
15 Cal.App.4th 1089, 1094. “In essence, the covenant is implied *as a supplement* to the express con-  
16 tractual covenants, to prevent a contracting party from engaging in conduct which (while not  
17 technically transgressing the express covenants) frustrates the other party’s rights to the benefits  
18 of the contract.” *McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 806.

19 The implied covenant imposes upon each contracting party both “the duty to refrain from  
20 doing anything which would render performance of the contract impossible by any act of his  
21 own” and “the duty to do everything that the contract presupposes that he will do to accomplish  
22 its purpose.” *McClain, supra*, 159 Cal.App.4th at 806 (citing precedent). The covenant protects  
23 only the express terms of the agreement and cannot impose substantive duties or limits on the  
24 contracting parties beyond those incorporated in the specific terms of their agreement. *McClain,*  
25 *supra*, 159 Cal.App.4th at 806 (citing precedent). “The precise nature and extent of the duties  
26 imposed under the implied covenant thus depend upon the purposes of the contract.” *Id.*, citing  
27 precedent.

28 A cause of action for breach of the covenant can be and often is pleaded separately but is  
essentially a species of breach of contract. In *Pasadena Live*, the plaintiff production company  
alleged breach of the covenant of good faith and fair dealing in its complaint against the city for  
breach of contract, based on allegations that their written agreement provided the company

1 would advance \$114,550 to the city for improvements to the city's amphitheater, and would have  
2 the opportunity to submit proposals for its productions in order to recoup its investment. The city  
3 later sent a letter to the company, however, barring the company from submitting any proposals.  
4 By sending the letter, the city failed to consider proposals submitted by the company, and there-  
5 fore the city failed to do everything that the contract presupposed the city would do to accom-  
6 plish the contract's purpose. The court held the complaint pleading these facts would survive  
7 demurrer as adequately pleading breach of the implied covenant of good faith and fair dealing.  
8 Here, the contract contemplated that Plaintiffs' fundraising event would take place at the IMAX  
9 Theater. Cancellation of the contract by Defendants on the preposterously flimsy pretext that  
10 publicity generated by a third party not subject to the contract had harmed Defendants' reputa-  
11 tion with the Smithsonian frustrated Plaintiffs' right to the financial benefit it hoped to realize  
12 through the IMAX event.

11 **C. Plaintiffs' Third Cause Of Action For Violation Of The First Amendment To**  
12 **The United States Constitution States Sufficient Facts.**

13 1. *Summary of Argument*

14 Defendants acted under color of state law when they violated Plaintiffs' constitutional  
15 rights of free speech and assembly. Under the symbiotic relationship, close nexus, joint partici-  
16 pation and entwinement tests for finding state action formulated by the United States Supreme  
17 Court, the complaint is sufficiently pled. Neither the Foundation, acting under color of law pur-  
18 suant to *Food and Agrig. Code* §§ 3857 and 4101, et seq., nor Rudolph, in his private official and  
19 individual capacities, is protected by Eleventh Amendment immunity.

19 2. *Defendants Were Engaged In State Action Under Color Of Law When*  
20 *They Terminated The Contract With Plaintiffs.*

21 An essential requirement of a 42 U.S.C. § 1983 claim is that the Defendant acted under  
22 color of state law. *Flagg Bros. v. Brooks* (1978) 436 U.S. 149, 155. To state a claim under §  
23 1983, a plaintiff must allege: (1) the defendant was acting under color of state law at the time the  
24 acts complained of were committed; and (2) the defendant deprived plaintiff of a right, privilege,  
25 or immunity secured by the Constitution or laws of the United States. *Briley v. State of Cal.* (9th  
26 Cir. 1977) 564 F.2d 849, 853. Conduct that is actionable under the Fourteenth Amendment as  
27 state action is also action under color of state law supporting a suit under § 1983. *Lugar v. Ed-*  
28 *mondson Oil Co.* (1982) 457 U.S. 922, 935. "[T]he party charged with the deprivation [of a right,  
privilege, or immunity secured by the Constitution or laws of the United States] must be a person

1 who may fairly be said to be a state actor. This may be because he is a state official, because he  
2 has acted together with or has obtained significant aid from state officials, or because his conduct  
3 is otherwise chargeable to the State.” *Id.* at p. 936. Although state action may be found in cases  
4 where there is such a close nexus between the State and the challenged action that seemingly pri-  
5 vate behavior may be fairly treated as that of the State itself (*Brentwood Acad. v. Tennessee Sec-*  
6 *ondary Sch. Athletic Ass’n.* (2001) 531 U.S. 288, 295), generally referred to as the close or joint  
7 nexus test, the Supreme Court has articulated a number of different factors or tests in different  
8 contexts for finding state action by a private party. See *Lugar v. Edmondson Oil Co., supra*, 457  
9 U.S. at p. 939 [listing tests and court precedents]. In addition to the close/joint nexus test, of rel-  
10 evance to this lawsuit are the (1) symbiotic relationship test (*see, e.g., Burton v. Wilmington*  
11 *Parking Authority* (1961) 365 U.S. 715); (2) joint participation test (*see e.g., Lugar v. Edmond-*  
12 *son Oil Co., supra*, 457 U.S. 922; and (3) pervasive entanglement test (*see, e.g. Brentwood*  
13 *Acad., supra*, 531 U.S. 288. Under any one of these tests, the allegations of the SAC show a  
14 combination of activity, collaboration, conformity of purpose and inseparability capable of estab-  
15 lishing state action under color of state law.

16 In this case, Foundation shares such a symbiotic relationship with the state, is so obvious-  
17 ly in joint participation with the state and so pervasively entangled with state activity, there is no  
18 question but that Foundation and Rudolph acted under color of state law in cancelling Plaintiffs’  
19 fundraising event. As Rudolph has admitted:

20 “The California Science Center and California Science Center Foundation *have a number*  
21 *of agreements that govern the relationship, including a lease relating to the IMAX Thea-*  
22 *ter and a Joint Operation Agreement.”*

23 (Request for Judicial Notice (“RJN”), Decl.Rudolph, Exhibit “A.” ¶ 6, 18-21, emphasis added.)

24 “*Because the Foundation and the California Science Center have spent considerable re-*  
25 *sources to build a reputation as a highly regarded and respected scientific institution, we*  
26 *are very attentive to ensure that private groups do not appropriate the reputation of the*  
27 *California Science Center for their own benefit.”*

28 (*Id.*, ¶ 8, 3-6, emphasis added.)

Entanglement (*Brentwood Academy*) appears conspicuously by Rudolph’s role as presi-  
dent of both the Center and the Foundation exercising powers indistinguishably benefiting the  
Center of the Foundation jointly. Additionally, the Center and Foundation operate jointly in the

1 form of a public-private partnership. (RJN, Exhibit "A," ¶ 6, 2:9-10, submitted in support of the  
2 Defendant California Science Center Foundation's Opposition to the Emergency Relief Request  
3 by American Freedom Alliance ["The California Science Center and the Foundation is one of the  
4 oldest and most successful public-private partnerships in the State of California."]).

5 In the context of free speech violations, a New York district court decision is instructive.  
6 In *People for the Ethical Treatment of Animals v. Guiliani* (S.D.N.Y. 2000) 105 F.Supp.2d 294  
7 ("PETA decision"), the City of New York formed a public-private partnership with organizers of  
8 a public art exhibit called the CowParade New York City 2000 ("CowParade") in which approx-  
9 imately 500 life-size fiberglass sculptures of cows painted, decorated or otherwise altered artisti-  
10 cally, were placed throughout the city. Individuals and businesses were solicited to become  
11 sponsors of CowParade by "adopting" a cow. Plaintiff, the animal advocacy organization People  
12 for the Ethical Treatment of Animals ("PETA"), submitted two cow designs, one of which was  
13 rejected by a committee set up to screen inappropriate designs submitted for the event. The cow  
14 design submitted by PETA that was rejected by the committee divided the cow into sections in a  
15 manner intended to resemble a butcher shop chart showing the cuts of meat derived from a cow.  
16 Within each section was a statement or quotation concerning the health and ethical problems as-  
17 sociated with the killing of cows for food. In its suit for a preliminary injunction, PETA alleged,  
18 as Plaintiffs herein have, that defendants violated 42 U.S.C. § 1983 and PETA's free speech  
19 rights under the First and Fourteenth Amendments of the United States Constitution as well as  
20 the state constitution, claiming that CowParade breached its agreement with PETA by not allow-  
21 ing it to display both cows and that the breach should be remedied by specific performance and  
22 damages.

23 The district court found the "contractual agreement between the City and the CowParade  
24 Organizers, coupled with the significant regulation and control over the event that was exercised  
25 by the City, created a sufficient link between the public and private entities, placing the Cow-  
26 Parade activities under the umbrella of state action sufficient to satisfy the requirements of 42  
27 U.S.C. § 1983." *Id.* The PETA decision relied on *Burton v. Wilmington Parking Auth.* (1961)  
28 365 U.S. 715, and applied the symbiotic test to determine whether the relationship between the  
city and the event partner in its public-private partnership was sufficient to attribute state action  
to the event's organizers. Under the *Burton* test, where "[t]he State has so far insinuated itself  
into a position of interdependence with [a private entity] ... it must be recognized as a joint par-

1 participant in the challenged activity, which, on that account, cannot be considered to have been ...  
2 purely private....” In the PETA case, the city and the event organizers conceded they formed a  
3 public-private partnership giving rise to a symbiotic relationship. Once the symbiotic test was  
4 satisfied, the court moved on to analyze whether PETA’s First Amendment rights were violated.<sup>3</sup>

5 The gravamen of Defendants’ argument is that Plaintiffs have failed to sufficiently allege  
6 a close enough relationship between the Center and Foundation to establish under any facts that  
7 Foundation/Rudolph acted under color of state law. Their argument crumbles under the weight of  
8 tortured reasoning and Rudolph’s own contradicting admissions: “The Science Center includes  
9 an IMAX theater, *which is leased by and operated by the Foundation.*” (RJN, Exhibit “A.” ¶ 4,  
10 1:26-27, emphasis added.) “The Foundation funds design and development of exhibitions and  
11 education programs at the California Science Center. *The Foundation also manages and arrang-*  
12 *es for the use of areas within the Science Center for private events.*” (*Id.*, ¶ 6, 10-13, emphasis  
13 added.) “The California Science Center and California Science Center Foundation *have a num-*  
14 *ber of agreements that govern the relationship, including a lease relating to the IMAX Theater*  
15 *and a Joint Operation Agreement.*” (*Id.*, ¶ 6, 18-21, emphasis added.) “*Because the Foundation*  
16 *and the California Science Center have spent considerable resources to build a reputation as a*  
17 *highly regarded and respected scientific institution, we are very attentive to ensure that private*  
18 *groups do not appropriate the reputation of the California Science Center for their own benefit.*”  
19 (*Id.*, ¶ 8, 3-6, emphasis added.)

20 Plaintiffs have alleged substantial facts supporting the presence of a symbiotic relation-  
21 ship (e.g., the Foundation’s concern for the Center’s reputation with the Smithsonian). SAC, ¶¶  
22 18-25. Defendants stretch mightily to claim first that Rudolph, wearing the hats of presi-  
23 dent/CEO of the Center and president of the Foundation, did *not* act for the benefit of the Center  
24 in executing the decision to cancel the event as alleged in the complaint and as acknowledged by  
25 Rudolph himself (“I decided to cancel the event scheduled for October 25, 2009 and Chris Sion  
26  
27  
28

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<sup>3</sup> Defendants here have not challenged the sufficiency of the First Amendment allegations. Indeed, they have neither 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 expressive 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 sent an email to the AFA with that direction.”; RJN, Exhibit “A.” ¶ 13, 4:14-15)), but then to  
2 claim the Foundation did not act under color of law.

3 *Lebron v. National Railroad Passenger Corp.* (1995) 513 U.S. 374 analogizes here. In  
4 *Lebron*, the Supreme Court held Amtrak, which was created to achieve government objectives,  
5 could be deemed a federal entity for purposes of the First Amendment regardless of its statutory  
6 designation as a “private” corporation. Amtrak was held to be a government agency or instru-  
7 mentality for the purpose of individual rights guaranteed against the Government by the Consti-  
8 tution. *Id.* at 400. In *Brentwood Academy, supra*, the Supreme Court held that a nominally pri-  
9 vate interscholastic athletic association comprised primarily of public schools was a state actor  
10 for purposes of claims under § 1983 due to a “substantial entwinement” with state regulatory  
11 functions. 531 U.S. 288, 302-03.

12 In *Clark v. Placer County* (1996) 923 F.Supp. 1278, a private, non-profit corporation or-  
13 ganized under California laws and operating a county fair was treated as the county government  
14 for § 1983 purposes. *Id.*, at 1283. Recognizing that a statutory scheme (*Government Code* §§  
15 2900, *et seq.*) ensured the “creation, maintenance and promotion of county fairs,” the court found  
16 that “nonprofit corporations running county fairs are agents of the county.” The court noted that  
17 while county fairs do not constitute a central governmental function, “all that is required for the  
18 purpose of § 1983 liability under *Lebron* is that the corporation have a ‘public statutory mis-  
19 sion.’” *Id.* at p. 1284. The court found sufficient similarities with *Burton v. Wilmington Parking*  
20 *Authority, supra*, to conclude the private fair operator to be a state entity for purposes of § 1983  
21 liability. The parallels it recited apply equally here:

22 Here, as there, the underlying relationship involved the leasing of public property. Here,  
23 as there, the relationship was specifically authorized by state statute. Here, as there, the  
24 income received from the private party was to be used exclusively for the maintenance of  
25 public land. Here, as there, the success of the public function ... depended on the finan-  
26 cial contributions of the private party.

27 *Id.* at p. 1286. Notwithstanding Foundation’s contrary assertion, under a host of cases, the Foun-  
28 dation is without any doubt a state actor subject to liability under § 1983 for violating Plaintiffs’  
rights.

This action is distinguishable from cases cited by Defendants. Both *Stark v. Seattle Sea-*  
*hawks* (W.D. Wash. 2007) WL 182017 and *Gallagher v. Neil Young Freedom Concert* (1995) 49  
F.3d 1442 involved security companies engaged in pat-down searches of patrons at public stadi-

1 ums. The courts analyzed the relationship under the “joint activity” and “public function” tests,  
2 neither of which pertains here, holding that pat-down searches conducted by private actors do not  
3 constitute state action because the state’s involvement in security at public events was not suffi-  
4 ciently tied to the practice of conducting pat-down searches so as to show sufficient state action  
5 directly benefiting the state. These decisions would be analogous to this situation if AFA had  
6 subcontracted services out and was swept into a constitutional challenge by aggrieved patrons  
7 caused by AFA’s subcontractor. Center and Foundation have a continuing, ongoing, permanent  
8 and inseparable connection; the Foundation’s very existence depends on the Center, and the Cen-  
9 ter relies on the Foundation specifically because it “may require individual skills not generally  
10 available in state civil service to support specialized functions, such as exhibit maintenance, and  
11 educational and guest services programs, including animal care and horticulture.” *Food and*  
12 *Arig. Code* § 4101.4, subd. (a). This case can further be distinguished from *Stark and Gallagher*  
13 in that the pat-down search policy was neither motivated nor compelled by any state law or state  
14 actor but derived solely from the activity of the private entities contracting with the security firm  
15 (the NFL and the Seattle Seahawks). Moreover, the city did not seek the policy or benefit from  
16 it. In this case, the Foundation acted on behalf of and as the agent for the Center (e.g., Joint Op-  
17 eration Agreement for IMAX theater). As Rudolph explains, the Foundation and the Center have  
18 spent considerable resources to build a reputation as a highly regarded and respected scientific  
19 institution and are very attentive to ensure that private groups do not appropriate the reputation  
20 of the Center for their own benefit. (RJN, Exhibit “A,” *supra*, ¶ 8, 3-6.)

21 Another decision cited by Defendants, *Lansing v. City of Memphis* (2000) 202 F.3d 821,  
22 involving time, place and manner restrictions on a public street, is even more distinguishable.  
23 There, “Memphis in May” festival organizers leased city property to conduct its annual festival.  
24 A street preacher challenged restrictions on his ability to proselytize on a public street near the  
25 city park, where the festival was situated. Applying the “public function” and “state compul-  
26 sion” tests, the court found there to be no evidence that the private festival had exclusive control  
27 of the streets

28 The evidence in this case shows that the contract was entered into by the Foundation as a  
partner and agent of the Center. *Food & Agric. Code* § 4101.4, subd.(b), provides that the Foun-  
dation’s relationship with the Center is exclusive and subject to state control:

1           “Notwithstanding any other provision of law, the California Science Center may enter in-  
2           to a personal services contract or contracts with the California Science Center Foundation  
3           without a competitive bidding process. These contracts shall be subject to approval by the  
4           State and Consumer Services Agency and the Department of General Services and be  
5           subject to all state audit requirements.”

6           Thus, the Foundation acts as the exclusive agent of the Center. Even more compelling to  
7           show that the Foundation is an agent for the Center is the nature of its partnership arrangement.  
8           “The California Science Center and the Foundation is one of the oldest and most successful pub-  
9           lic-private partnerships in the State of California.” (RJN, Exhibit “A,” Decl. Rudolph ¶ 6, 2:9-10.)  
10          “The California Science Center and California Science Center Foundation have a number of  
11          agreements that govern the relationship, including a lease relating to the IMAX Theater and a  
12          Joint Operation Agreement.” (RJN, Exhibit “A,” Decl. Rudolph ¶ 6, 2:18-21.) Far from being a  
13          completely separate and autonomous contractor, such as a security firm contracting with the  
14          Center’s IMAX theater, or an individual unaffiliated with a municipal event and outside the  
15          scope of the private event sponsor’s regulatory control, the Foundation is, for all intent and pur-  
16          pose, the *de facto* Center, lacking only the responsibility to maintain the physical facilities. This  
17          is particularly evident through Rudolph’s dual role as president of both the Center and the Foun-  
18          dation. Accordingly, under the symbiotic relationship, joint participation and pervasive entan-  
19          glement tests, there can be no doubt that the Foundation is a state actor that engaged in state ac-  
20          tion under color of state law in restricting Plaintiffs’ freedom to put on its fundraising event,  
21          thereby engaging in a constitutionally protected right of expression and assembly.

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

24           The Ninth Circuit recently made clear that private entities and their officers enjoy no  
25           Eleventh Amendment immunity. In *Del Campo v. Kennedy* (2008) 517 F.3d 1070, a district at-  
26           torney’s office<sup>4</sup> contracted with a private entity to enforce collections on bad checks. The court  
27           held that “[u]nder the law of this circuit, an entity invoking Eleventh Amendment immunity  
28           bears the burden of asserting and proving those matters necessary to establish its defense.” *Id.* at  
29           1075. “[O]ur cases confirm that private entities have no place within the sovereign immunity  
30           legal framework.” *Id.* at 1076. “[W]e should be extremely hesitant to extend this fundamental

<sup>4</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 and carefully limited immunity to private parties whose only relationship to the sovereign is by  
2 contract.” *Id.* “Although we hold that private entities cannot be arms of the state, we emphati-  
3 cally do not hold that they cannot act under color of state law for the purposes of 42 U.S.C. §  
4 1983 and similar statutes.” *Id.* at 1081, fn. 16. “The usual issue in our cases has been whether a  
5 governmental entity is an arm of the state or is better characterized as part of another level of  
6 government. Our inquiry has been careful, and we have often declined to extend immunity even  
7 to governmental entities.” *Id.* at 1076-1077.

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

15 This language from *Del Campo* reflecting on the *Takle* case could not be more hostile to  
16 the arguments Defendants have similarly raised here, that a private entity is entitled to sovereign  
17 immunity from constitutional liability though not a government agency. As that court articulat-  
18 ed, spotting the double-standard:

19 Connections to the state *even as substantial as those* of the University of Wisconsin Hos-  
20 pital’s did not require that privatization be treated as a farce in which the privatized entity  
21 enjoys the benefits both of not being the state and so being freed from the regulations that  
22 constrain state agencies, and of being the state and so being immune from suit in federal  
23 court.

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

26 **D. Plaintiffs Fifth And Sixth Causes Of Action For Conspiracy And Failure To**  
27 **Prevent Violations And A Conspiracy Are Sufficiently Pled.**

28 Plaintiffs have alleged a civil conspiracy between and among the Defendants to violate  
Plaintiffs’ constitutional rights by engaging in the prior restraint of Plaintiffs’ speech relating to  
intelligent design. Defendants disingenuously assert that Plaintiffs have merely alleged that De-  
fendants entered into an agreement. In fact, the SAC details factual allegations showing Defend-  
ants breached their contract to surreptitiously accomplish a violation of Plaintiffs’ First Amend-  
ment rights. As detailed in this brief, the SAC’s alleged facts show the gravamen of this case: a

1 behind-the-scenes effort, consistent with pressure placed on the Defendants by the Smithsonian  
2 and other anti-intelligent design activists, to prevent discussions of intelligent design at a science  
3 museum. The Center's vice-president of communications expressly stated her belief that these  
4 discussions were religious in nature and that speech about them should be excluded. The facts  
5 alleged amply show that invidiously discriminatory animus animated Defendants' action and that  
6 the conspiracy was aimed at interfering with Plaintiffs' First Amendment rights of speech and  
assembly.

7 **E. Plaintiffs' Ninth Cause of Action For Violation Of The Unruh Civil Rights  
8 Act States Sufficient Facts.**

9 *Civil Code* § 51, subd. (b), provides:

10 All persons within the jurisdiction of this state are free and equal, and no matter what  
11 their sex, race, color, religion, ancestry, national origin, disability, medical condition,  
12 marital status, or sexual orientation are entitled to the full and equal accommodations,  
advantages, facilities, privileges, or services in all business establishments of every kind  
whatsoever.”

13 *Civil Code* § 51.5, subd. (a), provides in relevant part:

14 “No business establishment of any kind whatsoever shall discriminate against, *boycott or*  
15 *blacklist*, or refuse to buy from, *contract with* ... any person in this state on account of  
16 any characteristic listed or defined in subdivision (b) or (e) of Section 51, or of the per-  
17 son's partners, members, stockholders, directors, officers, managers, superintendents,  
agents, employees, business associates, suppliers, or customers, because the person is  
perceived to have one or more of those characteristics, or because the person is associated  
with a person who has, or is perceived to have, any of those characteristics.”<sup>5</sup>

18 Defendants dubiously assert that Plaintiffs have not alleged intentional discrimination as  
19 a requirement of a cause of action for violation of *Civil Code* §§ 51 and 51.5, advancing their  
20 own subjective interpretation of evidence in a manner suited for summary judgment, not demur-  
21 rer. Plaintiffs are not required to prove intent, only to allege it, to defeat a demurrer. A demurrer  
22 does not test the sufficiency of the evidence or other matters outside the pleading to which it is  
23 directed. *Four Star Elect. V. F & H Constr* (1992) 7 Cal.App.4th 13751379. It challenges only  
24 the legal sufficiency of the affected pleading, not the truth of the factual allegations in the plead-  
25 ing or the pleader's ability to prove those allegations. *Cundiff v. GTE Cal., Inc.* (2002) 101

26  
27 <sup>5</sup> *Civil Code* § 51.5, subd. (c) provides: “(b) As used in this section, “person” includes any person, firm, associa-  
28 tion, organization, partnership, business trust, corporation, limited liability company, or company.”

1 Cal.App.4th 1395, 1404-1405. A demurrer is not the proper procedure for determining the truth  
2 of disputed facts, such as the correct interpretation of the parties' agreement or its enforceability.  
3 *Fremont Indem. Co. v. Fremont Gen. Corp.*(2007) 148 Cal.App.4th 97, 114-115. The Court may  
4 not make factual findings on a demurrer, including "implicit" findings. *Mink v. Maccabee*(2004)  
5 121 Cal.App.4th 835, 839. Plaintiffs have sufficiently alleged facts giving rise to a cause of ac-  
tion for violation of the Unruh Civil Rights Act.

6 The SAC specifically alleges: "Defendants' actions constitute intentional discrimination  
7 against Defendants on the basis of Defendants' perceived religious speech." (SAC ¶ 93, 26:1-2.)  
8 The facts supporting the allegations of intentional discrimination based on a belief that intelligent  
9 design is a religious-based doctrine are adequately pled. (SAC, ¶ 18, 6:18-27; 7:1-9). The SAC  
10 alleges, for instance, that the Center's vice-president for communication contacted Defendant  
11 Rudolph prior to the cancellation of the event to advise him that the Smithsonian Institution, with  
12 which it is a west coast affiliate museum, "was alarmed" that a "creationist" organization had  
13 publicized Plaintiffs' fundraising event, implying that the Center "officially supports the crea-  
14 tionist film," and that it wanted action taken to disassociate it from the event (SAC, ¶ 18, 6:24-  
15 26).<sup>6</sup> The SAC additionally alleges that the Smithsonian had "pulled the plug" on a similar event.  
16 (SAC, ¶ 18; 6:27, 7:1-2). The vice-president then proceeds to advise Rudolph that it isn't a sci-  
17 ence center's "place" to "debate Darwinism." (SAC, ¶ 18; 7:7-8). As alleged, the very next day  
18 the event was cancelled. A rational inference is easily drawn from these facts that the Defend-  
ants were animated by a belief that the theory of intelligent design is religious "creationism" by  
another name and inappropriately debated at a science center resulting in discrimination.

19 **F. Plaintiffs' Tenth Cause Of Action For Fraud States Sufficient Facts.**

20 1. *Plaintiffs Have Sufficiently Alleged Facts Showing Reasonable Reliance*  
21 *Related To Defendants Deceit And Concealment.*

22 "The loss of First Amendment freedoms, for even minimal periods of time, unquestiona-  
23 bly constitutes irreparable injury." *Elrod v. Burns* (1976) 427 U.S. 347, 373. The issue presented  
24 under Plaintiffs' Fourth Cause of Action for Fraud is whether the loss of AFA's First Amend-

25 <sup>6</sup> "Creationism has been defined as: (1) the doctrine that matter and all things were created, substantially as they now  
26 exist, by an omnipotent Creator, and not gradually evolved or developed: (2) (sometimes initial capital letter) the  
27 doctrine that the true story of the creation of the universe is as it is recounted in the Bible, esp. in the first chapter of  
Genesis; and (3) the doctrine that God immediately creates out of nothing a new human soul for each individual  
born. Dictionary.com, <http://dictionary.reference.com/browse/creationism>, accessed July 3, 2010.

1 ment freedom by entities and individuals acting under color of law is attributable to Defendants'  
2 scheme to deceive Plaintiffs into believing that they had committed a contractual breach when  
3 they had not (and thus conceal its civil rights violation) and to conceal their true reason for can-  
4 celling the event. Plaintiffs were deceived when they were told that they had breached the con-  
5 tract by failing to obtain Defendants' approval prior to issuing a press release that appeared on a  
6 third party's web site. In essence, Defendants cancelled the contract on the basis of facts they  
7 knew to be false.

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

16 By its terms, deceit may be characterized by any one these definitions, not by a combina-  
17 tion of them. The plain language of §§ 1709 and 1710 shows reliance where Plaintiffs were in-  
18 duced to alter their position to their injury or risk. Here, Plaintiffs have alleged facts sufficient to  
19 show that Defendants willfully deceived Plaintiffs with the intent of inducing it to *alter their po-*  
20 *sition to their injury* (loss of First Amendment freedom to present their message concerning in-  
21 telligent design in a public forum) *and risk* (loss of money they expected to generate through do-  
22 nations from major donors at the fundraising event and requirement that it they locate on short  
23 notice an alternative venue suitable to show the 3-D IMAX film). *Civil Code* § 1709. In fact, De-  
24 fendants succeeded in inducing Plaintiffs to alter their position to their injury by the loss of their  
25 First Amendment freedom to present their message concerning intelligent design in a public fo-  
26 rum. Defendants also succeeded in inducing Plaintiffs to alter their position to the risk of losing  
27 donations from those expected to attend the event. By any definition of deceit, Plaintiffs were  
28 forced to alter their position.

Courts give the words of the statute "a plain and commonsense meaning" unless the stat-  
ute specifically defines the words to give them a special meaning. *MacIsaac v. Waste Manage-*  
*ment Collection and Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082. "If the statutory lan-

1 guage is clear and unambiguous, *our task is at an end*, for there is no need for judicial construc-  
2 tion.” *Id.* at p. 1083. “In such a case, there is nothing for the court to interpret or construe.” *Id.*  
3 Section 1710 specifically defines “deceit.” One definition of deceit is “[t]he suggestion, as a fact,  
4 of that which is not true, by one who does not believe it to be true.” § 1710 (1). Here, the Com-  
5 plaint alleges that Defendants represented as fact that Plaintiffs had breached the contract, know-  
6 ing that to be false, when the truth was that Defendants did not wish to be associated with an in-  
7 telligent design event once informed of the nature of the event and Defendants had been admon-  
8 ished by Smithsonian officials for entering into the agreement. (*See, e.g.*, SAC, ¶¶ 18-20, 31,  
9 107-108.) Another definition of deceit is “[t]he assertion, as a fact, of that which is not true, by  
10 one who has no reasonable ground for believing it to be true.” § 1710(2). The Complaint alleges  
11 that Defendants cancelled the event based on a provision of the contract requiring Plaintiffs to  
12 obtain prior approval of publicity while objecting to the content of publicity Plaintiffs did not  
13 prepare or publish. Defendants had no reasonable ground for believing that Plaintiffs were re-  
14 sponsible for generating false or misleading publicity because Plaintiffs had publicized the event  
15 accurately on their own web site and did not control the Discovery Institute’s publicity. Moreo-  
16 ver ***Defendants would have been unaware of any collaboration between Plaintiffs and the Dis-***  
17 ***covery Institute at the time they cancelled the contract.*** A third definition of deceit, which de-  
18 scribes concealment, is “[the] suppression of a fact, by one who ... gives information of other  
19 facts which are likely to mislead for want of communication of that fact.” *Civil Code* § 1710(3).  
20 The Complaint alleges that Defendants suppressed the fact that they had received complaints  
21 from numerous parties, including the Smithsonian, about the event’s intelligent design theme,  
22 which they were acting on. (*e.g.*, SAC, ¶¶ 23-25).

23 The SAC’s allegations clearly demonstrate actionable deceit in this case under the plain  
24 meaning of deceit derived from § 1710.

25 2. *Plaintiffs Have Sufficiently Alleged Facts Showing Forbearance Related*  
26 *To Defendants Deceit And Concealment.*

27 “California law has long recognized the principle that induced forbearance can be the ba-  
28 sis for tort liability.” *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 174. Notably,  
“[f]orbearance -- the decision not to exercise a right or power ... [is sufficient] to fulfill the ele-  
ment of reliance necessary to sustain a cause of action for fraud or negligent misrepresentation.”  
*Id.* at 174 (citations omitted). This concept derives from the principle, declared by the Restate-

1 ment of Torts (Second) § 525, that “[o]ne who fraudulently makes a misrepresentation of fact,  
2 opinion, intention or law for the purpose of inducing another to act or to refrain from action in  
3 reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by  
4 his justifiable reliance upon the misrepresentation.” Defendants made representations containing  
5 false reasons for cancelling the event and terminating the contract, hoping Plaintiffs would be-  
6 lieve were being seriously proposed. The false representations induced Plaintiffs to forbear from  
7 taking further action, such as appealing to the president, Rudolph, directly or the board to secure  
8 the venue. Defendants made the false statements to cause Plaintiffs to *not* attempt to exhibit the  
9 film and to *not* take other steps to persuade Defendants to fulfill their promise.

10 Plaintiffs are unable to mitigate the loss of their First Amendment right of free speech  
11 constituting irreparable injury. Plaintiffs suffered an immediate loss of this right and irreparable  
12 injury as a direct result of Defendants’ deception and the concealment of their ulterior basis for  
13 backing out of the contract. The SAC alleges Defendants sought to cancel the contract only after  
14 they had been contacted by the Smithsonian Institution about concerns that the event was being  
15 promoted as one sponsored by Defendants. The Smithsonian sought to distance itself from an  
16 event mentioning the subject of intelligent design, as it had previously done at a similar event,  
17 and thus pressured its affiliated museum to do the same. Once it learned of the Smithsonian’s  
18 objection to an intelligent design film being shown at its affiliate science center, Defendants re-  
19 fused to perform under the contract.

20 **G. Plaintiffs’ Eleventh Cause Of Action For Injunctive Relief States Sufficient**  
21 **Facts.**

22 “The First Amendment presupposes that the freedom to speak one’s mind is not only an  
23 aspect of individual liberty-and thus a good unto itself-but also is essential to the common quest  
24 for truth and the vitality of society as a whole.” *Balboa Island Village Inn, Inc. v. Lemen, supra*,  
25 40 Cal.4th at 1147. “Under our Constitution, ‘there is no such thing as a false idea. However  
26 pernicious an opinion may seem, we depend for its correction not on the conscience of judges  
27 and juries, but on the competition of other ideas.’ ” *Id.* (Citation omitted.) “The loss of First  
28 Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable  
injury.” *Elrod v. Burns, supra*, 427 U.S. 347 at 373. Plaintiffs have alleged facts showing that  
unless Defendants are permanently enjoined from engaging in conduct intended or having the  
effect of suppressing discussion concerning intelligent design, they will persist in restricting the  
right of Plaintiffs to engage in protected expressive activity at the Center in the future.

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

7 In this case, Plaintiffs have alleged a violation of their First Amendment rights due to ef-  
8 forts by Defendants to censor their program relating to intelligent design. E-mails exchanged  
9 between Defendants' employees suggest that they believed Plaintiffs' event should be cancelled  
10 due to the perception that it was a "creationist" event: "A science center should not even be  
11 asked to partner with any group associated with debating Darwinism - it's not our place." (SAC,  
12 ¶ 18, 7:7-8). In *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 61, 66-67, the United States  
13 Supreme Court concluded that letters from a state commission on morality advising book dis-  
14 tributors that the commission's members considered certain books objectionable for sale to  
15 youths constituted "informal censorship" in violation the First Amendment even though the  
16 books were not banned and the commission lacked authority to apply legal sanctions. The court  
17 concluded that the practice amounted to a "system of prior administrative restraints, since the  
18 Commission is not a judicial body and its decisions to list particular publications as objectionable  
19 do not follow judicial determinations that such publications may lawfully be banned." *Bantam* at  
20 70, quoted in *Smith v. Novato Unified School District* (2007) 150 Cal.App.4th 1439, 1463. Here,  
21 Plaintiffs believe they have sufficiently alleged entitlement to relief under § 1983 for violation of  
22 its First Amendment rights.

23 While it is true that injunctive relief is, by its very terms, a form of relief sought, it is  
24 common in a case alleging violation of the First Amendment to assert it as a cause of action in  
25 order to focus the Court's attention on the prospective relief being sought. Where the form of a  
26 pleading does not prejudice the opposing party, courts will view it as harmless "form over sub-  
27 stance." See, e.g., *Weiss v. Chevron, U.S.A., Inc.* (2d Dist.1988) 204 Cal.App.3d 1094, 251 (trial  
28 court could consider evidence not initially included in defendant's motion for summary judg-  
ment, but submitted together with its reply to plaintiff's opposition); *Motor City Sales v. Superi-*  
*or Court* (1973) 31 Cal.App.3d 342, 346 (relating to fictitious party pleading). It is only neces-

1 sary that Plaintiffs assert a cause of action that gives rise to injunctive relief and to pray for such  
2 relief, yet as a matter of form, no harm and no prejudice to the moving party results from separat-  
3 ing it into a section labeled "Cause of Action." Holding Plaintiffs to a requirement that equitable  
4 relief sought may not be expressed in the form of a cause of action would "exalt form over sub-  
5 stance." *Id.*

6 If not permanently enjoined, Defendants will continue to engage in the practice of prior restraint  
7 relating to intelligent design and other topics of which it is ignorant or to which it otherwise ob-  
8 jects. Plaintiff has adequately alleged the injunctive relief sought, and presenting it in the form of  
9 a Cause of Action does not prejudice Defendants.

10 **III. CONCLUSION**

11 The Court should overrule the demurrer in its entirety. Plaintiffs are entitled to amend the  
12 Complaint should the Court sustain any portion of the demurrer.

13 DATED: July 4, 2010

14 **THE BECKER LAW FIRM**

15 By:

16   
17 \_\_\_\_\_

18 **WILLIAM J. BECKER, JR., ESQ.**  
19 Attorneys for Plaintiffs, AMERICAN FREEDOM  
20 ALLIANCE and ADRIAN (AVI) DAVIS

1 **PROOF OF SERVICE**

2 I, William J. Becker, Jr., declare that:

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

6 On February 14, 2011, I served the foregoing documents:

7 **REQUEST FOR JUDICIAL NOTICE [REPLY RE: DEMURRER TO CROSS-  
8 COMPLAINT]**

9 The above-referenced document was served on:

10 Allan S. Ono, Esq.  
11 Erik Katz, Esq.  
12 Deputy Attorney General  
13 Natural Resources Law Section  
14 OFFICE OF THE ATTORNEY GENERAL  
15 300 S. Spring Street, 11th Floor  
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Attorneys for Defendants, **California Science Cen-  
ter Foundation and Jeffrey Rudolph in his offi-  
cial capacity as President of the California Sci-  
ence Center Foundation**

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

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

25 Executed on February 14, 2011, at Los Angeles, California.

26 \_\_\_\_\_ /s/

27 William J. Becker, Jr.  
28