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[EXEMPT FROM FILING FEES -
GOV. CODE § 6103]

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

MAR 25 2011

John A. _____ Clerk

By GLORIBETTA ROBINSON Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

BC 423687

**AMERICAN FREEDOM ALLIANCE, a
nonprofit corporation,**

Plaintiff,

v.

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

Defendants.

**DEFENDANTS CALIFORNIA SCIENCE
CENTER AND JEFFREY RUDOLPH IN
HIS INDIVIDUAL AND OFFICIAL
CAPACITY AS PRESIDENT AND CEO
OF THE CALIFORNIA SCIENCE
CENTER'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION ON PLAINTIFF'S
THIRD AMENDED COMPLAINT**

**[Notice of Motion and Motion; Separate
Statement of Undisputed Material Facts;
Appendix of Non-California Authorities;
Declaration of C. Tateishi; Declaration of
Allan S. Ono; Declaration of Jeffrey
Rudolph; and [Proposed] Order filed
concurrently herewith]**

Date: June 9, 2011
Time: 8:45 a.m.
Dept: 14
Judge: The Honorable Terry A. Green
Trial Date: July 25, 2011
Action Filed: October 14, 2009

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1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **INTRODUCTION**

4 Plaintiff, American Freedom Alliance ("AFA"), contends that it contracted for the use of
5 the IMAX facility located on the grounds of the California Science Center for a private event
6 featuring two films intended to stimulate scientific debate between opposing views on evolution
7 and intelligent design ("Event"). AFA now alleges that defendants breached their contractual
8 commitment for use of the venue in willful violation of its civil rights. But AFA's reflexive
9 distrust stemming from what it views as a pervasive bias against intelligent design cannot, by
10 itself, support its claims for Constitutional violations. Plaintiff has no factual support for any of
11 these claims and as set forth below, defendants California Science Center ("Center") and Jeffrey
12 Rudolph, in his individual and official capacity as President and CEO of the Center ("Rudolph",
13 and collectively with the Center, "Center Defendants"), are entitled to judgment as a matter of
14 law for at least the following reasons:

15 1. The Center Defendants cannot have breached the alleged Event contract because
16 they were not parties to an Event contract with AFA, did not engage AFA in any contract
17 negotiations, or even have the ability to contract with AFA (or any other private party) for the
18 rental of the IMAX facility;

19 2. AFA has not filed a statutorily required claim for damages against the Center with
20 the California Victim's Compensation and Government Claims Board and the time for doing so
21 has long passed;

22 3. Even were the Center Defendants somehow in breach of an Event contract with
23 AFA, they nevertheless possess Eleventh Amendment immunity from lawsuits which assert
24 alleged federal civil rights violations;

25 4. Even were the Center Defendants somehow in breach of an Event contract with
26 AFA, there is no evidence that the Center Defendants intended to discriminate against AFA; and,

27 5. Even if the Center Defendants somehow intended to discriminate against AFA,
28 there is no possible threat of future injury to AFA by the Center necessary to support injunctive

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1 relief because the Center Defendants lack the ability to contract with private parties for the use of
2 the IMAX facilities (i.e., the Center Defendants will never have the future opportunity to contract
3 with AFA).

4 STATEMENT OF FACTS

5 I. THE CENTER

6 The Center, also known as the is the Sixth District Agricultural Association, was created by
7 the California Legislature pursuant to the Food and Agriculture Code, Division 3, Part 3. (Sep.
8 Stmt. 1; Food & Agr. Code, §§ 3801 et seq.) The Center is “a state institution” organized within
9 “the State and Consumer Services Agency and is deemed a tax-exempt organization as an
10 instrumentality of this state in accordance with Section 23706 of the Revenue and Taxation
11 Code.” (Sep. Stmt. 2; see also Food & Agr. Code, § 3953.) In its recognized capacity as a State
12 institution, the Legislature has, among other things, specifically authorized the Center to establish
13 a space-age museum, and to create an independent California African-American History Museum.
14 (Food & Agr. Code, §§ 4102, 4103, 4104.) Today, the Center is the West Coast’s largest
15 interactive science center and museum.

16 II. THE RELATIONSHIP BETWEEN THE CENTER AND THE FOUNDATION

17 Defendant California Science Center Foundation (“Foundation”) is a non-profit section
18 501(c)(3) organization that raises funds to support exhibits and educational programs featured at
19 the Center. (Sep. Stmt. 4.) The Foundation also leases the Exposition Park IMAX theater from
20 the Center pursuant to a 25 year lease agreement. (Sep. Stmt. 5.) The Foundation and its
21 employees are solely responsible for operations at the IMAX and have the exclusive authority to
22 contract with third parties for private events held at the venue. (Sep. Stmts. 7, 8, 9.)

23 III. THE AFA CONTRACT AND ITS CANCELLATION

24 On or about September 24, 2009, AFA approached Foundation employees to ascertain the
25 availability of the IMAX facility for a proposed October 25, 2009 private fund raising event
26 entitled “We Are Born of Stars IMAX Screening” (“Event”). (Sep. Stmt. 11.)

27 The Event was to consist of the screening of two films. The first film entitled “We Are
28 Born of Stars (3D)” purported to express a positive view of evolutionary theory. (Third Amended

1 Complaint ("TAC") ¶ 10.) By contrast, the second film, "Darwin's Dilemma: The Mystery of the
2 Cambrian Fossil Record," purported to challenge the theory of Darwinian evolution. (TAC ¶ 11.)
3 Because it was a private event, the Foundation was not particularly concerned about the Event's
4 content and, over the next few days, the Foundation and AFA came to agree upon terms for the
5 Event. (Sep. Stmt. 44.) Neither the Center nor its employees were ever involved in any Event
6 contract negotiations on behalf of the Center or Foundation with AFA. (Sep. Stmt. 12.)

7 The contract included standard terms and conditions governing the use of promotional
8 materials. (Sep. Stmt. 40.) That provision, which AFA admits it understood, provided as follows:

9 **PROMOTIONAL MATERIALS:** It is required that the Event Services Office
10 approve, for technical and factual accuracy, all promotional materials mentioning
11 the California Science Center produced for your event (including invitations,
12 programs, press releases, etc.) prior to printing or broadcast. Please allow
13 sufficient time for this approval. (Sep. Stmts. 40, 43.)

14 On October 5, 2009, the Foundation learned of press releases that had been issued relating
15 to the Event. (Sep. Stmt. 45.) The Foundation believed these press releases misappropriated the
16 Center's name and reputation by implying that the Center, as a Smithsonian-affiliated Institution,
17 was the entity premiering the Event's films. One press releases stated, "The debate over Darwin
18 will come to California on October 25, when the Smithsonian Institution's west coast affiliate
19 premieres 'Darwin's Dilemma: The Mystery of the Cambrian Fossil Record,' a new intelligent
20 design film which challenges Darwinian evolution." (Sep. Stmt. 46.) Because none of the press
21 releases were ever submitted to the Foundation's Event Services Office for approval, the
22 Foundation believed that the press releases violated the Promotional Materials provisions of the
23 Event contract. (Sep. Stmts. 47, 50.) In order to stem what he believed were misleading publicity
24 pieces, on October 6, 2009, Rudolph, acting in his capacity as President of the Foundation,
25 decided to cancel the AFA Event contract. (Sep. Stmts. 48, 49.) This was solely his decision in
26 his Foundation capacity; Rudolph did not consult with any Center employees. (Sep. Stmt. 18.)
27 The cancellation was communicated to AFA on October 6, 2009, and Plaintiff filed suit eight (8)
28 days later claiming that defendants had somehow schemed to violate its civil rights. What may at
most have then been a straight forward contract dispute was quickly transformed into a civil
rights-styled lawsuit with, as set forth below, no facts to support it.

1 of a claim. (Gov. Code, § 945.4.) “[F]ailure to timely present a claim for money or damages to a
2 public entity bars a plaintiff from filing a lawsuit against that entity.” (*State of California v.*
3 *Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239.) Filing a civil complaint in superior court
4 does not satisfy a claimant’s claim presentment obligation. (*City of Stockton v. Superior Court,*
5 *supra*, 42 Cal.4th at 746 [“The legislature’s intent to require the presentation of claims before suit
6 is filed could not be clearer. (§ 945.4.)”].) The claim filing procedures and limitations
7 specifically apply to district agricultural associations, such as the Center. (Food & Agr. Code,
8 § 3955.)

9 AFA’s Complaint does not contain an allegation that it presented a claim pursuant to the
10 Government Claims Act. (Sep. Stmt. 23.) Indeed, as of February 17, 2011, AFA has not
11 presented a claim against the Center to the California Victim’s Compensation and Government
12 Claims Board. (Sep. Stmt. 24.) “The period for asserting contract claims is one year.” (*City of*
13 *Stockton v. Superior Court, supra*, 42 Cal.4th at p. 746, n. 13 [citing Gov. Code, § 911.2].)
14 Therefore, the last day on which AFA could have submitted a claim for the alleged breach of
15 contract – which allegedly occurred on October 6, 2009 – was October 5, 2010. Because AFA
16 has not complied with the Government Claims Act, and time for doing so has long passed, its
17 First Cause of Action seeking contract damages is barred.

18 **B. The Center Cannot be Liable for Breach of Contract Because it is Not a**
19 **Party to the Event Contract**

20 Even if AFA’s breach of contract claim were not barred for failure to comply with the
21 Government Claims Act, it is also barred for the independent reason that the Center cannot be
22 liable for the alleged breach of a contract to which it is a stranger: the Center is not a party to the
23 Event contract, was not involved in negotiating the Event contract, and was not involved in the
24 cancelation of the Event contract.

25 AFA claims that the Center is a party to the Event contract. (TAC ¶ 8.) That contention is
26 demonstrably false. The Event contract does not identify the Center as a contracting party. (Sep.
27 Stmt. 12.) The Event contract was not executed by the Center, but instead was the product of
28 negotiations exclusively between the Foundation and AFA. (Sep. Stmt. 12.) “It is essential to the

1 validity of a contract, not only that the parties should exist, but that is should be possible to
2 identify them.” (Civ. Code, § 1558.) Because the Event contract neither identifies the Center as a
3 contracting party, nor was it executed by the Center, the Center is not a direct party to the contract.

4 **C. The Foundation is Not the Center’s Agent**

5 AFA may attempt to argue that the Foundation executed the Event contract as an agent on
6 behalf of the Center. (See, e.g., TAC ¶ 7 [“each of the Defendants . . . are the agents . . . of each
7 other . . .”].) But the Foundation is not the Center’s agent and such boilerplate contentions are
8 baseless.

9 In February 1995, the Center and the Foundation entered into a 25-year lease for the
10 IMAX facility. (Sep. Stmt. 5.) The lease specifically disclaims the creation of an agency or
11 partnership relationship. (Sep. Stmt. 6; IMAX Lease ¶ 13A [“This Amended and Restated Lease
12 shall not be construed as constituting Foundation as agent or partner of Museum . . .”].)¹ Thus,
13 while the IMAX Lease requires the Foundation to conduct its operations in accordance with both
14 State and Federal laws, the Center neither has the ability to contract with third parties for rental of
15 the IMAX nor has authority over the Foundation’s contractual dealings with third parties seeking
16 to rent the IMAX for private events. (Sep. Stmts. 16, 7, 8, 9; Tateishi Decl. ¶ 5.) Consistent
17 therewith, the IMAX Lease even expressly prohibits the Center from dictating what films will be
18 shown (such as the films AFA intended to show). (Sep. Stmt. 5.)

19 Nor can AFA present evidence that an implied ostensible agency relationship exists. (Civ.
20 Code, § 2300.) “Liability of the principal for the acts of an ostensible agent rests on the
21 [equitable] doctrine of ‘estoppel,’ the essential elements of which are [1] representations made by
22 the principal, [2] justifiable reliance by a third party, and [3] a change of position from such
23 reliance resulting in injury.” (*J.L. v. Children’s Institute, Inc.* (2009) 177 Cal.App.4th 388, 404.)
24 It is AFA’s burden to establish the existence of an ostensible agency relationship between the
25 Center and the Foundation. Even assuming AFA could satisfy the first two of these elements
26 (which it cannot), AFA would still be unable to establish that it suffered injury due to some

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1 misplaced reliance on the Foundation's contracting authority. Not only did the Foundation have
2 authority to contract with AFA for its after-hours private Event at the IMAX, it had the *exclusive*
3 authority to do so. (Sep. Stmt. 8.) AFA wanted to negotiate with the party that could put them
4 into the IMAX and that is precisely what occurred. (Sep. Stmt. 13.)

5 Nor does an ostensible agency relationship even make sense. If Plaintiff contends that the
6 Center was the principal and the Foundation was the Center's agent, at a minimum, the Center
7 would need to possess the ability to enter into a contract directly with AFA. But the undisputed
8 evidence is that only the Foundation had that ability (pursuant to its 25-year lease of the IMAX
9 facility). If the Center did not have the ability to itself rent the IMAX facility to AFA, no one,
10 including the Foundation, could have been the Center's agent for that purpose.

11 The undisputed facts preclude a finding of agency, implied or otherwise, as a matter of law.

12 **II. AFA'S CONSTITUTIONAL CLAIMS AGAINST THE CENTER DEFENDANTS LACK**
13 **MERIT**

14 AFA's Second, Third, Fourth, and Eighth Causes of Action are each based on alleged
15 violations of the United States and California Constitutions. All these causes of action fail.

16 **A. The Center Defendants Did Not Engage in the Actions AFA Claims Were**
17 **Unconstitutional**

18 AFA's lawsuit is based on an erroneous contention that the cancellation of the AFA
19 contract violated its constitutional rights. The case fails as to the Center for, among other reasons,
20 the simple fact that neither the Center nor any of its employees were involved in the contracting
21 or cancellation of the AFA Event. Only the Foundation, and not the Center, had the legal right
22 and authority to book private events at the IMAX Theater. (Sep. Stmts. 8, 9.) Only Foundation
23 employees, and not Center employees, were involved in the negotiation of the AFA Event
24 contract. (Sep. Stmt. 38.) Only Rudolph, as President of the Foundation, made the decision to
25 cancel the AFA Event contract. (Sep. Stmt. 48, 49.) No Center employees were involved in the
26 decision to cancel the AFA Event contract. (Sep. Stmt. 18.) In simple terms, whatever AFA
27 contends was done unlawfully or unconstitutionally, it was not done by the Center. AFA's bare
28 speculation flies in the face of the facts, is not evidence and is legally insufficient to support its
supposed civil rights claims. (*Keniston v. Roberts* (9th Cir. 1983) 717 F.2d 1295, 1300 [vague

1 and conclusory allegations are insufficient to support civil rights claims or to withstand summary
2 judgment].)

3 **1. AFA has not and cannot produce evidence that the Center**
4 **Defendants intentionally discriminated against AFA**

5 Even assuming that the Foundation's decision to cancel the Event were somehow
6 attributable to the Center Defendants, AFA still cannot prove that the Foundation's decision to
7 cancel the Event contract was the result of a discriminatory motive. Rudolph's deposition
8 testimony is clear—he alone, as President of the Foundation, made the decision to cancel the
9 Event after determining that “the press statements put out were in violation of [the Foundation's]
10 policies and procedures.” (Sep. Stmts. 46, 50.) AFA has no evidence to refute Rudolph's
11 testimony. Rather, its unequivocal refusal to accept any other explanation for the cancellation is
12 based solely upon unsupported speculation and conjecture. (Sep. Stmt. 60.) But AFA's
13 subjective belief and bald assertion of discriminatory intent are inadequate. (*Foster v. Arcata*
14 *Assoc. Inc.* (9th Cir. 1985) 772 F.2d 1453, 1459, cert denied, (1986) 475 U.S. 1048, overruled on
15 other grounds by *Kennedy v. Allied Mutual Ins. Co.* (9th Cir. 1991) 952 F.2d 262.) This is
16 because vague and conclusory allegations are legally insufficient to support civil rights claims or
17 to withstand summary judgment. (*Keniston v. Roberts, supra*, 717 F.2d at 1300.). As such, AFA
18 must support its First Amendment claims with actual evidence demonstrating that deterrence of
19 its First Amendment rights “was a substantial or motivating factor in [the Foundation's] conduct.”
20 (*Sloman v. Tadlock* (9th Cir. 1994) 21 F.3d 1462 [applying intent-based, retaliatory discharge
21 framework to claim that police officers' actions were intended “to prevent [plaintiff] from
22 expressing his political views”].) In other words, AFA must show that defendants “intended to
23 interfere with [its] First Amendment rights.” (*Mendocino Environmental Center v. Mendocino*
24 *County* (9th Cir. 1999) 192 F.3d 1283, 1300.)

25 The same standard applies to AFA's claims under the California Constitution. When
26 interpreting similar provisions of the California Constitution, “[d]ecisions of the United States
27 Supreme Court . . . ought to be followed unless persuasive reasons are presented for taking a
28 different course.” (*People v. Teresinski* (1982) 30 Cal.3d 822, 836.) Thus, “California courts

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1 have routinely followed Supreme Court precedents in addressing public employee free speech
2 matters.” (*Kaye v. Board of Trustees of the San Diego Country Public Law Library* (2009) 179
3 Cal.App.4th 48, 57 [citing examples].) Because Article 1, §§ 2, 3, and 4 of the California
4 Constitution are similar to the federal Constitution, the same federal standard applies to those
5 claims absent a persuasive reason otherwise. (*Edelstein v. City and County of San Francisco*
6 (2002) 29 Cal.4th 164, 179 [“Generally, when we interpret a provision of the California
7 Constitution that is similar to a provision of the federal Constitution, we will not depart from the
8 United States Supreme Court’s construction of the similar federal provision unless we are given
9 cogent reasons to do so”].)

10 Similarly, AFA cannot establish its equal protection claim. AFA baldly alleges that the
11 Defendants “intentionally treat[] Plaintiff differently than other similarly-situated organizations
12 based on the viewpoint of its expression.” (TAC ¶ 67.) But, a number of federal courts have held
13 that an equal protection claim cannot be brought where, as here, it is premised on the same facts
14 as a First Amendment claim. (See, e.g., *Kirby v. City of Elizabeth City* (4th Cir. 2004) 388 F.3d
15 440, 447; *Watkins v. Bowden* (11th Cir. 1997) 105 F.3d 1344, 1354; *Bernheim v. Litt* (2d Cir.
16 1996) 79 F.3d 318, 323; *Thompson v. City of Starkville* (5th Cir. 1990) 901 F.2d 456, 468;
17 *Vukadinovich v. Bartels* (7th Cir. 1988) 853 F.2d 1387, 1391–92.) For those courts willing to
18 consider equal protection claims based on First Amendment violations, those claims are generally
19 evaluated under the “class-of-one” methodology. (See, e.g., *Neveu v. City of Fresno* (E.D. Cal.
20 2005) 392 F.Supp.2d 1159 [applying “class-of-one” methodology to equal protection claim that
21 plaintiff was treated differently “for having exercised his rights to free speech”]; *Cain v. Tigard-
22 Tualatin School Dist.* (D. Or. 2003) 262 F.Supp.2d 1120, 1130–31 [dismissing claim based on
23 First Amendment retaliation].) Thus, AFA’s claim fails if, as here, there is a rational basis for the
24 cancellation (e.g. the dissemination of unapproved press releases suggesting Smithsonian and
25 Science Center sponsorship of the Event). But even if the decision to cancel was irrational, AFA
26 still cannot prove intentional discrimination. (*Village of Willowbrook v. Olech* (2000) 528 U.S.
27 562, 564 [establishing the “class-of-one” analysis and noting the requirement that plaintiff be
28 “intentionally treated differently”]; *Village of Arlington Heights v. Metropolitan Housing*

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1 *Development Corp.* (1977) 429 U.S. 252, 265 [conclusory allegations by themselves do not
2 establish an equal protection violation without proof of invidious discriminatory intent].)

3 Thus, each of AFA's civil rights claims requires proof that the cancellation of the Event
4 was the result of a discriminatory motive. Proof of improper motive cannot be the result of mere
5 speculation. (See *Karam v. City of Burbank* (2003) 352 F.3d 1188, 1194.) But, in their
6 depositions, AFA's own witnesses failed to identify any evidence of improper motive, except for
7 the singular act of the cancellation itself. (Sep. Stmt. 60.) Nevertheless, AFA in its various
8 complaints has alleged that defendants "have instituted a policy whereby the advancement,
9 promotion or discussion of intelligent design is prohibited." (TAC ¶ 41.) However, AFA has
10 developed no evidence to support this claim. In its interrogatory responses, AFA suggests that
11 documents and testimony from Chris Sion (Foundation Vice President of Food and Event
12 Services) and documents obtained from the Natural History Museum of Los Angeles County
13 demonstrate the existence of such a policy, noting that the "unanimity of position suggests a
14 policy." (Sep. Stmt. 47.1)

15 A closer examination of this "evidence" demonstrates it is either misconstrued or mere
16 speculation. AFA has previously relied on e-mails from Sion as purported evidence of
17 discriminatory intent. But this Court has previously found that those e-mails "don't show
18 discriminatory intent." (Ono Decl. Ex. 1 [July 19, 2010 Hearing Transcript] at 6:20-23.)
19 Moreover, Sion, and other Foundation witness, testified that Rudolph ultimately made the
20 decision to cancel the Event. (Sep. Stmt. 48.) Further, Sion—and every other Foundation
21 witness—denied the existence of any policy addressing the content of private events. (Sep. Stmt.
22 51.) Even the e mail from the Natural History Museum AFA relies on was not received by
23 anyone at the Foundation until after the Event was cancelled. (Sep. Stmt. 52.) In fact, the actual
24 evidence demonstrates that AFA's speculation regarding a discriminatory policy is incorrect.
25 AFA's own witnesses testified that the Foundation Defendants were aware of the Event's subject
26 matter before any agreement was reached and before they became aware of the unapproved press
27 releases. (Sep. Stmt. 11.) Rudolph testified that he "had a general understanding" as to the nature
28 of the Event based on an October 1, 2009 e-mail from Sion. (Sep. Stmt. 53.) Indeed, AFA

1 witness Joe Peterson testified that Sion was supportive of having a “conservative” event. (Sep.
2 Stmt. 54.) AFA’s witnesses also testified that the Foundation employees, particularly Sion, were
3 aggressively trying to get the contract finalized. (Sep. Stmt. 55.) The Foundation even agreed to
4 modify its standard payment terms in an effort to assist AFA. (Sep. Stmt. 56.) Tellingly,
5 Foundation employee recommendations to not cancel the Event in response to the inaccurate
6 press releases (which were ultimately rejected by Rudolph in his official capacity as Foundation
7 President) supports the conclusion that the Foundation has no policy to prohibit discussions of
8 intelligent design at private events. (Sep. Stmt. 57.)

9 Finally, the testimony of the Foundation’s witnesses demonstrate that—consistent with
10 the reasons given at the time—the Event was cancelled because AFA had violated the
11 Promotional Materials provision of the Event Policies & Procedures. All of the Foundation
12 witnesses testified that the inaccurate press releases were the reason for the cancellation. (Sep.
13 Stmt. 58.) Rudolph did not consider the subject matter of the Event when making the decision to
14 cancel (Sep. Stmt. 50), a statement that is confirmed by the fact that Foundation CFO Cynthia
15 Pygin testified that the subject matter of the Event never was discussed in her conversations with
16 Rudolph prior to the cancellation. (Sep. Stmt. 59.) Indeed, Rudolph’s concerns that the press
17 releases violated the agreement and were misleading—implying sponsorship by the Center and
18 the Smithsonian when it was only a private event —were the motivating factor for his decision to
19 cancel. (Sep. Stmts. 46, 47,49, 50.)

20 Because there is no evidence of intentional discrimination, AFA cannot prevail on its
21 alleged state and federal constitutional claims as a matter of law.

22 **B. AFA’s Federal Claims Against the Center Defendants Fail**

23 Even assuming that AFA could somehow establish that the Foundation discriminated
24 against AFA and that the Center was responsible for it, the Center, as an arm of the state, is
25 immune from lawsuits based on alleged violations of federal law.

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1 **1. The Center enjoys Eleventh Amendment immunity as an “arm of the**
2 **state”**

3 The Eleventh Amendment to the United States Constitution provides that “[t]he Judicial
4 power of the United States shall not be construed to extend to any suit in law or equity,
5 commenced or prosecuted against one of the United States by Citizens of another State, or by
6 Citizens or Subjects of any Foreign State.” (U.S. Const., XI Amendment.) The “preeminent
7 purpose of state sovereign immunity is to accord States the dignity that is consistent with their
8 status as sovereign entities.” (*Federal Maritime Com’n v. South Carolina State Ports Authority*
9 (2002) 535 U.S. 743, 760.) The Eleventh Amendment immunity applies not only when the State
10 itself is named in an action, but also to “actions against state agents and state instrumentalities.”
11 (*Regents of the University of California v. Doe* (1997) 519 U.S. 425, 429.) It has been interpreted
12 to preclude lawsuits filed in *federal court* by citizens of their own state (*Welch v. Texas Dept. of*
13 *Highways and Public Transp.* (1987) 483 U.S. 468, 472-473), as well as to preclude lawsuits filed
14 in *state court* based on a federal statute. (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000)
15 83 Cal.App.4th 1098, 1103 [“if an entity enjoys Eleventh Amendment immunity, it is also
16 immune from suit under section 1983, even in state court”].) While state entities are protected by
17 the Eleventh Amendment, local cities and counties are not. (*Monell v. Department of Social*
18 *Services of City of New York* (1978) 436 U.S. 658.)

19 Whether a governmental entity like the Center is protected by the Eleventh Amendment
20 depends on whether it “is to be treated as an arm of the State partaking of the State’s Eleventh
21 Amendment immunity, or is instead to be treated as a municipal corporation or other political
22 subdivision to which the Eleventh Amendment does not extend.” (*Mt. Healthy City School Dist.*
23 *Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 280.) Courts have looked to the following factors to
24 make that determination:

25 [1] whether a money judgment would be satisfied out of state funds, [2] whether
26 the entity performs central governmental functions, [3] whether the entity may sue
27 or be sued, [4] whether the entity has power to take property in its own name or
28 only the name of the state, and [5] the corporate status of the entity. To determine
these factors, the court looks to the way state law treats the entity.

(*Mitchell v. Los Angeles Community College Dist.* (9th Cir. 1988) 861 F.2d 198, 201.)

1 “[V]ulnerability of the State’s purse [is] the most salient factor in Eleventh Amendment
2 determinations.” (*Hess v. Port Authority Trans-Hudson Corp.* (1994) 513 U.S. 30, 48; *Durning v.*
3 *Citibank, N.A.* (9th Cir. 1991) 950 F.2d 1419, 1423-1424 [whether a money judgment would be
4 satisfied out of state funds is “the most important factor”].) In this case, if the Center were
5 subject to a money judgment, that judgment would be satisfied by money drawn from the State’s
6 General Fund. (Sep. Stmt. 30.)² Indeed, almost 90% of the Center’s spending is drawn from the
7 State’s General Fund. (Sep. Stmt. 28.) The remainder of the Center’s spending is based on work
8 for which it will be reimbursed by a third-party,³ or spending authorized by the Legislature from a
9 state special fund known as the Exposition Park Improvement Fund. (Sep. Stmt. 29.) The
10 Exposition Park Improvement Fund would not be available to fund a judgment in this case, as
11 expenditures from that fund “may only be used, upon appropriation from the Legislature, for
12 improvements to Exposition Park,” (Food & Agr. Code, § 4106, subd. (e).)

13 A finding that the state’s purse is at risk should end the “arm-of-the-state” inquiry. But
14 even a review of the remaining, less significant factors support the conclusion that the Center is
15 an arm of the State for Eleventh Amendment purposes. Tellingly, the State has control over the
16 Center’s litigation. While the Center may be sued, it cannot sue without obtaining the approval of
17 the Department of Food and Agriculture. (Food & Agr. Code, § 3954.) Likewise, the Center
18 takes money in the name of the State. Money donations to the Center are not held directly by the
19 Center, but are sent to the Legislature controlled Exposition Park Improvement Fund, and can
20 only be appropriated back to the Center by the Legislature. (Sep. Stmt. 31; Tateishi Decl. ¶ 7.)

21 Finally, corporate status seals the analysis. The Legislature created the Center, housed it
22 within the State’s State and Consumer Services Agency, determined that it is “an instrumentality
23 this state”, decreed that it is a “state institution”, proclaimed that its directors are “state officers”,
24

25 ² The fact that the Center may have contractual indemnity rights from a third party is
26 irrelevant to an arm of state analysis. (*Regents of the University of California v. Doe* (1997) 519 U.S. 425,
431 [“The Eleventh Amendment protects the State from the risk of adverse judgments even though the
State may be indemnified by a third party”].)

27 ³ For example, the Center is authorized to incur postage expenses for the Foundation up to a
28 certain limit, so long as the Foundation reimburses the Center for the actual cost.
29

1 and provide state control by requiring that its directors be appointed by the Governor. (Food &
2 Agr. Code, §§ 3953, 3959, 3962, 4101.)

3 AFA has previously cited *ITSI TV Productions v. Agricultural Assns.*, for the proposition
4 that at least one obscure district agricultural association could not establish that it was an arm of
5 the state based upon the particular facts of that case. (*ITSI TV Productions, Inc. v. Agricultural*
6 *Assns.* (9th Cir. 1993) 3 F.3d 1289.) The *ITSI TV* court recognized that the “most important
7 factor” in determining whether a different agricultural association was protected by the Eleventh
8 Amendment was “whether a money judgment would be satisfied out of state funds.” (*Id.*, at p.
9 1292.) After determining that all of that particular agricultural association’s funds were received
10 from sources other than the State’s General Fund, the Court concluded that it was not protected
11 by the Eleventh Amendment. (*Id.*, at pp. 1292-1293.) That is clearly not the case here as almost
12 90% of the Center’s budget comes out of the State’s General Fund. (Sep. Stmt. 28.) As such, the
13 Center is an arm of the state for purposes of the Eleventh Amendment, and immune from AFA’s
14 Second, Third and Fourth Causes of Action premised on violations of federal law.

15 **2. The Center is not a “person” under 42 U.S.C. § 1983**

16 While the Fourteenth Amendment allows Congress to enact certain statutes that abrogate a
17 state’s sovereign immunity, the United States Supreme Court has unambiguously held that
18 Congress did not abrogate the states’ sovereign immunity when it enacted 42 U.S.C. § 1983.
19 (*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 64 [“a state is not a person within the
20 meaning of § 1983”].) The court’s ruling was based on the fact that only “persons” are subject to
21 § 1983, and Congress did not intend for states to be included within the definition of persons. (*Id.*,
22 p. 65.) Because the Center is an arm of the state and therefore not a person for purposes of
23 § 1983, AFA’s Second and Third Causes of Action, expressly based on 42 U.S.C. § 1983, are
24 therefore prohibited as a matter of law. (*Id.*) AFA’s Fourth Cause of Action, premised on an
25 alleged violation of the equal protection clause found in the federal Constitution’s Fourteenth
26 Amendment, is similarly barred for the same reasons, as courts have held that a violation of the
27 equal protection clause can only be prosecuted through a 42 U.S.C. § 1983 action. (*Bank of Lake*
28 *Tahoe v. Bank of America* (9th Cir. 2003) 318 F.3d 914, 917 [claim for equal protection violation

1 “must utilize 42 U.S.C. § 1983”], citing *Azul-Pacifico, Inc. v. City of Los Angeles* (9th Cir. 1992)
2 973 F.2d 704, 705.)

3 **C. AFA’s Federal Claims Against Rudolph Fail**

4 “Plaintiff is limited to injunctive and declaratory relief against the individual defendants in
5 their official capacities, and damages against the individual defendants in their personal
6 capacities.” (*Carmen v. San Francisco Unified School Dist.* (N.D. Cal 1997) 982 F.Supp. 1396,
7 1407.)

8 **1. No relief is available against Rudolph in his official capacity**

9 **a. Damages are not available against Rudolph in his official
10 capacity**

11 The Supreme Court has held that “[s]tate officers sued for damages in their official capacity
12 are not ‘persons’ for purposes of [a § 1983] suit because they assume the identity of the
13 government that employs them.” (*Hafer v. Melo* (1991) 502 U.S. 21, 27.) Inasmuch as the
14 Center is a State entity, Rudolph, in his official capacity as President and CEO of the Center, also
15 enjoys the same immunity. (*Will v. Michigan, supra*, 491 U.S. at 71.) Therefore, AFA’s claim
16 for damages against Rudolph in his official capacity is barred just as AFA’s claims are barred
17 against the Center.

18 **b. Injunctive relief is not available against Rudolph in his official
19 capacity**

20 While the State’s Eleventh Amendment immunity bars all manner of claims against the
21 Center, it does not prevent a plaintiff from seeking prospective injunctive relief against a state
22 officer acting in his official capacity. (*Ex Parte Young* (1908) 209 U.S. 123; *Pennhurst State Sch.
23 & Hosp. v. Halderman* (1984) 465 U.S. 89.) To obtain an injunction, however, the plaintiff must
24 prove that it faces a significant threat of a future injury. (*Haley v. Casa Del Rey Homeowners
25 Ass’n* (2007) 153 Cal.App.4th 863, 873 [“Injunctive relief is available to prevent future harm, not
26 to address past harm”]; *Bank of Lake Tahoe v. Bank of America* (9th Cir. 2003) 318 F.3d 914,
27 918.)

28 AFA ostensibly seeks an injunction prohibiting Rudolph, in his official Center capacity,
from refusing to allow AFA access to hold private events, including events concerning intelligent

1 design. (Sep. Stmt. 67.) But Rudolph, in his Center capacity, has no control over private event
2 bookings at the IMAX. (Sep. Stmts. 62, 63, 68.) He has no ability to rent the IMAX to AFA or
3 any other third party for a private event now or in the future. (Sep. Stmt. 63, 68.) The IMAX
4 Lease even expressly prohibits the Center from requiring the Foundation to show any particular
5 film. (Sep. Stmt. 61.)

6 Because Rudolph, in his official Center capacity, has no control over which private events
7 the Foundation may prospectively book with private entities like AFA, AFA does not face a
8 threat of future harm from him in his Center capacity. In other words, AFA cannot obtain an
9 injunction against Rudolph in his official Center capacity because Rudolph, in that capacity, is
10 incapable of having future private event-related dealings with AFA.

11 **2. No relief is available against Rudolph in his individual capacity**

12 **a. AFA is not entitled to damages against Rudolph in his**
13 **individual capacity as he possesses qualified immunity**

14 The doctrine of qualified immunity protects public officials from personal liability when
15 performing discretionary functions. (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.) In order to
16 overcome a public official's qualified immunity, a plaintiff is required to show that the official (i)
17 violated clearly established statutory or constitutional rights, (ii) of which a reasonable person
18 would have known. (*Conn v. Gabbert* (1999) 526 U.S. 286, 290; *Pearson v. Callahan* (2009) 555
19 U.S. 223; 109 S.Ct 818 [Doctrine of qualified immunity protects a government official from
20 personal liability when such official reasonably believes his conduct complies with the law.];
21 *Davis v. Scherer* (1984) 468 U.S. 183, 197 [The plaintiff shoulders the burden of proving that the
22 rights he claims are "clearly established"].) "The protection of qualified immunity applies
23 regardless of whether the government official's error is a mistake of law, a mistake of fact, or a
24 mistake based on mixed questions of law and fact." (*Pearson, supra*, 109 S.Ct. at p. 815.) Thus,
25 the qualified immunity standard gives ample room for mistaken judgments by protecting all but
26 the plainly incompetent or those who knowingly violate the law. (*Brian v. Hunter* (1991) 502
27 U.S. 224, 229; *Davis, supra*. 468 U.S. at p. 197 ["[Qualified immunity] safeguards all but the
28 plainly incompetent or those who knowingly violate the law....[I]f officers of reasonable

1 competence could disagree on [whether a chosen course of action is constitutional], immunity
2 should be recognized.”]; *Harlow, supra*, 457 U.S. at pp. 816-17 [Bare allegations of malice
3 should not suffice to subject government officials” to the burdens of trial or extended discovery].)
4 Indeed, this accommodation for reasonable error exists “because officials should not err always
5 on the side of caution because they fear being sued.” (*Hunter, supra*, 502 U.S. at p. 229.)

6 For the reasons discussed above, Rudolph, in his individual (or any other) capacity, did
7 not violate AFA’s constitutional rights.⁴ But assuming arguendo that AFA somehow established
8 a constitutional violation by Rudolph, a reasonable official in Rudolph’s position could
9 nevertheless have believed that it was within his discretion to cancel the Event contract under the
10 circumstances presented.

11 Whether a reasonable official *under these facts* could have believed that it was not
12 unconstitutional to cancel the Event contract is a question of law the court can determine on
13 summary judgment. (*Knox v. Southwest Airlines* (9th Cir. 1997) 124 F.3d 1103, 1107 [For
14 qualified immunity inquiry, reasonableness of defendant’s actions are not a question of fact, they
15 are a question of law].) Here, Rudolph’s uncontroverted testimony was that he canceled the
16 Event contract without regard to the content of AFA’s Event. (Sep. Stmts. 69, 70.) Rudolph
17 further testified that he believed that AFA violated the terms of the Event contract, and that
18 violation of the contract gave the Foundation the right to cancel. (Sep. Stmts. 70, 73.) Upon
19 these facts, even were Rudolph’s decision to cancel ultimately wrong and in breach of the Event
20 contract, a reasonable official in Rudolph’s position could easily have believed that cancellation of
21 the Event contract under the circumstances was constitutional. As such, Rudolph is afforded
22 qualified immunity for that decision and plaintiff’s claims asserted against him in his individual
23 capacity and barred as a matter of law.

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26 _____
27 ⁴ Rudolph canceled the Event contract in his official capacity as Foundation President.
28 (Sep. Stmt. 49.) The qualified immunity argument is made arguendo to address the Third Amended
Complaint’s unfounded, scatter-gun, allegation of wrongdoing in Rudolph’s individual capacity.

1 **b. AFA can seek an injunction governing the Center's actions only**
2 **against Rudolph in his official capacity**

3 AFA cannot obtain an injunction against Rudolph in his personal capacity, as the
4 injunction seeks to regulate his activities as it relates to duties in his official capacity. (*Carmen v.*
5 *San Francisco Unified School Dist.* (N.D. Cal 1997) 982 F.Supp. 1396, 1407 ["Plaintiff is limited
6 to injunctive and declaratory relief against the individual defendants in their official
7 capacities..."].)

8 **3. Even if AFA prevails on its Constitutional claims, it is not entitled to**
9 **money damages as claimed**

10 AFA's operative Third Amended Complaint seeks money damages for the alleged violation
11 of the California Constitution. However, AFA cannot satisfy the necessary damages element of
12 its cause of action, as no money damages are available even if there was a violation of the
13 California Constitution. The Supreme Court expressly held that a plaintiff cannot obtain money
14 damages even if it proves a violation of Article I, section 2 (speech). (*Degrassi v. Cook* (2002) 29
15 Cal.4th 333, 342.) A court of appeal recently expressly held that a plaintiff cannot obtain money
16 damages even if it proves a violation of Article I, section 3 (association). (*MHC Financing Ltd.*
17 *Partnership Two v. City of Santee* (2010) 182 Cal.App.4th 1169, 1184.) While the Center is
18 aware of no case law directly discussing the availability of money damages for a violation of
19 Article I, section 4 (religion), the same result should follow the courts' holdings that no money
20 damages are available for violations of Article I, § 2 (speech) and § 3 (association.) (See
21 *Katzberg v. Regents of the University of California* (2002) 29 Cal.4th 300.)

22 **III. BECAUSE THERE IS NO EVIDENCE OF A CONSTITUTIONAL VIOLATION, AFA'S**
23 **CAUSE OF ACTION FOR DECLARATORY RELIEF IS MOOT**

24 AFA requests judicial declarations that "the cancellation of the EVENT and breach of the
25 contract violated the United States Constitution and the California Constitution" and that "the
26 Defendants engaged in content and viewpoint discrimination by preventing Plaintiff from
27 addressing the topic of intelligent design in a public forum." (TAC ¶¶ 111, 112.) As discussed
28 above, AFA cannot prove violations of the United States Constitution or the California

1 Constitution. Thus, the request for declaratory relief is moot, and summary adjudication should
2 be granted.

3 **IV. AFA CANNOT SEEK PUNITIVE DAMAGES AGAINST THE CENTER**

4 Paragraph 4 of AFA's prayer for relief seeks "punitive and exemplary damages on the
5 Fourth Cause of Action for Fraud." (Sep. Stmt. 82.) This prayer for punitive damages should be
6 deemed moot as the court has already sustained the Center's demurrer to AFA's fraud cause of
7 action.

8 To the extent that any claim for punitive damages against the Center as to any remaining
9 cause of action can be deemed adequately pled, which it is not, such a prayer is barred as a matter
10 of law. Government Code section 818 expressly states, "[n]otwithstanding any other provision of
11 law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or
12 other damages imposed primarily for the sake of example and by way of punishing the
13 defendant." (Gov. Code, § 818.) Therefore, AFA may not seek punitive damages against the
14 Center for any reason.

15 **CONCLUSION**

16 For all the foregoing reasons, the California Science Center and Jeffrey Rudolph, in his
17 individual and official capacity as President and CEO of the California Science Center,
18 respectfully request that the court enter summary judgment or, in the alternative, summary
19 adjudication, in their favor and against AFA.

20 Dated: March 23, 2011

Respectfully Submitted,

21 KAMALA D. HARRIS
22 Attorney General of California

23 

24 ALLAN S. ONO
25 Deputy Attorney General
26 *Attorneys for Defendants*
27 *California Science Center and Jeffrey*
28 *Rudolph in his individual and official*
capacity as President and CEO of the
California Science Center

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DECLARATION OF SERVICE BY MESSENGER

Case Name: **American Freedom Alliance v. California Science Center, et al.**

No.: **BC 423687**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On March 25, 2011, I caused the attached DEFENDANTS CALIFORNIA SCIENCE CENTER AND JEFFREY RUDOLPH IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS PRESIDENT AND CEO OF THE CALIFORNIA SCIENCE CENTER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION ON PLAINTIFF'S THIRD AMENDED COMPLAINT to be personally served by Ace Messenger Service by placing a true copy thereof for delivery to the following person(s) at the address(es) as follows:

William J. Becker, Jr., Esq.
The Becker Law Firm
11500 Olympic Boulevard, Suite 400
Los Angeles, CA 90064

James L. Zelenay Jr., Esq.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 25, 2011, at Los Angeles, California.

Olivia Padilla
Declarant


Signature