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FILED
LOS ANGELES SUPERIOR COURT

MAY 26 2011

JOHN A. CLARKE, CLERK
BY *Raul Sanchez* DEPUTY

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

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

14 Plaintiff,

15 vs.

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

22 Defendants.

Case No. BC423687

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

**PLAINTIFF AMERICAN FREEDOM
ALLIANCE'S RESPONSE TO
DEFENDANT CALIFORNIA SCIENCE
CENTER FOUNDATION'S SEPARATE
STATEMENT RE: AMERICAN
FREEDOM ALLIANCE'S FIRST CAUSE
OF ACTION FOR BREACH OF
CONTRACT ON THE GROUND THAT
THE FOUNDATION'S CANCELLATION
WAS JUSTIFIED**

[Memo. of Ps & As; Obj. to Evid.; Decl. of W.
Becker, Jr.; Decl. of T. Woodward; Decl. of P.
Lepiscopo; Appdx. of Non-Calif. Auth.; and
[Proposed] Order filed concurrently herewith]

HEARING DATE: June 9, 2011
HEARING TIME: 8:45 a.m.
DEPT: 14

Complaint Filed 10/14/09
TAC Filed: 9/18/10
Trial: 9/12/11

1 Plaintiff, American Freedom Alliance, hereby submits this Separate Statement of
 2 Disputed and Undisputed Facts in Opposition to The Motion Of Defendants, California Science
 3 Center Foundation and Jeffrey Rudolph, For Summary Adjudication Motion For Summary
 4 Adjudication On American Freedom Alliance's First Cause Of Action For Breach Of Contract
 5 On The Grounds That The Foundation's Cancellation Was Justified and in response to
 6 Defendants' Separate Statement of Undisputed Material Facts.

<u>MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE</u>	<u>OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE</u>
DEFENDANTS' ISSUE NO. 1: THE FOUNDATION DEFENDANTS ARE ENTITLED TO SUMMARY ADJUDICATION BECAUSE AFA COMMITTED A MATERIAL BREACH OF THE CONTRACT.	
11 1. The Foundation is a non-profit, section 12 501 (c)(3) organization that raises funds to 13 support exhibits and educational programs 14 featured at the California Science Center 15 (the "Science Center"). 16 (Zelenay Decl., Exh. 53 [Dep. Exh. 200, 17 Rudolph Injunction Decl.] at ¶¶ 3, 6; Exh. 1 18 [Rudolph Dep. Tr.] at 38:11-15.)	Undisputed.
20 2. The Foundation's Event Services Office 21 manages and arranges for the use of areas 22 within the California Science Center for 23 private events that occur after public hours. 24 (Zelenay Decl., Exh. 1 [Rudolph Dep. Tr.] 25 at 159:14-160:7, 163:15-164:9; Exh. 2 26 [Sion Dep. Tr.] at 80:1-7, 386:16-387:14, 27 400:25-402:4; Exh. 53 [Dep. Exh. 200, 28 Rudolph Injunction Decl.] at 2:22-26.)	Undisputed.

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<p>3. In or about May of 2009, the Discovery Institute and AFA began to have discussions about holding an event in Los Angeles relating to intelligent design.</p> <p>(Zelenay Decl., Exh. 40 [Dep. Exh. 151, 5/27/09 Bylsma email]; Exh. 26 [Dep. Exh. 47, 9/28/09 Crowther email] [“they are now trying to do the screening of Darwin’s Dilemma at the California Science Center IMAX theater. If they get that venue, all hell will break loose with the Darwinists. . . . This has the potential for some fun publicity.”]; Exh. 4 [Bylsma Dep. Tr.] at 21:19-24:8, 25:24-26:24, 28:2-30:4, 36:3-17, 46:11-47:11; Exh. 3 [West Dep. Tr.] at 15:12-24.)</p>	<p><i>Disputed</i> that AFA and the Discovery Institute began discussions for the purpose of jointly producing an event. <i>Disputed</i> that discussions of any sort began in or about May 2009. Undisputed that AFA and the Discovery Institute discussed AFA’s interest in producing an event in Los Angeles relating to intelligent design.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>(Becker Decl., Exh. No. 2, Bylsma Dep. Tr., 25:24-31:2. [“I don’t recall when I had my first contact with them regarding this series of events.”].</p>
<p>4. Peter Bylsma acted on AFA’s behalf to conduct publicity related to the Event, and in late 2009 was also acting informally as an executive director for AFA.</p> <p>(Zelenay Decl., Exh. 4 [Bylsma Dep. Tr.] at 43:16-46:9, 68:1-71:2, 72:1-12, 293:18-295:16; Exh. 5 [Davis Dep. Tr.] at 97:24-98:11, 274:10-275:13; Exh. 51 [Dep. Exh. 171, 10/27/09 Bylsma email].)</p>	<p>Undisputed.</p>
<p>5. On or around September 24, 2009, Chris Sion, an employee at the Foundation, was</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of</p>

<p>1 contacted by AFA regarding scheduling a 2 private event at the California Science 3 Center. 4 5 (Zelenay Decl., Exh. 2 [Sion Dep. Tr.] at 6 75:11-79:25, 255:25-257:22; Exh. 20 [Dep. 7 Exh. 33, 9/25/09 Peterson email] at p. 6.) 8</p>	<p>this case with regard to whether Moving Parties were justified in cancelling AFA's contract and event or whether AFA committed a material breach of the contract. This is foundational background information. Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Undisputed.</p>
<p>9 6. Over the course of several days in late 10 September 2009 and early October 2009, 11 the Foundation and AFA conducted 12 logistical discussions concerning the 13 possible booking of the IMAX theater at the 14 California Science Center for a private 15 event on October 25, 2009 (the "Event"). 16 17 (Zelenay Decl., Exh. 2 [Sion Dep. Tr.] at 18 96:8- 98:20; Exh. 5 [Davis Dep. Tr.] at 19 83:25-84:2.)</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether Moving Par- ties were justified in cancelling AFA's con- tract and event or whether AFA committed a material breach of the contract. It merely pro- vides background. Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party under- stands this alleged fact: Undisputed.</p>
<p>20 7. AFA has stated that the Discovery 21 Institute was a co-sponsor or partner of the 22 Event. 23 24 (Zelenay Decl., Exh. 4 [Bylsma Dep. Tr.] at 25 63:10-67:25, 88:5-90:22, 150:15-151:24, 26 160:13-161:6, 167:22-171:7; Exh. 41 [Dep. 27 Exh. 153, 9/16/09 Bylsma email]; Exh. 19 28 [Dep. Exh. 31, AFA press release stating that "American Freedom Alliance and Discovery Institute Partner" for the Event];</p>	<p><i>Disputed.</i> The Discovery Institute was not a co-sponsor or partner of the October 25, 2009, Event. Nor has AFA ever publicly, or officially, stated that it was. During the early stages of preparing for an event that was to have been produced at another venue, Peter Bylsma, AFA's publicist, utilized language that was never approved or adopted for use in a draft version of a press release and a draft version of a brochure he prepared. The Moving Party's evidence does not support the</p>

1 Exh. 5 [Davis Dep. Tr.] at 230:18-233:25];
2 Exh. 7 [S. Levi Dep. Tr.] at 51:24-55:10,
3 58:21-9:24, 61:1-62:23 [stating that Dep.
4 Exh. 31 was posted to the AFA website];
5 Exh. 56 [Dep. Exh. 233, 9/11/09 Davis
6 email] at p. 2 [stating that the Darwin
7 Debates were to be "co-hosted by the
8 Discovery Institute"].)

alleged fact that "AFA has stated that the
Discovery Institute was a co-sponsor or
partner of the Event." A mock-up brochure
with draft content, states that "This needs to
be confirmed, approved and polished but will
serve to get things laid out." The press release
purporting to identify the Discovery Institute
as a "partner" with AFA was not approved by
AFA and did not appear on its web site.
Stella Levy, AFA's graphic artist consultant,
could not state affirmatively that the press
release was published, speculated when asked
whether it was ["That's what I believe." We
can check."]. Davis testified that the
Discovery Institute was not a co-sponsor and
took no financial risk in the event. Bylsma
testified that he used the term "partner" in a
loose sense of the word not intending to
convey co-sponsorship.

SUPPORTING EVIDENCE:

Becker Decl., Exh. No. 4, Davis. Dep. Tr.,
251:11-252:2 ["The document you presented
to me called the Press Release, which has the
word 'partner,' the Discovery Institute is part-
nering with the American Freedom Alliance,
was never released. It was a draft document. It
was presented for my perusal. I would never
have allowed such a document to be distribut-
ed. It required my approval. And I believe the
eventual press release actually, I am not cer-
tain if we actually did do another press re-

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lease, but that press release would never have gone out. Q. Is there any more, sir? A. Well, the reason that it wouldn't have gone out is because *we were not partnering with the Discovery Institute*. And so I would never have approved it.”; emphasis added.]; *id.*, 232:23-233:15 [“American Freedom Alliance and Discovery Institute partner to highlight the debate at film debut screening October 25.” Q. Do you see that, sir? A. Yeah, I do. Q. That's accurate, right? A. It isn't accurate because *we weren't partnering.*” emphasis added.]; *id.*, Exh. No. 17, Levy Dep. Exh. 233 (9/8/09 e-mail from P. Bylsma to S. Levy) [“This needs to be confirmed, approved and polished but will serve to get things laid out.”]; *id.*, Exh. No. 5, Levy Dep., 62:1-11 [“Do you recall which one of these two is the one that was on the website? A. I think this one. Q. Exhibit -- the document that's marked Exhibit 31 is the one that you believe has been on the website? A. Yes. MR. BECKER: *Do you know?* THE WITNESS: That's what I believe. *We can check.* But I believe that this one is the one, Exhibit 31.”; emphasis added.]; *id.*, Exh. No. 4, Davis Dep. Tr., 231:8-9 [“And was it an accurate description of what this program was all about?” Yes, apart from the fact that the word ‘partner’ might be misconstrued to identify the Discovery Institute as a sponsor of the event. My thoughts at the time were to men-

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tion the Discovery Institute because of its reputation as the premier think tank for Intelligent Design in order to sell tickets. The term 'partner,' as a synonym for 'co-sponsor,' never crossed my mind, and it was not what we intended to convey to the public. It was an accurate description about the program as far as I was concerned at the time, without the benefit of hindsight this litigation has presented, and also deals with many other events taking place within that time frame."]; *id.*, Exh. No. 4, Davis Dep. Tr., 48:9-10 ["They were not an official co-sponsor of the event."]; *id.*, 166:1-3 [*"It wasn't their event. They weren't involved in organizing it. They had no financial risk or responsibility."*; emphasis added.]

8. The Discovery Institute provided services to AFA by arranging for at least one of its employees to speak at the Event. This speaker would travel from Seattle to Los Angeles at no charge to AFA.

(Zelenay Decl., Exh. 5 [Davis Dep. Tr.] at 41:3-42:11, 113:25-115:10; Exh. 3 [West Dep. Tr.] at 18:8-19:16, 41:9-43:23.)

Undisputed.

9. AFA coordinated with the Discovery Institute on the publicity related to the Event, and was aware that the Discovery Institute intended to distribute its own promotional materials related to the Event.

Objection. Vague and ambiguous as to the term "coordinated," "was aware" and "intended to distribute." Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands the alleged fact: Undisputed.

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(Zelenay Decl., Exh. 65 [AFA's Supplemental Responses to Foundation's 2nd RFAs, No. 6] at 5:3-22; Exh. 4 [Bylsma Dep. Tr.] at 48:18-52:6, 77:9-82, 88:5-90:22, 92:16-95:12, 103:20-105:11, 127:14-133:12, 154:8-22, 193:19-194:7, 195:11-199:23; Exh. 14 [Dep. Exh. 22, 9/28/09 Crowther email] ["Before we begin aggressively promoting this I wanted to confirm that these dates are for sure, and that you all have contracts in place"] Exh. 22 [Crowther Dep. Exh. 40, 9/21/09 West email] [asking for contact information for DI public relations counsel, "with whom I would like to coordinate our efforts:]; Exh. 25 [Crowther Dep. Exh. 45, 9/23/09 Bylsma email]; Exh. 27 [Dep. Exh. 50, 9/28/09 Crowther email]; Exh. 28 [Dep. Exh. 52, 9/29/09 West email]; Exh. 29 [Dep. Exh. 53, 9/30/09 West email], Exh. 32 [Dep. Exh. 56, 10/2/09 Crowther email]; Exh. 42 [Dep Exh. 155, 9/21/09 Bylsma email]; Exh. 43 [Dep. Exh. 157, 9/30/09 Bylsma email; Exh. 46 [Dep. Exh 161, 10/2/09 Bylsma email]; Exh 5 [Davis Dep. Tr.] at 38:1-17, 112:6-113:16, 168:10-170:4, 170:25-171:16; Exh. 8 [Crowther Dep. Tr.] at 82:20-85:7, 91:20-93:6, 103:23-104:6 ["My recollection is that I explained [to Bylsma] what we were already doing to support/promote the film"], 107:5-24

1 ["That's what I was explaining to them,
2 what we were doing to support the film,
3 what our effort would be for promoting one
4 of our films."], 162:21-163:24, 172:21-
5 176:8; Exh. 3 [West Dep. Tr.] at 22:8-26:3;
6 Exh. 9 [Luskin Dep. Tr.] at 51:7-14.)

7 10. In the initial discussions about the
8 Event, the Foundation was aware of the
9 nature of the Event and that AFA planned to
10 show the movie "Darwin's Dilemma" and
11 have a debate about intelligent design and
12 Darwinism. As the Event was a private
13 event, this was of no concern to the
14 Foundation.

15 (Zelenay Decl., Exh. 2 [Sion Dep. Tr.] at
16 66:15-21, 132:8-141 :4 [rejecting request
17 that the Science Center become a partner in
18 the Event]; Exh. 1 [Rudolph Dep. Tr.] at
19 238:5-15 ["I think that our policies and
20 practices and everything we've done,
21 including in this case, would have allowed a
22 private event to go ahead and debate
23 whatever they want, if it's a private event."]
24 324:1-23 ["generally, a private event
25 doesn't bother us what it's about, because it
26 is a private event, just a use of our
27 facilities:]; Exh. 5 [Davis Dep. Tr.] at
28 152:1-153:2, 153:8-155:18, 155:25-156:5.)

Objection. Vague and ambiguous as to the terms "aware of" and "nature of the dispute." Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: *Disputed* that in the initial discussions the Foundation was aware of the "the nature" of the Event. Sion testified that she believed that the event was "something that would *dispute* the theory of evolution." (Emphasis added.) In fact, the Event was not designed to "dispute" the theory of evolution but to screen two films, "Darwin's Dilemma" and "We Are Born of Stars." The former film focused on Charles Darwin's concerns that his theory could not solve the riddle of the Cambrian Explosion. The latter film was intended to present a "pro-evolution" [i.e., pro-Darwin] perspective. The event was part of a series of events entitled "Debating Darwin."

SUPPORTING EVIDENCE:

Becker Decl., Exh. No. 52 (excerpts from transcript of *Darwin's Dilemma* produced in Response to Subpoena Duces Tecum served on the Natural History Museum of Los

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Angeles County, quoting Charles Darwin from "On the Origin of the Species": "If my theory be true, it is indisputable that before the lowest Cambrian stratum was deposited, long periods elapsed, and during these periods of time, the world swarmed with living creatures. To the question of why we do not find rich, fossiliferous deposits belonging to these assumed earlier periods, prior to the Cambrian, *I can give no satisfactory answer.*"; emphasis added.] *id.* ["The distinctness of specific forms, and their not being blended together by innumerable transitional links, *is a very obvious difficulty.* I allude to the manner in which species belonging to several of the main divisions of the animal kingdom suddenly appear in the lowest known fossiliferous rocks."; emphasis added.]; *id.*, Exh. No. 6, Peterson Tr., 29:6-10, AFA "wanted to have a balanced presentation" and "to bring in pros and cons of Darwinism and try to have an even-handed debate, public series of events about that." *Id.*, 30:3-8 ["And I said, 'To be fair, you need to have a pro-evolution film. And I have a great film for you to do that. It is one of my all-time favorite films.' And I told him about the film 'We Are Born of Stars.'"]; *id.*, Exh. No. 9, Sion Dep. Tr., 143:6-17 [Q. Did you have an understanding at the time that you wrote this e-mail that any of the films were to

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	<p>be shown by AFA at their event would Darwin's theory of evolution as you it? A. I believe -- I believe at this time I that there was a DVD that was being proposed to at the same event that was called something to the effect [of] Darwin's Dilemma, Challenging Darwin, or something of that nature. And that's what made me think that there was something that would dispute the theory of evolution.]</p>
<p>11. On or around September 25, 2009, the Foundation sent to AFA an Event Price Estimate and copy of the Event Policies and Procedures. These documents state that no contract would be formed until the documents are signed by AFA and received by the Foundation.</p> <p>(Zelenay Decl., Exh. 20 [Dep. Exh. 33, 9/25/09 Peterson email] at p. 1; Exh. 6 [Peterson Dep. Tr.] at 98:1-99:22; Exh. 12 [Dep. Exh. 16, contract] at pp. 1 & 3; Exh. 2 [Sion Dep. Tr.] at 226:16-231:19, 242:9-243:9.)</p>	<p>Disputed. Neither the Event Price Estimate ("EPE") nor the Event Policies and Procedures ("EPP") states "that no contract would be formed until the documents are signed by AFA and received by the Foundation." The EPP specifically provides that "[o]nce a client's Event Price Estimate is signed and the Science Center's Events Department has received a deposit, <i>an Event Manager will handle scheduling and be the liaison between the client and the Science Center.</i> By signing the Event Price Estimate, you are acknowledging your agreement with these policies and procedures." It does not refer to the formation of a contract.</p> <p>SUPPORTING EVIDENCE: Becker Decl., Exh. No. 41, Sion Dep. Exh. No. 16 (EPE and EPP only).</p>
<p>12. The Event Services Department requires that all contracting parties agree to comply with the Event Services Policies and Procedures.</p>	<p>Undisputed. Only <i>contracting</i> parties were required to agree to comply with the Event Services Policies and Procedures.</p>

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<p>(Zelenay Decl., Exh. 1 [Rudolph Dep. Tr.] at 168:5-169:11; Exh. 53 [Dep. Exh. 200, Rudolph Injunction Decl.] at 2:24-26.)</p>	
<p>13. A provision in the Event Services Policies and Procedures relates to the issuance of promotional materials regarding private events. This provision states:</p> <p>PROMOTIONAL MATERIALS: It is required that the Event Services Office approve, for technical and factual accuracy, all promotional materials mentioning the California Science Center produced for your event (including invitations, programs, press releases, etc.) prior to printing or broadcast. Please allow sufficient time for this approval.</p> <p>(Zelenay Decl., Exh. 12 [Dep. Exh. 16, contract] at p. 6; Exh. 1 [Rudolph Dep. Tr.] at 217:25-219:23; Exh. 2 [Sion Dep. Tr.] at 226:16-231:19.)</p>	<p>Undisputed.</p>
<p>14. The Promotional Materials provision is intended to ensure that the name of the California Science Center or the Foundation is not misappropriated by groups holding private events at the Center.</p> <p>(Zelenay Decl., Exh. 2 [Sion Dep. Tr.] at 102:18- 103:6 [provision is important “[t]o preserve the name and reputation of the</p>	<p>Undisputed.</p>

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California Science Center or California Science Center Foundation”].)	
15. Because the California Science Center and the Foundation have a valuable interest in maintaining a good reputation in the community and worldwide, it tries to ensure that private groups do not appropriate the reputation of the Science Center for their own benefit and for private events that the Science Center or the Foundation is not sponsoring. (Zelenay Decl., Exh. 1 [Rudolph Dep. Tr.] at 224:4-20 [“If we do an event, it’s usually from the beginning and the formation of an event and the development of a program that we would do that.”], 236:16-237:1 [“I have no objection to any debate. I have concerns about whether events are private or public and whether the name of our institution is attached to an event that is not our event in an inappropriate way.”], 291:5-293:3 [“the second issue was the reputation of the California Science Center, which is the most valuable thing we have is our name and our reputation, and we protect that in everything we do; at least we attempt to protect that in everything we do is what I should say”].)	Undisputed.
16. The Event Policies and Procedures also	Objection. Immaterial. The alleged fact has

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<p>contain a provision stating: LIABILITIES: ... Clients are to ensure that all vendors review and agree to comply with all requirements established by the California Science Center.” (Zelenay Decl., Exh. 12 [Dep. Exh. 16, contract] at p. 4; Exh. 2 [Sion Dep. Tr.] at 226:16-231:19.)</p>	<p>no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract because the Discovery Institute was not a vendor. <i>See</i> Black’s Law Dict. (6th ed. 1991) p. 1079 [“<i>Vendor</i>. The person who transfers property or goods by sale. A seller of goods or services. A merchant, retail dealer, supplier, importer, wholesale distributor; one who buys to sell; a seller.”]; <i>see also Paykar Construction, Inc. v. Bedrosian</i> (1999) 71 Cal.App.4th 803, 807 [“The statute uses the word ‘sale,’ which is defined in Black’s Law Dictionary (6th ed.1990) as: “A contract between two parties, called, respectively, the ‘seller’ (or vendor) and the ‘buyer’ (or purchaser), by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property.’ ”]; Becker Decl., Exh. No. 4, Davis Dep. Tr., 376:25-377:4 [“They are providing us with services. <i>Now, they are not being paid for those services</i>” (emphasis added)]. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed.</p>
<p>17. As a provider of speakers and publicity for the Event, AFA’s President, Avi Davis, described the Discovery Institute as a vendor for the Event.</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract because</p>

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<p>(Zelenay Decl., Exh. 5 [Davis Dep. Tr.] at 113:25-115:10, 374:23-377:10 ["I think they are like a contractor. They are providing us with services."]; Exh. 3 [West Dep. Tr.] at 18:8-19:16, 41:9-43:23; see also Sep. Stmt. ¶¶ 3, 7-9.)</p>	<p>the Discovery Institute was not a vendor. <i>See</i> Opposing Party's Response and Supporting Evidence, ¶ 16, <i>supra</i>, hereby incorporated. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Disputed. AFA's President, Avi Davis, described the Discovery Institute as a providing "access to speakers" and "information about speakers" and helping coordinate travel arrangements to Los Angeles. He further described them as being "<i>like a contractor</i>." (Emphasis added.) He further stated that the Discovery Institute was not paid for any services.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>Opposing Party's Response and Supporting Evidence, ¶ 16, <i>supra</i>; Becker Decl., Exh. No. 4, Davis Dep. Tr., 376:23-377:4 ["[W]ould you put them in the same category as a vendor then, essentially? A. Well, I just said that. Yeah. I think they are <i>like a contractor</i>. They are providing us with services. <i>Now, they are not being paid for those services</i>." (Emphasis added.)</p>
<p>18. Prior to receiving a signed version of the Revised Event Price Estimate from AFA, Chris Sion, the Vice President of Food & Event Services at the Foundation, spoke to Avi Davis, President of AFA, about certain terms that the Foundation</p>	<p>Disputed. Sion did not tell Davis that all promotional materials for the Event had to be approved by the Foundation in advance of any release. Disputed that there was a signed version of a revised price estimate or a document titled "Revised Price Estimate."</p>

1 required for a private party to use the
2 Science Center facilities for a private event.
3 Ms. Sion specifically told Mr. Davis (i) that
4 all promotional materials for the Event had
5 to be approved by the Foundation in
6 advance of any release; (ii) that AFA
7 needed to obtain insurance relating to the
8 Event, and (iii) details regarding payment
9 for the Event.

10 (Zelenay Decl., Exh. 2 [Sion Dep. Tr.] at
11 100:14-102:10,255:4-24, 268:7-270:13;
12 Exh. 5 [Davis Dep. Tr.] at 34: 12~21.)

SUPPORTING EVIDENCE:

Becker Decl., Exh. No. 4, Davis Dep. Tr.,
211:18-213:8 ["Q. Now, that document that
you're looking at right now, the first page of
Exhibit A to Exhibit 19 in the deposition,
that's not executed by you, correct? A. Yes. Q.
The one we're looking at. So my question for
you is: To the best of your recollection, Mr.
Davis, did you ever execute the event letter of
agreement that we're looking at here? MR.
BECKER: I think it's been asked and an-
swered but you can answer. THE WITNESS:
I don't know. BY MR. DENNIS: Q. And now
back to where we were about that weekend of
October 3 and 4 of 2009. Was there anything
about your being out observing the Sabbath
and visiting your boys that weekend that -- A.
Traveling with my boys. Q. I'm sorry, travel-
ing with your boys, that's causing you to re-
flect now that it was that trip that somehow
prevented you from executing that particular
document? A. My understanding is that the
third part of the document was separate from
the other two. There was an amendment.
There was an amendment to the contract. I
signed the contract, I didn't sign the amend-
ment, and I don't know why I did not at least I
don't know if I signed it or not. I know that we
attempted to send it again on -- the amendment
on the 2nd, as the thing says, and we attempt-
ed and I went away and I left my secretary to

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send it on the 5th. That's my understanding of that situation. Now, it would be unusual for me to ask my secretary to send a document that's not signed and so that's why I'm telling you I don't know if I signed it or not or whether I let -- because we had -- probably had a couple of copies of it in the office. She may have picked up this one and sent it in for all I know. I just can't remember whether I signed it or not. There were a lot of things happening --"]; *id.*, Exh. No. 6, Peterson Dep. Tr., 254:6-255:13 [“Q This promotional material section that we just referred to, do you recall counsel asking you earlier whether Chris Sian had ever discussed that provision with you? A Yes. Q Okay. Did she ever discuss that provision with you specifically? A No. Q Did she ever bring it up at all? A Only in an inference in an e-mail where she said I know you want to get your promotion going. Q Okay. But she didn't refer you to that provision did A No. MR. ONO: Objection. Leading. Q BY MR. BECKER: Did she refer you to that provision? A She did not. Q Did she ever quote it to you? A No. MR. BECKER: That's all I have. MR. ZELENAY: All right. MR. BECKER: Oh, strike that. Q Did anybody at the Science Center or Foundation ever refer you to that provision? A No. Q To your knowledge did anybody at the Science Center ever specifically refer that provision to any-

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	body at AFA? MR. ONO: Lacks foundation. Calls for speculation. MR. ZELENAY: Objection. Asked and answered. THE WITNESS: No, they did not.”]
<p>19. AFA’s representatives were aware that the contract contained a provision requiring approval by the Event Services Office of all promotional materials mentioning the California Science Center before distribution to the public.</p> <p>(Zelenay Decl., Exh. 65 [AFA’s Supplemental Responses to Foundation’s 2nd RFAs, No. 16] at 11:10-24; Exh. 2 [Sion Dep. Tr.] at 100:14-102:10 [Sion told Davis “my request that we see in advance a copy of any material that included the name of the California Science Center Foundation or the California Science Center”]; Exh. 5 [Davis Dep. Tr.] at 53:2-55:16 [“I read that contract. I knew what we had to do.”], 100:24-102:18 [“I understood that I had to submit all of the publicity materials to Chris Sion prior to it being publicized or released to the public”]; Exh. 6 [Peterson Dep. Tr.] at 85:1-87:1 [“I did have a conversation with A vi saying the brochure that we were working on is going to need to be reviewed by the Foundation.”].)</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract because AFA did not publish the alleged press releases relied upon by the Foundation for its decision to rescind the contract. Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Disputed.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>See Moving Party’s Undisputed Material Fact ¶ 12, <i>supra</i>, and supporting evidence, hereby incorporated [“The Event Services Department requires that all contracting parties agree to comply with the Event Services Policies and Procedures.” (Emphasis added.)]. AFA was aware of the provision of the contract, but did not interpret it as requiring it to manage third party promotional materials or to include web sites, e-mails to colleagues, etc. Becker Decl., Exh. No. 4, Davis Dep. Tr., 54:18-23 [“The obligation, Pat, was for American Freedom Alliance to produce and to show any materials it put out. The organization -- the American Freedom Alliance was the signatory to the contract, not</p>

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the California -- not the Discovery Institute.”];
id., Exh. No. 4, Davis 55:1-16 [“So anything
that we put out -- you know, we had no
control over what the -- what the Discovery
Institute did. I just explained to you that the
relationship was a very vague one. They were
promoters of the film and the film was being
screened in Los Angeles. It was the Los
Angeles premiere and any expectation I had
was they would probably go out and promote
it, you know. It wasn't us -- it wasn't us doing
it. We -- our materials were never sent to
Chris Sion. I read the contract, Pat. I read that
contract. I knew what we had to do. But we
never got the opportunity to send in our stuff
because the contract was canceled on the 6th
of October. And the materials that we had
prepared never went to Chris Sion because
she wouldn't even accept my phone calls.”];
id., 104:1-5 [“We had an obligation -- we had
an obligation to submit all of our materials to
the California Science Center under our
contract. They didn't. They weren't a party to
the to the contract.”]; *id.*, Exh. No. 2, Bylsma
Dep. Tr., 235:3-23 [“Q. Okay. And you knew
when you read the contract, that, in fact,
promotional materials had, in fact, been
released publicly that as far as you knew, had
not been sent over to the Foundation in
advance; is that right? MR. BECKER: Vague,
ambiguous. Calls for speculation. THE

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	<p>WITNESS: I don't recall thinking along those lines. MR. DENNIS: Q. You gave that no thought about whether or not you had been in compliance with the contract on that provision? MR. BECKER: Vague, ambiguous. Calls for a legal conclusion. Calls for speculation. THE WITNESS: I knew so little about the contract, I didn't consider it. MR. DENNIS: Q. You gave it no consideration at all; is that right? A. No, I didn't.""]</p>
<p>20. AFA never submitted any publicity or other promotional materials to the Event Services Office or the Foundation for approval.</p> <p>(Zelenay Decl., Exh. 4 [Bylsma Dep. Tr.] at 236:10-237:22; Exh. 5 [Davis Dep. Tr.] at 55:17-56:1.)</p>	<p><i>Disputed</i> as to the implied premise of the alleged fact that AFA had promoted the event to the media prior to its cancellation. The event was cancelled before Avi Davis had approved AFA's promotional materials prior to having them reviewed by the Foundation. Otherwise, undisputed.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>Becker Decl., Exh. No. 4, Davis Dep. Tr. 55:17-56:9 ["Q. After you signed the contract on October 1, did the American Freedom Alliance prepare and distribute any promotional materials regarding the event? A. It did not. Q. Did the American Freedom Alliance send any promotional materials regarding --A. I want to amend that response. We did prepare materials. We did prepare materials but we didn't -- we didn't send them to Chris Sion. Q. Okay. And A. There's a reason for that. It's because I was traveling and I didn't want to</p>

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send out anything until I got back five days later. Q. Those materials you just referenced that were prepared by the American Freedom Alliance regarding the event, where did they go? A. They just stayed. Q. They were never given to anybody? A. Not yet, no. They weren't distributed to the press. They were just done in-house."]; *id.*, 56:19-23 [Q. So the American Freedom Alliance's promotional materials for the October 25, 2009, event were never distributed publicly or to a third party before the cancellation? A. That's correct."]

21. On September 29, 2009, Mr. Davis sent AFA's final brochure for the Event to the Discovery Institute. Mr. West of the Discovery Institute sent an email forwarding the brochure to Mr. Crowther, stating "We can start promoting these events."

Exh. 28 [Dep. Exh. 52, 9/29/09 West email]; Exh. 7 [Levi Dep. Tr.] at 46:6-48:9; Exh. 5 [Davis Dep. Tr.] at 161:7-163:20 [discussing Dep. Exp. 22]; Exh. 14 [Dep. Exh. 22, 9/28/09 Crowther email]; Exh. 27 [Dep. Exh. 50, 9/28/09 Crowther email]; Exh. 8 [Crowther Dep. Tr.] at 157:19-160:8 ["I didn't understand this to mean that the brochure was helping me. It was helping to promote the upcoming event. That's what it says, that AFA has developed it to help

Undisputed.

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promote the upcoming events.”.)	
<p>22. AFA provided a draft press release for the Event to the Discovery Institute. On September, 30, 2009, Mr. Bylsma wrote to Mr. Crowther, stating “Avi [the President of AFA] says we are locked in so we are ready to start publicizing The release is attached.”</p> <p>(Zelenay Decl., Exh. 15 [Dep. Exh. 24, 9/30/09 Bylsma email]; Exh. 4 [Bylsma Dep. Tr.] at 48:18-52:6,95:24-97:25, 142:1-22, 151:25-153 :24; Exh. 25 [Crowther Dep. Exh. 45, 9/23/09 Bylsma email] at p. 3 [“I will have a release ready tomorrow and will that to you for your review and use”]; Exh. 43 [Dep. Exh. 157, 9/30/09 Bylsma email]; Exh. 5 [Davis Dep. Tr.] at 68:12-69:7, 177:22-182:11.)</p>	<p><i>Disputed</i> that AFA provided the Discovery Institute with a draft version of a press release that it made available to the Discovery Institute for the purpose of publishing. Otherwise, undisputed.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p><i>See</i> Moving Party’s supporting evidence.</p>
<p>23. On October 1, 2009, the Discovery Institute posted AFA’s press release for the Event on the Discovery Institute’s website and distributed it to its PR firm.</p> <p>(Zelenay Decl., Exh. 5 [Davis Dep. Tr.] at 43:7- 44:17, 255:23-258:11; Exh. 29 [Dep. Exh. 53, 9/30/09 West email]; Exh. 30 [Dep. Exh. 54, AFA press release on DI website]; Exh. 8 [Crowther Dep. Tr.] at 173:23-177:23,179:2-180:23; Exh. 69 [Crowther email, CRC0000002-4]</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract because AFA did not post the press release and the Discovery Institute was not subject to the terms of the contract. <i>See</i> Moving Party’s Undisputed Fact No. 12 and supporting evidence, <i>supra</i>, hereby incorporated [“The Event Services Department <i>requires that all contracting parties agree to comply</i> with the Event Services Policies and Procedures.”</p>

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<p>["Attached is the press release from AFA about the LA premiere of Darwin's Dilemma. Feel free to reuse this as is, or to revise as you see fit."]; Exh. 68 [Internet printouts of available publicity].)</p>	<p>(Emphasis added.)). Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Undisputed.</p>
<p>24. AFA published promotional materials about the Event at the California Science Center on a "microsite" on AFA's website. (Zelenay Decl., Exh. 16 [Dep. Exh. 28, AFA website]; Exh. 7 [Levi Dep. Tr.] at 30:18-31:17, 39:12-40:15; Exh. 4 [Bylsma Dep. Tr.] at 161:18-162:23; Exh. 68 [Internet printouts of available publicity].)</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract because AFA did not post the press release and the Discovery Institute was not subject to the terms of the contract. See Moving Party's Undisputed Fact No. 12 and supporting evidence, <i>supra</i>, hereby incorporated ["The Event Services Department <i>requires that all contracting parties agree to comply</i> with the Event Services Policies and Procedures." (Emphasis added.)). Objection. Vague and ambiguous as to the meaning of the term "published." Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: <i>Disputed</i>. <u>SUPPORTING EVIDENCE:</u> Opposing Party's Response and Supporting Evidence, ¶ 16, <i>supra</i>; Becker Decl., Exh. No. 4, Davis Dep. Tr., 202:13-17 ["Q. Was it accessible to the public on October 5th at 11:30 in the morning? A. Yes, but only if the public had knowledge of the precise URL, which would have been improbably unlikely."]; <i>id.</i>,</p>

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	<p>250:20-251:5 [“It was presented as a micro site of a -- for the future publicity of the event. This micro site I to the best of my knowledge, was never made accessible to the public. The only way you could -- it was presented as what we would call a work-in-progress. It was never actually posted to the AFA website, to my understanding. It became a micro site that was used to gather information. The only way you could gain access to that micro site was to obtain the URL. That URL had to be typed in and presented.]</p>
<p>25. AFA forwarded a link to the microsite to the Discovery Institute on September 30, 2009 who posted the link on the Discovery Institute’s website on October 1, 2009 and distributed the link to others.</p> <p>(Zelenay Decl., Exh. 52 [Dep. Exh. 180, 9/30/09 Davis email]; Exh. 31 [Dep. Exh. 55, RSS feed]; Exh. 36 [Dep. Exh. 88, 9/30/09 West email]; Exh. 5 [Davis Dep. Tr.] at 255:23-258:11,371:3-372:25; Exh. 3 [West Dep. Tr.] at 146:15-151:13, 154:9-156:8.)</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract because the Foundation cancelled the event and rescinded the contract on the basis of press releases posted on the Internet by the Discovery Institute, which was not a party to the contract between AFA and the Foundation. <i>See</i> Moving Party’s Undisputed Fact No. 12 and supporting evidence, <i>supra</i>, hereby incorporated [“The Event Services Department <i>requires that all contracting parties agree to comply</i> with the Event Services Policies and Procedures.” (Emphasis added.)]. Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Undisputed.</p>
<p>26. Peter Bylsma sent emails to members of</p>	<p>Objection. Immaterial. The alleged fact has</p>

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<p>the Prager Listener Group on October 1, 2009 and October 5, 2009 forwarding information about the Event and requesting that this information about the Event be distributed to other members to help promote the Event at the California Science Center.</p> <p>(Zelenay Decl., Exh. 18 [Dep. Exh. 30(10/5/09 Bylsma email)]; Exh. 44 [Dep. Exh. 158, 10/1109 Bylsma email]; Exh. 45 [Dep. Exh. 159, 10/1109 Bylsma email]; Exh. 4 [Bylsma Dep. Tr.] at 171:8-180:24, 182:7 183:21,247:15-248:13, 252:2-254:4.)</p>	<p>no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract because the Foundation cancelled the event and rescinded the contract on the basis of press releases posted on the Internet by the Discovery Institute, which was not a party to the contract between AFA and the Foundation. <i>See</i> Moving Party's Undisputed Fact No. 12 and supporting evidence, <i>supra</i>, hereby incorporated ["The Event Services Department requires that all contracting parties agree to comply with the Event Services Policies and Procedures." (Emphasis added.)]. Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Undisputed.</p>
<p>27. On October 5, 2009, Peter Bylsma sent an email to a staff member of the Frank Pastore show, a radio talk show, providing information about the Event.</p> <p>(Zelenay Decl., Exh. 48 [Dep. Exh. 164(10/5/09 Bylsma email re Frank Pastore Show)]; Exh. 4 [Bylsma Dep. Tr.] at 231:20-234:5.)</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract because the Foundation cancelled the event and rescinded the contract on the basis of press releases posted on the Internet by the Discovery Institute, which was not a party to the contract between AFA and the Foundation. <i>See</i> Moving Party's Undisputed Fact No. 12 and supporting evidence, <i>supra</i>, hereby incorporated ["The Event Services Department requires that all contracting parties agree to comply with the Event Services Policies and Proce-</p>

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	dures.” (Emphasis added.)). Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Undisputed.
<p>28. Mr. Peterson and Mr. Bylsma sent information about the Event to Woodbury University prior to the cancellation with the intent that the Event be publicized to its students.</p> <p>(Zelenay Decl., Exh. 6 [Peterson Dep. Tr.] at 103:21-104:20, 130:24-137:24; Exh. 59 [Dep. Exh. 312, 10/6/09 Bylsma email].)</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract because the Foundation cancelled the event and rescinded the contract on the basis of press releases posted on the Internet by the Discovery Institute, which was not a party to the contract between AFA and the Foundation. <i>See</i> Moving Party’s Undisputed Fact No. 12 and supporting evidence, <i>supra</i>, hereby incorporated [“The Event Services Department <i>requires that all contracting parties agree to comply</i> with the Event Services Policies and Procedures.” (Emphasis added.)). Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Undisputed.</p>
<p>29. AFA posted the brochure for the Event on AFA’s website publicizing the Event at the California Science Center.</p> <p>(Zelenay Decl., ¶ 69 [stating that brochure was publicly available for viewing on October 7, 2009]; Exh. 68 [Internet printouts of available publicity]; Exh. 7 [Levi Dep. Tr.] at 20:12-16, 33:13-35:1;</p>	<p>Disputed. The universal resource locator (URL) for the brochure under development was inaccessible to the public and did not “publicize” the event.</p> <p>SUPPORTING EVIDENCE:</p> <p>Becker Decl., Exh. No. 4, Davis Dep. Tr., 202:13-17 [“Q. Was it accessible to the public on October 5th at 11:30 in the morning? A. Yes, but only if the public had knowledge of</p>

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<p>Exh. 55 [Dep. Exh. 231, AFA brochure.]</p>	<p>the precise URL, which would have been improbably unlikely.”]; <i>id.</i>, 250:20-251:5 [“It was presented as a micro site of a -- for the future publicity of the event. This micro site I to the best of my knowledge, was never made accessible to the public. The only way you could -- it was presented as what we would call a work-in-progress. It was never actually posted to the AFA website, to my understanding. It became a micro site that was used to gather information. The only way you could gain access to that micro site was to obtain the URL. That URL had to be typed in and presented.”]; <i>id.</i>, 163:4-20 [“So is it correct that AFA had been had already sent to Discovery Institute a brochure to help promote the upcoming event by September 28?” MR. BECKER: Vague and ambiguous, calls for speculation, assumes facts not in evidence, lacks foundation, and misstates and mischaracterizes his earlier testimony. THE WITNESS: Are you finished? I interrupted you, sorry. Are you finished with the question? MR. BECKER: Yes, and I just objected. THE WITNESS: Okay. Peter sent a draft of a brochure which we had not yet printed or published. We couldn't because we didn't know where the venue was.”</p>
<p>30. On October 5, 2010, AFA posted publicity for the Event on its website as part of a “Call to Action Newsletter.” An</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA commit-</p>

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<p>introductory letter providing a link to the newsletter was distributed to subscribers of the newsletter.</p> <p>(Zelenay Decl., Exh. 57 [Dep. Exh. 235, 10/2/09 Bylsma email]; Exh. 58 [Dep. Exh. 236, AFA newsletter]; Exh. 7 [Levi Dep. Tr.] at 62:24-77:10.)</p>	<p>ted a material breach of the contract because the Foundation cancelled the event and rescinded the contract on the basis of press releases posted on the Internet by the Discovery Institute, which was not a party to the contract between AFA and the Foundation. <i>See</i> Moving Party's Undisputed Fact No. 12 and supporting evidence, <i>supra</i>, hereby incorporated ["The Event Services Department <i>requires that all contracting parties agree to comply</i> with the Event Services Policies and Procedures." (Emphasis added.)]. Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Undisputed.</p>
<p>31. AFA posted a press release on its website stating that "American Freedom Alliance and Discovery Institute Partner to Highlight the Debate at Film Debut Screening October 25."</p> <p>(Zelenay Decl., Exh. 19 [Dep. Exh. 31, AFA press release]; Exh. 4 [Bylsma Dep. Travel to.] at 160:13-162:23, 167:22-171 :7; Exh. 5 [Davis Dep. Travel to.] at 230:18-233:25]; Exh. 7 [S. Levi Dep. Travel to.] at 58:21-59:24, 61:1-62:23 [stating that Dep. Exh. 31 was posted to the AFA website].)</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract because the Foundation cancelled the event and rescinded the contract on the basis of press releases posted on the Internet by the Discovery Institute, which was not a party to the contract between AFA and the Foundation. <i>See</i> Moving Party's Undisputed Fact No. 12 and supporting evidence, <i>supra</i>, and Opposing Party's Response and Supporting Evidence, ¶ 52, <i>infra</i>, hereby incorporated ["The Event Services Department <i>requires that all contracting parties agree to comply</i> with the Event Services Policies and Procedures." (Emphasis added.)].</p>

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Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact:

Disputed. There is no evidence that AFA posted a press release on its website stating that “American Freedom Alliance and Discovery Institute Partner to Highlight the Debate at Film Debut Screening October 25. Moving Party’s evidence is based on speculation, surmise and conjecture.

SUPPORTING EVIDENCE:

See Opposing Party’s Response and Supporting Evidence, ¶ 16, *supra*, incorporated herein; Becker Decl., Exh. No. 4, Davis Dep. Tr. 232:16-17 [“I am not sure whether this went out or not. . . .”], *id.*, 62:24-63:1 [“We don’t post press releases on our Website. We never do. Instructions to Peter Bylsma were to hold off until I got back.”]; *id.*, 68:5-11 [“Q. And it’s your testimony, right, sir, that the American Freedom Alliance didn’t publicize or promote the event through its own materials by its own conduct at all? A. Well, eventually it *did*. Q. Before the cancellation? A. No.”]; *id.*, Exh. No. 2, Bylsma Dep. Tr., 164:12-13 [“There was a point in which some information was posted. I think it was when we got the new venue.”]. Bylsma testified that he was unaware of the content of the website. *id.*, 167:1-9 [“THE WITNESS: I was aware that a micro site -- In order to sell the event, we had to

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	<p>prepare a micro site that had the information as current and specific and consistent as it could be. I was aware that there was an affiliated micro site to the website. But I wouldn't go into the American Freedom website to look for information that was posted there for an event that wasn't -- I hadn't confirmed yet." Objection. Immaterial. The alleged fact is immaterial because it is not limited in time for the purpose of establishing a fact having significance in determining the outcome of this case. ; Levy stated that it was her "belief" that the press release was posted, but was speculating, adding that "We can check." ["Do you recall which one of these two is the one that was on the website? A. I think this one. Q. Exhibit -- the document that's marked Exhibit 31 is the one that you believe has been on the website? A. Yes. MR. BECKER: <i>Do you know?</i> THE WITNESS: That's what I believe. <i>We can check.</i> But I believe that this one is the one, Exhibit 31." (emphasis added.)] Objection. Immaterial.</p>
<p>32. On October 2, 2009, the Discovery Institute sent an email to AFA informing them that Discovery Institute would issue publicity early next week to the area media in Washington D.C. and the California wire. The email included the misleading and inaccurate information that the California Science Center was the west coast affiliate</p>	<p><i>Disputed</i> that the e-mail included misleading and inaccurate information. The California Science Center is a west coast affiliate of the Smithsonian Institution, which it proudly boasts on its web site. Otherwise Undisputed. <u>SUPPORTING EVIDENCE:</u> Becker Decl., Exh. No. 38, Sion Dep. Tr., Dep. Exh. No. 12 (California Science Center</p>

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of the Smithsonian Institution. Mr. Bylsma responded on October 5, 2009 saying, "John this is excellent and much appreciated! Please let me know if we get any hits too."

(Zelenay Decl., Exh. 34 [Dep. Exh. 60, 10/2/09 West email]; Exh. 3 [West Dep. Tr.] at 186:25-188:11, 189:13-190:21; Exh. 37 [Dep. Exh. 95(10/5/09 Bylsma email); Exh. 5 [Davis Dep. Tr.] at 198:5-200:21; Exh. 1 [Rudolph Dep. Tr.] at 285:5-286:22.)

web site section entitled "Smithsonian Affiliate Designation"); *id.*, Exh. No. 4, Davis Dep. Tr., 343:4-9 ["A. I think that Smithsonian name probably lent some legitimacy and credibility to the film, and to the fact that it's taking place in a Smithsonian-affiliated institution gives it a mark of authenticity. And since it wasn't false, it was perfectly legitimate to use."]; *id.*, Exh. No. 3, Crowther Dep. Tr., 193:23-194:23 ["The headline states, quote, 'Smithsonian Institution Affiliated Science Center Will premiere Intelligent Design Film.' The first sentence of the press release says, 'The debate over Darwin will come to the Smithsonian Institution's west coast affiliate on October 25th.' It then goes on. The second paragraph, in the first sentence says, 'Darwin's Dilemma will be screened at 7 p.m. on Sunday, October 25th, in the IMAX theater at the California Science Center, a specifically designated Smithsonian affiliation.' MR.

BECKER: You said specifically? Q. I'm sorry, 'specially designated Smithsonian affiliation.' Do you recall where you got the information from relating to these statements about Smithsonian Institution affiliation? MR.

BECKER: Vague and ambiguous. A. My recollection is reading it on the California Science Center's web site. Q. So was that the first time that you had heard that information, when you went on the California Science

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Center's web site? MR. BECKER: Vague and ambiguous, 'heard that information.' A. To the best of my recollection, I read that on the California Science Center's web site."; *id.*, Exh. No. 11, West Dep. Tr., 97:25-99:12 ["Q. Why did the Discovery Institute want to have the word "Smithsonian" in the title of their press releases, to the best of your recollection? MR. NETTERFIELD: Vague. MR. BECKER: Vague, lacks foundation, calls for speculation. MR. NETTERFIELD: Ambiguous. A. Well, to the best of my recollection, I didn't actually write the press release, so I can only answer insofar as my general recollection of what I may have been thinking at the time. And you are right that I found out about the connection, and I found out about the connection by going to the Science Center web site, and there was a whole page touting the fact of affiliation. And I did find that interesting. As I also previously testified to, what we were trying to do that fall was to raise public attention about Steve Meyer, about Darwin's Dilemma, especially because Steve Meyer was featured in it, and about Dave Berlinski. And so with regard to the event that was scheduled to take place at California Science Center, we wanted to gain attention for Darwin's Dilemma, not just locally, but at the national level, because we're a national think tank. So I believe, at least my recollection of what I was thinking --

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	<p>and again, I didn't write it, to my recollection, so I'm only part of the story when you say what was Discovery Institute thinking. But in my recollection of what I was thinking, anything that suggested the national prominence of the venue, and certainly the Smithsonian connection, which the Science Center was very proud of and made a big deal about on their web site, would give -- more likely to have national reporters look at the film, because this was being screened at the Science Center, which was one of the Smithsonian's affiliate museums."}]</p>
<p>33. AFA never made any effort to view or obtain a copy of the promotional materials before they were released by the Discovery Institute.</p> <p>(Zelenay Decl., Exh. 4 [Bylsma Dep. Tr.] at 91:9-19, 98:3-99:19, 109:25-113:20, 150:2-14 ["What you're asking seems to imply that I would be looking to approve what they are doing. That wasn't the case."]; Exh. 5 [Davis Dep. Tr.] at 52:19-24, 382:8-383:18, 386:4-387:8, 415:13-17, 415:23-416:2; Exh. 8 [Crowther Dep. Tr.] at 85:8-13.)</p>	<p>Undisputed.</p>
<p>34. AFA never gave any admonition or warning to the Discovery Institute that promotional material must be approved by the Event Services Office before</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract because</p>

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distribution to the public.

(Zelenay Decl., Exh. 4 [Bylsma Dep. Tr.] at 233:7-234:5; Exh. 5 [Davis Dep. Tr.] at 44:18-45:10 [“We expected them to exercise both prudence and caution in promoting the event”], 52:19-24, 371 :3-372:25; Exh. 8 [Crowther Dep. Tr.] at 202:9-203:3; Exh. 3 [West Dep. Tr.] at 123:20-124:24.)

35. On or about October 5, 2009, after repeated requests, the Foundation received a signed Revised Event Price Estimate from AFA regarding the booking of the Science Center and AFA’s agreement to abide by the Event Services’ Policies and procedures, including the provision regarding promotional materials.

(Zelenay Decl., Exh. 2 [Sion Dep. E-mail.] at 242:9-244:10,266:10-24,268:7-269:20, 273:2-23; Exh. 12 [Dep. Exh. 16, contract documents]; Exh. 17 [Dep. Exh. 29(10/5/09 Abidin e-mail].)

the Foundation cancelled the event and rescinded the contract on the basis of press releases posted on the Internet by the Discovery Institute, which was not a party to the contract between AFA and the Foundation. See Moving Party’s Undisputed Fact No. 12 and supporting evidence, *supra*, hereby incorporated [“The Event Services Department *requires that all contracting parties agree to comply* with the Event Services Policies and Procedures.” (Emphasis added.)]. The contract does not state that AFA was required to admonish or warn the Discovery Institute. Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Undisputed.

Objection. Vague and ambiguous as to the meaning of “repeated requests.” Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this Request: *Disputed* that there were “repeated” requests insofar as it implies that AFA ignored its duty to sign the contract. *Disputed* that the Foundation received a “Revised Price Estimate.” *Disputed* that the contract that the Foundation rescinded included the Event Letter of Agreement. That document was required to be signed no later than October 2, 2009, but was never signed.
SUPPORTING EVIDENCE:
Becker Decl., Exh. No. 4, Davis Dep. Tr.,

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	211:18-213:8 (see Opposing Party's Response and Supporting Evidence, ¶ 18, <i>supra</i> , hereby incorporated.)
<p>36. The alleged agreement between the Foundation and AFA consisted of the Event Price Estimate, the Event Policies & Procedures and the Event Letter of Agreement.</p> <p>(Zelenay Decl., Exh. 66 [AFA Third Am. Compl.] at ¶ 9; Exh. 5 [Davis Dep. Tr.] at 32:11-36:13; Exh. 13 [Dep. Exh. 19, Davis Decl.] at 2:9-17 & Exh. A.)</p>	<p>Disputed. The agreement between the Foundation and AFA, rescinded by the Foundation, consisted of just two documents, the <i>Event Price Estimate</i> ("EPE") and the <i>Event Policies & Procedures</i> ("EPP"). A third document based on new negotiated terms, the <i>Event Letter of Agreement</i> ("ELA"), was never executed.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>Becker Decl., Exh. No. 41, Sion Dep. Exh. No. 16 (Event Price Estimate - last page); <i>id.</i>, Exh. No. 4, Davis Dep. Tr., 35:7-11 ["Q. And is it your belief that this last page of Exhibit A to Exhibit 19 of your deposition, the event price estimate, does that reflect the result of those negotiations? A. It does."]; <i>id.</i>, 36:9-13 ["Q. Okay. I guess what I'm after is there something material to this written agreement that you believe got modified in your oral discussions with Ms. Matsunaga or Ms. Sion? A. Once we signed it, no."]; <i>id.</i>, 26:24-27:2 ["[D]o I understand your position now that you believe the contract may have been in effect as early as October 1? A. Yes."]</p>
<p>37. On October 5, 2009, the same day that the Foundation received the Revised Event Price Estimate from AFA; the Foundation became aware of press releases that were issued over the PR Newswire relating to the</p>	<p>Disputed that there was a signed version of a revised price estimate or a document titled "Revised Price Estimate." Otherwise, undisputed.</p> <p><u>SUPPORTING EVIDENCE:</u></p>

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<p>Event. (Zelenay Decl., Exh. 1 [Rudolph Dep. Tr.] at 230:10-233:12; Exh. 10 [Ameaga Dep. Tr.] at 50:2-53:23.)</p>	<p>See Moving Party's Undisputed Fact No. 18 and supporting evidence, <i>supra</i>, hereby incorporated.</p>
<p>38. The Discovery Institute caused two press releases related to the Event to be issued on October 5, 2009. (Zelenay Decl., Exh. 3 [West Dep. Tr.] at 59:24-62:2, 97:25-99:12; Exh. 8 [Crowther Dep. Tr.] at 189:12-191:2, 195:8-196:12, 204:11-205:4; Exh. 33 [Dep. Exh. 57, 10/2/09 Crowther email]; Exh. 35 [Dep. Exh. 67(10/5/09 Crowther email); Exh. 47 [Dep. Exh. 162, 10/6/09 A. Smith email].)</p>	<p>Undisputed.</p>
<p>39. A press release was issued on October 5, 2009 to the newswire specific to Washington D.C. area media. The headline of this press release stated: "Smithsonian Institution Affiliated Science Center Will Premiere Intelligent Design Film." The first sentence of the press release stated "The debate over Darwin will come to the Smithsonian Institution's west coast affiliate on October 25th, with the premiere of <i>Darwin 's Dilemma: The Mystery of the Cambrian Fossil Record</i>, a new intelligent design film which challenges Darwinian evolution."</p>	<p>Undisputed.</p>

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(Zelenay Decl., Exh. 33 [Dep. Exh. 57, 10/2/09 Crowther email]; Exh. 61 [Dep. Exh. 316, 10/8/09 Peterson email].)	
<p>40. The headline of the Washington D.C.-specific press release inaccurately implies that the Science Center and the Smithsonian Institution were sponsoring the Event and “premier[ing]” the movie Darwin’s Dilemma.</p> <p>(Zelenay Decl., Exh. 1 [Rudolph Dep. I.] at 285:5-286:22 [“what clearly stood out to me was that ‘the Science Center will premiere the intelligent design film,’ because ‘will premiere’ clearly suggests to me, and I believe the record of e-mails shows to others, that that suggests a sponsorship by us and that was not true, and that was offensive”]; Exh. 5 [Davis Dep. I.] at 342:21-343:17 [“I think that Smithsonian name probably lent some legitimacy and credibility to the film, and to the fact that it’s taking place in a Smithsonian-affiliated institution gives it a mark of authenticity”].)</p>	<p><i>Disputed.</i> The headline of the Washington D.C.-specific press release factually states the location of the event.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>See Moving Party’s evidence; Becker Decl., Exh. No. 4, Davis Dep. Tr., 336:4-7 [“Since then I have seen that actually what they produced was accurate, not inaccurate. And they were doing it to promote their film in the best way they knew how.”]; Peterson Dep. Tr., 166:22-23 [“I don’t feel that it is inaccurate at this point.”]</p>
<p>41. Mr. Crowther stated that the release was “aimed at getting attention by using the Smithsonian name.”</p> <p>(Zelenay Decl., Exh. 70 [10/5/09 Crowther email, CRC0000005-6.]</p>	<p>Undisputed.</p>

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<p>42. A press release was issued on October 5, 2009 to the newswire specific to California media. The headline of this press release stated: "Intelligent Design Documentary to Premiere at Smithsonian Affiliated Science Center." The first sentence of the press release stated "The debate over Darwin will come to California on October 25th, when the Smithsonian Institution's west coast affiliate will premiere <i>Darwin's Dilemma: The Mystery of the Cambrian Fossil Record</i>, a new intelligent design film which challenges Darwinian evolution."</p> <p>(Zelenay Decl., Exh. 33 [Dep. Exh. 57, 10/2/09 Crowther email]; Exh. 35 [Dep. Exh. 67(10/5/09 Crowther email).]</p>	<p>Undisputed.</p>
<p>43. The headline of the California-specific press release inaccurately implies that the Science Center and the Smithsonian Institution were sponsoring the Event and "premier[ing]" the movie Darwin's Dilemma.</p> <p>(Zelenay Decl., Exh. 1 [Rudolph Dep. Tr.] at 285:5-286:22; Exh. 5 [Davis Dep. Tr.] at 342:21-343:17 ["I think that Smithsonian name probably lent some legitimacy and credibility to the film and to the fact that it's taking place in a Smithsonian-affiliated</p>	<p>Disputed. The headline of the California-specific press release factually states the location of the event.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>See Opposing Party's Response and Evidence, No. 40, hereby incorporated.</p>

institution gives it a mark of authenticity”].)	
<p>44. The CSC was only one of 20 Smithsonian Affiliates in Californian out of 165 nationally as of October 2009.</p> <p>(Zelenay Decl., Exh. 54 [Dep. Exh. 212, 10/7/09 Amega email]; Exh. 10 [Amega Dep. Tr.] at 117:19-118:11.)</p>	Undisputed.
<p>45. None of the press releases distributed by the Discovery Institute were [sic] ever submitted to the Foundation or the Event Services Office for approval.</p> <p>(Zelenay Decl., Exh. 65 [AFA’s Supplemental Responses to Foundation’s 2nd RFAs, No. 7] at 5:23-6:12; Exh. 1 [Rudolph Dep. Tr.] at 281-24-282:19 [“I wasn’t overly focused on the specifics of who was putting out the material, because I’m aware, again, that in today’s world, that the internet and the accessibility of anyone – that an organization, an individual, any number of people working together can put things out in multiple names.”]; Exh. 11 [Pygin Dep. Tr.] at 97:22-98:16 [“The contract was violated because the press release was issued without being previewed by the Events Department”].)</p>	<p><i>Disputed</i> as to the implied premise of the alleged fact that the Discovery Institute was under any legal obligation to submit its promotional material for the event to the Foundation. The Discovery Institute was not a party to the contract between AFA and the Foundation, and AFA was under no legal duty to compel the Discovery Institute’s compliance with its contract. The contract was rescinded and the event was cancelled by Defendants prior to AFA submitting its promotional material. AFA was not responsible for submitting promotional materials generated by independent outside organizations.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>Becker Decl., Exh. No. 4, Davis Dep. Tr., 55:17-23 [“Q. After you signed the contract on October 1, did the American Freedom Alliance prepare and distribute any promotional materials regarding the event? A. It did not.”]; <i>see</i> Opposing Party’s Response and Evidence, No. 19, hereby incorporated.</p>
46. Members of AFA immediately	Objection. Immaterial. The alleged fact has

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1 recognized that the press releases from the
2 Discovery Institute were misleading and
3 inappropriate.

4 (Zelenay Decl., Exh. 4 [Bylsma Dep. Tr.] at
5 219:7-220:5; Exh. 5 [Davis Dep. Tr.] at
6 183:4-184:7 ["It wasn't about you, you
7 know, poking your finger in the eye of the
8 Smithsonian or the California Science
9 Center"], 332:10-333:15 [agreeing that the
10 Discovery Institute "had been deliberately
11 provocative about how they styled their
12 press release"], 335:18-336:14 ["And I
13 could understand – I know this was
14 certainly seen as provocative by the
15 Smithsonian, and I might have seen it that
16 way as well if I was the Smithsonian."],
17 336:16-339:23 ["I saw it as an attempt of
18 the Discovery Institute to promote the film
19 and to stir some attention and publicity for
20 it, and they used the means that they knew
21 best to do it."], 340:16-341 :6; Exh. 6
22 [Peterson Dep. Tr.] at 148:7-149:4, 165:1-
23 167:12, 175:3-16, 177:16-178:1; Exh. 60
24 [Dep. Exh. 315, 10/7/09 Watt email] at 1
25 [referring to "poorly worded" press
26 release]; Exh. 61 [Dep. Exh. 316, 10/8/09
27 peterson email] at 2 [stating that Discovery
28 Institute issued an "ambiguously worded
document" and "obviously ... were trying to
tweak [sic] the noses of the Smithsonian".)

no significance in determining the outcome of
this case with regard to whether AFA commit-
ted a material breach of the contract. Objec-
tion. Vague and ambiguous as to the meaning
of the term "immediately recognized." Sub-
ject to and without in any way waiving the
foregoing objections, and to the extent that
Responding Party understands this alleged
fact: *Disputed*. Members of AFA did not
"immediately recognize." Rather, they jumped
to a conclusion based upon insufficient facts
or knowledge.

SUPPORTING EVIDENCE:

Becker Decl., Exh. No. 4, Davis Dep. Tr.,
335:22-338:25 ["THE WITNESS: Yeah. I
wanted to add for the record that I was angry
at the time and I thought that the act was pro-
vocative; however, I have since come to view
this as not a provocative act but as the ra-
tionale of the Discovery Institute, to say what
they did, to do what they did, I did not.
Since then I have seen that actually what they
produced was accurate, not inaccurate. And
they were doing it to promote their film in the
best way they knew how. And I could under-
stand -- I know this was certainly seen as pro-
vocative by the Smithsonian, and I might have
seen it that way as well if I was the Smithson-
ian. But I feel what they did in the end was
not a provocation, even though I felt at the
beginning that they did. BY MR. DENNIS: Q.

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The press release, you are referring to a press release which started with the word 'Smithsonian' or something like that?

A. Or something like that. Q. All right. And you recall there was an implication at least in that press release that the Smithsonian had something to do with putting on the film?

MR. BECKER: Vague and ambiguous, mischaracterizes the documents. THE WITNESS: Well, yes. I saw it as an attempt of the Discovery Institute to promote the film and to stir some attention and publicity for it, and they used the means that they knew best to do it.

BY MR. DENNIS: Q. Okay. All right. And your initial reaction was you were very angry with them; right? A. I was angry because it affected us. We had our venue taken away from us and I wasn't happy about that.

Q. Right. A. It left us with a very big problem.

Q. And I think you have testified here, and I believe you did previously, that you felt that it was provocative? A. At the time. But upon reflection, I do not think that it was provocative.

Q. Did you learn anything factually after the cancellation which persuaded you that it was not provocative despite your first reaction? A. The only thing -- I didn't learn anything. I just reassessed the whole situation, and I understood that there was -- I had originally thought this was an attempt to get even with the Smithsonian for whatever reason.

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And then I started to see it as from a promotional angle it was an attempt to promote the film and give us as much attention as possible. Now, the press release doesn't say that the Smithsonian produced the film or is sponsoring the film or that the California Science Center is sponsoring it. It just shows this is the place where it was going to take place. And so when I first saw it, I was traveling and I saw it on my phone and I didn't have a chance to examine it seriously. But in hindsight, I think that my reaction was a little bit overstated. Q. Your reaction that you testified a few minutes ago, your initial reaction was that you felt that it was provocative and you were very angry? A. Yes. Q. Okay. A. And that's the reason why I requested assistance from the Discovery Institute to help us bridge the gap, financial gap. Q. That was bridging the financial gap with respect to putting the program on in another location? A. Another venue, yeah.”] *Id.*, Exh. No. 6, Peterson Dep. Tr., 190:12-194:2 [“On page 2 of this e-mail from you to Scott, in the first full paragraph you mention near the middle of the paragraph, ‘So they’ -- and I believe -- I am sorry. I believe you are talking about the Discovery Institute there. ‘So they thought they could release an ambiguously worded document which, had we seen it in advance, we would not have approved.’ Do you see that? A Yes. Q What did you

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mean by that sentence? A Again my mindset was here I have all this work and effort put down the tube because this Discovery Institute that I had no knowledge of in advance of what they were, who they were about -- since then I have learned about it -- had screwed up. So I was quite angry with them. And the press release -- my viewpoint at the time was the California Science Center is a public entity that I should be able to trust. They, the esc, had an objection -- had an objection to the wording in this press release. What possible reason would I have to doubt that the California Science Center wasn't justified in objecting to wording that came from the Discovery Institute? Because they are a bunch of scientists. I should be able to trust them. They are smart guys. They certainly don't have any dog in this hunt. They are neutral. They are aboveboard. Their reputation and their morality is pristine. Since then I don't believe that anymore. And so at the time, when I said that they could put out an ambiguously worded document which, had we seen in advance, we wouldn't have approved, I don't necessarily think that now. I think that that document there is nothing wrong with it."; 240:7-241:4 ["Q Okay. Well, my question was what did you mean at the time you wrote this? A At the time I wrote that it is pretty self-explanatory. Q At the time you wrote it, which, 'Had we seen it in ad-

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vance we would have approved' -- A Because I was very emotionally invested in this. I was white hot angry with them. And I thought they have to be the bogeyman. California Science Center, they are wonderful people. They are honorable, aboveboard people. These guys must be the bogeyman. But it turns out it is the opposite. It is the California Science Center is the bogeyman. Q So are you saying sitting here today that, had you seen the press release in advance, they would have approved it? A If it would have been up to me to approve it, yes, I would have approved it. Now I am not the final say. Q Right. Avi Davis is. A Right. Q The last sentence of that paragraph you say, 'But obviously they were trying to tweak the noses of the Smithsonian.' I had asked you earlier about your e-mail about waving the red flag in front of the bull and whether it had anything to do, at the time you wrote it, about your view with respect to whether they were trying to tweak the noses of the Smithsonian by putting that in the press release. What did you mean when you wrote this sentence at the time you wrote it? A At the time I wrote it, the only conclusion I could reach was that again Smithsonian, California Science Center, California Science Center Foundation had to have had some reason for being upset with this wording. And they were the honorable actor here. And so there had to

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be some other reason, you know, something that would cast negativity on the Discovery Institute. That they had to be the bad actor here. So, you know, I don't -- I had had discussions. I didn't have any one-on-one e-mail or phone calls with the Discovery Institute personnel. And so I am saying it is obvious. But I had no factual information about, hey, are you guys trying to tweak their noses? Or I was venting emotionally and saying this had to be the only explanation. Well, in retrospect it isn't the only explanation. There has been a war going between the Smithsonian and California Science Center type organizations that are the defenders of Darwinism and Darwinian evolution versus Discovery Institute's position of intelligent design."]; 242:1-244:9 ["Q You will recall you were asked some questions about what you meant by waving a red flag in front of a bull. Do you recall that? A Yes. Q And it further stated here, nit seems like they were deliberately trying to screw this up on referring to the Discovery Institute. A Right. Q At the time that you wrote that e-mail on October 7, 2009, at 10:09 A.M., did you have any information regarding the relationship, if any, between Smithsonian Institution and the Discovery Institute? MR. ZELENAY: Objection. Vague. THE WITNESS: No, I did not. The knowledge I had which was -- that was on the 7th; is that

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right? So that was obviously after the cancellation. And let me just look at it again. The only thing that I could conclude was that there was some level of acrimony between the two parties. This -- where was that other e-mail? A So basically Peter sent me an e-mail saying that we are scrambling with the press release thing and Discovery expected it. And that's really the first hint that I had that there was bad relations between Discovery Institute and Smithsonian. And so that's where I said, well, you know, there must be some waving of a red flag in front of a bull because of that bad relation. Q Between the time that Peter sent Exhibit 314's e-mail to you and the time that you wrote the e-mail on Exhibit 163, did you speak to Peter at all? A I believe I did. Q And what was discussed? A That there had been a history of -- we didn't go into great detail. But basically that there was a history of bad relations between the two, Smithsonian and the Discovery Institute. Q Apart from that general knowledge, did you discuss anything more detailed about it? A No. Q At the time that you wrote the e-mail marked as Exhibit 163, is that all the information you had about any kind of bad rapport between the Smithsonian and the Discovery Institute? A Yes. Q Have you since come to learn more about -- A Much more. Q -- about a conflict between those two groups? A Yes. Q Now, essentially

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	<p>the same question with respect to Exhibit 316, which is dated October 8. This is your e-mail to Scott Watt. And this is the one where you refer on page 2 of that document to the Discovery Institute as jerks. You said, 'These jerks at the Discovery Institute had no business doing this.' And then further down it says, 'I guess there is some preexisting level of acrimony between them and the Smithsonian. So they thought they could release an ambiguously worded document.' And then below that, 'They think they have done nothing wrong because they were stating the fact that the film was going to be released at the esc location. But obviously they were trying to tweak the noses of the Smithsonian.' Between October 7 at 10:09 A.M. and October 8 at 7:31 P.M., did you come to learn any more information about the details of the acrimonious relationship between the Smithsonian and the Discovery Institute? A No. Q Was that e-mail then based on the information you obtained from Peter or from some other source? A That was hearing from Peter. Q Any other source? A No."]</p>
<p>47. Harold Closter of the Smithsonian Institution notified the California Science Center on October 5, 2009 of the Discovery Institute's press release and the misrepresentations in the press release.</p>	<p>Disputed. Closter notified the California Science Center of inaccuracies, not misrepresentations. <u>SUPPORTING EVIDENCE:</u> <i>See Moving Party's evidence.</i></p>

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<p>(Zelenay Decl., Exh. 54 [Dep. Exh. 212(10/5/09 Closter email string]; Exh. 10 [Ameqa Dep. Tr.] at 50:2-53:23, 55:15-20, 76:4-18, 117:19-118:11.)</p>	
<p>48. As a result of its relationship with the Smithsonian Institution, the California Science Center has been provided with artifacts on loan and other valuable assets.</p> <p>(Zelenay Decl., Exh. 53 [Dep. Exh. 200, Rudolph Injunction Decl.] at ¶¶ 4, 14.)</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract. Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Undisputed.</p>
<p>49. Members of the public and outside groups sent emails to the Foundation stating that they believed that the press releases stated that the California Science Center was sponsoring the Event.</p> <p>(Zelenay Decl., Exh. 63 [CSCF0001039, e-mail from member of public stating “[t]he language used in the press release seems to indicate that the esc is in some way supporting the screening”]; Exh. 62 [CSCF0001042, email from member of the public stating “[p]lease explain how a prestigious science museum could be sponsoring anti-science”].)</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract. Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Undisputed.</p>
<p>50. The misleading press releases had the potential of causing injury to the reputation of the California Science Center and to its relationship with the Smithsonian</p>	<p><i>Disputed.</i> The press releases were not misleading. See Opposing Party’s Response and Supporting Evidence, ¶ 47.</p>

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(Zelenay Decl., Exh. 1 [Rudolph Dep. Travel to.] at 287:25-293:3,302:1-303:19 [“the loss was when the inaccurate information was put out in the press release, and that’s where our reputation was damaged.”] Exh. 54 [Dep. Exh. 212(10/5/09 Closter travel to string); Exh. 10 [Amege Dep. Travel to.] at 50:2-53:23, 55:15-20, 76:4-18, 117:19-118:11; Exh. 11 [Pygin Dep. Travel to.] at 91:24-94:5 [“It would be hard to know if someone didn’t give us a gift because of this”].)

51. A retraction of the press releases was not sufficient to correct the potential harm caused by the releases to the Foundation or the California Science Center because the misrepresentation had already been widely distributed on the Internet nor would a retraction ensure compliance with the Promotional Materials provision in the future.

(Zelenay Decl., Exh. 1 [Rudolph Dep. Tr.] at 98:1-23, 262:10-264:13 [“so I didn’t believe that a simple retraction was even possible, when something has gone viral on the web and is all over the place, nor would it suffice, because we didn’t know what would continue to happen”]; Exh. 6

Disputed. A retraction or some public statement correcting misconceptions allegedly caused by the press releases, would have been sufficient. In fact, the Smithsonian requested and both the Foundation’s public relations firm recommended and its own head of communications recommended against cancelling the event and simply providing a statement to the public. Foundation executives even prepared a draft letter to AFA demanding that it issue a public statement.
SUPPORTING EVIDENCE:
Becker Decl., Exh. No. 37, Sion Dep. Tr., Dep. Exh. No. 11 (10/5/09 e-mail from S. Amege to J Rudolph, et al., 2:05 p.m, p. 3) [“The Smithsonian Institute [sic] called and . . . would like us to issue a correction statement

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1 [Peterson Dep. Tr.] at 201: 15-16 ["And
2 anything that gets out on the Internet, it
3 trumpets everything and you have no
4 control over it."])

5 on PR newswire as to what our role is and that
6 we are just one of many Smithsonian affiliates
7 on the west coast."]; *id.*, Exh. No. 14, Amega
8 Dep. Tr., Dep. Exh. No. 212 (10/6/09 e-mail
9 from H. Closter to S. Amega) ["Thanks for
10 lending an ear. We earnestly hope that the
11 California Science Center will provide an ac-
12 curate statement to the media informing of
13 your role (or non-role) in presenting or serv-
14 ing as the host site of the film on October
15 25."]; *id.*, Exh. No. 1, Amega Dep. Tr., 96:5-
16 9 ["A. I called Jim Lucas and shared with him
17 the issue and he recommended that we simply
18 correct the misperception by letting people
19 know when they called; that it was not neces-
20 sary to cancel or put stuff on the wires.]; *id.*,
21 Exh. No. 12, Amega Dep. Tr., Dep. Exh. No.
22 210 (10/5/09 e-mail from S. Amega to J. Ru-
23 dolph ["Hi Jeff and William, As I mentioned
24 to William, after giving this some thought
25 (especially with relation to Holly Strom), I
26 think we should handle this by simply provid-
27 ing a statement to be used by Guest Services
28 and the Communications Dept. in response to
any inquiries. There is no need to publicly fan
the flames by fighting over PR Newswire or
by cancelling the event. Here is my proposed
statement - please review: The California Sci-
ence Center regularly allows independent in-
stitutions and organizations to use the IMAX
facilities for a fee. Most often, such groups

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choose the Science Center because of its focus on science and technology. This private event is in no way an endorsement by the Science Center and the Smithsonian Institute. The California Science Center is one of 20 Smithsonian Affiliates in California. The Smithsonian and the Science Center are not involved in any way with the program.”]; *id.*, Exh. No. 37, Sion Dep. Tr., Dep. Exh. No. 11 (10/5/09 e-mail from S. Amega to C. Sion, et al. [“After giving it some thought, I have changed my mind, and I don't think canceling the event is the way to go. Instead I think a statement correcting the misconceptions in their news release that we provide for any inquiries by a guest or the media is the best approach. I've written the statement, and I'm waiting for Jeff and William's approval.”]; *id.*, Exh. No. 12, Sion Dep. Tr., Exh. 38 (10/6/09 e-mail from C. Pygin to J. Rudolph with letter attachment) [“[W]e require that you issue a statement clarifying that the Smithsonian and the California Science Center have no participation in this event beyond serving as the venue in Los Angeles. The required statement of clarification is below. If you do not issue this clarification immediately to the recipients of the October 5th press release, your event will be canceled. . . . Clarification:
The Darwin Debates held at the California Science Center on October 25, 2009 are in no

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	way endorsed by or affiliated with the California Science Center or the Smithsonian Institute but are a private event held at the location.”]
<p>52. As a result of these violations of AFA’s contractual commitments, and the fact that these press releases falsely appropriated the Science Center’s name and reputation, the Foundation notified AFA on October 6, 2009-one day after it had received the signed Revised Event Price Estimate from AFA-that it was cancelling the October 25, 2009 Event.</p> <p>(Zelenay Decl., Exh. 24 [Sion Dep. Exh. 45, 10/6/09 Sion email]; Exh. 1 [Rudolph Dep. Tr.] at 98:1-23, 262:10-264:13 [“I had looked on the web and had seen a number of press releases put out by different sources that were, in my judgment, factually incorrect and misrepresented the situation and damaged our relationship and our reputation”], 269:9-270:2, 281 :6-23 [“the press statements put out were in violation of our policies and procedures that were potentially harmful to the reputation of the Science Center and to our relationship with the Smithsonian. I believe that violated our agreement, and that, as I indicated earlier, I felt that the best course of action was to cancel the event”]; Exh. 2 [Sion Dep. Tr.] at</p>	<p>Disputed. Moving Party rescinded the contract and cancelled AFA’s event solely on the basis of the press releases issued by the Discovery Institute. AFA was not required under the contract to manage the Discovery Institute’s press information program.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>Becker Decl., Exh. No. 33, Rudolph Dep. Tr., Exh. 200 (Rudolph Decl, ¶ 9, 3:9-20; ¶ 13, 4:14-15) [“On October 5,2009, I received an email from Shell Amega, the Vice President of Communications at the Foundation, forwarding a Press Release that was dated October 5, from an organization known as the Discovery Institute concerning a private event scheduled for the IMAX Theater on October 25, 2009. By referring to the event with the following language: "when the Smithsonian institution's west coast affiliate premieres <i>Darwin's Dilemma</i>", the promotional material implied that the California Science Center was sponsoring the event, which was factually inaccurate. . . . I decided to cancel the event scheduled for October 25, 2009 and Chris Sion sent an email to the AFA with that direction.”]; <i>id.</i>, Exh. No. 50, Sion Dep. Tr., Exh. 45 (10/6/09 e-mail from C. Sion to A. Davis)</p>

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<p>385:14-386:2; Exh. 5 [Davis Dep. Tr.] at 123:20-124:6; Exh. 68 [Printouts of publicity available on 10/7/09].)</p>	<p>["It has come to our attention that in a press release issued October 5, 2009 by the American Freedom Alliance [sic], it is inferred [sic] that the California Science Center as a Smithsonian Institute [sic] affiliate is cosponsoring the Darwin Debates."]; <i>id.</i>, Exh. No. 48, Sion Dep. Exh. No. 40 (10/6/09 e-mail from P. Bylsma to C. Sion) ["First, the press release in question was written and distributed by the Discovery Institute and not by the American Freedom Alliance, and the American Freedom Alliance had no control or approval over their publicity activities. Thus, in no way could this press release violate anything in your contract with American Freedom Alliance."]; <i>id.</i>, Exh. No. 15, Amega Dep. Tr., Exh. 214 (10/7/09 e-mail from Amega to Rudolph, et al. ["On Oct. 5th, the Discovery Institute placed a news release [sic] on PR Newswire promoting a creationist film that they had scheduled, through a third party, to show in a private screening at the Science [sic] Center's IMAX Theater. They wrongly implied that the California Science Center and Smithsonian Institute were endorsing the film."].</p>
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<p>53. After the Foundation cancelled the Event, AFA turned to the Discovery Institute for advice about not only how to respond, but how to take advantage of the "publicity opportunities." At the suggestion</p>	<p>Objection. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Whether AFA turned to the Discovery Institute for advice has no tendency to prove or disprove any disputed fact that is of consequence to the determination of this ac-</p>
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of the Discovery Institute, AFA immediately raised the defense that the Discovery Institute was an independent third party.

(Zelenay Decl., Exh. 50 [Dep. Exh. 169, 10/8/09 Bylsma email] ["I just spoke with Avi and it looks like we have some publicity opportunities out of this you and I should discuss:] Exh. 38 [Dep. Exh. 97, 10/6/09 Bylsma email]; Exh. 4 [Bylsma Dep. Tr.] at 273:22-277:17, 282:5-285:21 & errata; Exh. 21 [Sion Dep. Exh. 40, 10/6/09 Sion email]; Exh. 23 [Sion Dep. Exh. 41, 10/7/09 Sion email]; Exh. 49 [Dep. Exh. 166, 10/6/09 Bylsma email]; Exh. 3 [West Dep. Tr.] at 196:3-198:10; Exh. 71 [10/7/09 Crowther email, CRC0000011-12 [email from Mr. Crowther stating that he wrote the email sent by Mr. Bylsma to Ms. Sion]; Exh. 72 [10/8/09 Crowther email string, CRC0000208-209.]

54. The Discovery Institute referred AFA to its current counsel and has funded some of AFA's legal fees and the October 25 event held at USC.

Zelenay Decl., Exh. 5 [Davis Dep. Tr.] at 330:2-335:14 ["And so this was sort of a penance. They want to make sure that the event went forward and that we had the

tion. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether AFA committed a material breach of the contract. Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this Request: *Disputed* as to "At the suggestion of the Discovery Institute, AFA immediately raised the defense that the Discovery Institute was an independent third party." All defenses raised in connection with this litigation have been raised by counsel for AFA on its behalf. Objection. Lacks probative value, confuses the issues, is misleading and is unduly prejudicial.

Objection. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Whether The Discovery Institute referred AFA to its current counsel and has funded some of AFA's legal fees and the October 25 event held at USC has no tendency to prove or disprove any disputed fact that is of consequence to the determination of this action. Objection. Immaterial. The alleged fact has no significance in determining the out-

<p>1 wherewithal, the financial wherewithal to 2 mount both the TRO and to mount the event 3 in the event the TRO failed:]; Exh. 39 [Dep. 4 Exh. 98, 10/19/09 West. Email]; Exh. 3 5 [West Dep. Tr.] at 202:22-205:15, 205:19- 6 207:16.)</p>	<p>come of this case with regard to whether AFA committed a material breach of the contract. Objection. Vague and ambiguous as to the meaning of "legal fees." Objection. The al- leged fact that AFA has been paid legal fees seeks to expose confidential information pro- tected by the attorney-client privilege. Cal.Ev.Code §§ 950, et seq. Subject to and without in any way waiving the foregoing ob- jections, and to the extent that Responding Party understands this alleged fact: <i>Disputed</i> that any legal fees have been paid in this case.</p>
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12 Plaintiff, American Freedom Alliance, also submits the following statement of additional ma-
13 terial facts that raise a triable issue with respect to Issue No. 1, together with references to sup-
14 porting evidence, in opposition to Defendants' motion.

<p><u>ADDITIONAL MATERIAL</u> <u>DISPUTED FACTS</u></p>	<p><u>SUPPORTING EVIDENCE</u></p>
<p>17 PLAINTIFF'S ISSUE NO. 1: THE FOUNDATION DEFENDANTS ARE NOT 18 ENTITLED TO SUMMARY ADJUDICATION BECAUSE AFA DID NOT COMMIT 19 A MATERIAL BREACH OF THE CONTRACT.</p>	
<p>20 1. The California Science Center Foundation 21 is an auxiliary to the California Science Cen- 22 ter ("Center"). As an auxiliary to the Center, 23 its primary purpose is the promotion of edu- 24 cation through the development and expan- 25 sion of the Center's exhibit and educational 26 programs and scientific activities. The Center 27 and Foundation share a "common mission" 28 to aspire to stimulate curiosity and inspire</p>	<p>Becker Decl., Exh. No. 29, Rudolph Dep. Tr., Dep. Exh. No. 193 (Foundation Bylaws, Article I, "Purpose") ["The CALIFORNIA SCIENCE CENTER FOUNDATION is a nonprofit corporation, created to function as an auxiliary to the CALIFORNIA SCIENCE CENTER. Its primary purpose is the promo- tion of education through the development and expansion of the Science Center's exhibit</p>

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<p>science learning in everyone by creating fun, memorable experiences.</p>	<p>and educational programs and scientific activities.”]; <i>id.</i>, Exh. No. 30, Rudolph Dep. Exh. No. 194 (Joint Operation Agreement, p.1) [“Center and Foundation share one common mission: “We aspire to stimulate curiosity and inspire science learning in everyone by creating fun, memorable experiences, because we value science as an indispensable tool for understanding our world, accessibility and inclusiveness, and enriching people’s lives.”]</p>
<p>2. The contract AFA signed directly benefits the Center, and the Center is identified as its beneficiary. The contract also states that the Event Services Manager is a “Center”, not a “Foundation,” official. And Chris Sion and Shell Amega, whether or not they are employees of the Foundation, serve in positions that are established for the benefit of the Center. Additionally, the California Science Center web site promotes the IMAX Theater as a <i>Center</i>, not a <i>Foundation</i>, attraction.</p>	<p>Becker Decl., Exh. No. 41, Sion Dep. Tr., Dep. Exh. No.16 (Event Price Estimate) [“If you would like to proceed with booking your event at the California Science Center, please sign below and return .. By signing this agreement you are agreeing to the terms and conditions that are incorporated herein and with the Event Policies & Procedures.”]; <i>id.</i>, (Event Policies and Procedures) [“To assure your event functions smoothly at the California Science <i>Center</i>, please review the following policies and procedures. Once a client’s Event Price Estimate is signed and the Science <i>Center’s</i> Events Department has received a deposit, an Event Manager will handle scheduling and be the liaison between the client and the Science <i>Center</i>.”]; “The California Science <i>Center</i> can not be held responsible for equipment malfunction, damage, or non-availability on the day of your</p>

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event.”; “All clients and outside caterers are required to provide a certificate of public liability and property damage insurance in the amount of \$2,000,000, naming the California Science *Center*, the California Science *Center* Foundation and the State of California as additional insured for the term of your event (including setup, event, & teardown time). Please provide the Science *Center’s Event Manager* evidence of your insurance coverage at least two weeks before your event date. Live performers must be covered by additional insurance.”; “By signing the Event Price Estimate (EPE), clients agree to pay the cost of repair, restoration, replacement of damage done by you, your subcontractors, vendors, agents, or invitees to the California Science *Center*, its equipment or exhibits. The California Science *Center* shall be held harmless for all claims arising out of use of the California Science *Center* and the California Science *Center’s* property. Client assumes full responsibility for theft, loss or damage to any property and equipment brought to the California Science *Center* by you, your subcontractors, vendors, agents, or invitees. Contracts made directly with your vendors are solely between you and your vendor. Clients are to ensure that all vendors review and agree to comply with all requirements established by the California Sci-

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ence *Center*. . . . By signing the Event Price Estimate you acknowledge that the California Science *Center* is not responsible for policing your fire code adherence and is not responsible for the refunding of rental fees due to the closure of an event by a Fire Marshall.”; “The California Science *Center* is not responsible for any damage or loss of articles placed or left in the California Science *Center* prior to, during or following an event.”; “The Science *Center* will charge a \$35.00 processing fee for any check returned for insufficient funds. If a check is returned, a cashier's check or credit card payment will be required.”;” California Science *Center* personnel are not responsible for moving, setting up, or taking down any equipment that does not belong to the Science *Center* with the exception of banners. All requests for movement of Science *Center* owned furniture and equipment must go through the California Science *Center's Event Manager*. All non-Science *Center* items must be removed immediately following the event.”; “Set-up/staging of events is only permitted to take place within the Donald P. Loker Conference *Center* and Wallis Annenberg Building or in the service hallways during Science *Center* operational hours.”; “Set-up/staging times are determined by the Science *Center's Event Manager*.”; “The client and its sub-

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contractors (caterer, event co., decor co., etc.) are responsible for removal of all personal and company property within that time unless other arrangements are made in advance with the California Science *Center's* **Event Manager**.”; “No candles or open flames are permitted inside the Science *Center* unless a permit from the Fire Marshall is submitted to the Event Manager 2 weeks prior to the event. . . . Absolutely no pins, nails, staples or tapes of any kind are permitted on any walls, ceilings or floors on the Science *Center* property. No pyrotechnics are permissible on Science *Center* property. No helium balloons (air-filled OK) are permissible inside the Science *Center*. No objects can be hung from the ceiling without express prior permission and assistance from the Science *Center* (additional fees may apply). Also, no glitter, sequins, confetti, fake snow, etc. is allowed on the Science *Center* property. Decorations are not allowed in the exhibit halls. The client is responsible for removing or causing the removal of all decorations immediately following the event. Nothing is allowed in the Big Lab fountain. Only the Science *Center* can hang banners. The Science *Center* will hang (2) banners for free - additional banners will be hung for \$50.00 per banner.”; “The California Science *Center* is a smoke free facility. No smoking is per-

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mitted in this building or within 20 feet of its entrances.”; “Live music is allowed after the California Science *Center* has closed to the public for the duration of your event.”; “The California Science *Center* is not responsible for weather or road conditions (including traffic), power outages, acts of God, criminal activities, economic downturns, political changes, or any other activity, event or condition beyond its control. There will be no refunds or allowances resulting from these conditions.”; “It is required that the Event Services Office approve, for technical and factual accuracy, all promotional materials mentioning the California Science *Center* produced for your event (including invitations, programs, press releases, etc.) prior to printing or broadcast. Please allow sufficient time for this approval.”; “The maximum amount of guests allowed inside the Science *Center* for a buyout is 4,000.”; “The California Science *Center* encourages the use of our in-house caterer, Kensington Caterers, which can be reached by calling (323) 935-4300.”; “The Science *Center’s Event Manager* will determine upon request how many jack-stands will be needed outside exhibit galleries.”; “Equipment brought to the Science *Center* used to heat or cook food must be approved in advance by the California Science *Center’s Event Manager*.”; “Any out-

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side caterer must attend a final event walkthrough with the Science *Center's Event Manager* and the client at least one week before the event.”; “The California Science *Center's Event Manager* must receive a copy of the permit at least one day before your event.”; “Once the Letter of Agreement has been signed, the Science *Center's Event Manager* will arrange an on-site event walkthrough with the client and any caterer to discuss plans, policies, procedures and any equipment or materials necessary for your event.”; There will be an additional charge of \$50.00 per event walkthrough over three. Please consult the Science *Center's Event Manager* if more than three event walkthroughs are anticipated.”; The Science *Center* does not take responsibility for deliveries or storage of materials and equipment. Any delivery to the Science *Center* must be met by a representative of the client and arranged in advance with the Science *Center's Event Manager*.”; “Any guest management function at an event, e.g. nametags, entry restrictions, early entry, registration, etc. is solely the responsibility of the client and not the responsibility of California Science *Center staff*.”; While the Event Manager will inform the client when the event is approaching the end of the contracted time, it is the client's responsibil-

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ity to make sure all guests leave the California Science *Center* by the end of the contracted event time. Clients will be required to sign an overtime contract if their guests are in the California Science *Center* more than 15 minutes past the end of the contracted event time.”; “Under no circumstance is an *outside* company permitted to provide a security function on California Science *Center* property.”; “The IMAX Theater is not included in a Science *Center* buyout and will still be open to the public during regular IMAX hours (currently 9:00 A.M.-9:00 P.M.) unless contracted for separately.”; “Electricity in the California Science *Center* is limited to approximately (2) 20 amp circuits per floor in the central atrium.”; “The following spaces are available for rent in the California Science *Center*: Edgerton Court, Disney Court, the Donald P. Loker Conference *Center*, the World of Life, Creative World 2nd Floor, Creative World 3rd Floor, Sky Court Gallery, Weingart Special Exhibits Gallery, Lorsch Family Pavilion, Science Plaza, the Rose Garden Cafe dining area, and the *IMAX Theater*.”; “When renting the entire California Science *Center* (buyout), all areas above excluding the IMAX Theater are included in your rental agreement and are available for use. The IMAX Theater is not included in a Science *Center* buyout and will

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	<p>still be open to the public during regular IMAX hours (currently 9:00 A.M.-9:00 P.M.) The McDonald's area is included in a Science <i>Center</i> buyout (an additional staffing fee will apply)."; "Clients and vendors are not permitted to use California Science <i>Center</i> walkie-talkies or Nextel. They are welcome to rent their own and, if necessary, rent an additional radio for the Science <i>Center's Event Manager</i> at their expense." (emphasis added.); <i>id.</i>, Exh. No. 43, Sion Dep. Tr., Dep. Exh. No. 33 (e-mail signature blocks for L. Matsunaga ["Lori Matsunaga, Event Services California Science Center"; and C. Sion "Vice President, Food & Event Services, California Science Center"]; <i>id.</i>, Exh. No. 36, Sion Dep. Tr., Dep. Exh. No. 9 (IMAX Theater web page on the California Science Center web site) ["The Science Center is always bringing in new and exciting IMAX films, but you may click here to see which films are currently showing." (emphasis added.)]</p>
<p>3. The Center is s an affiliated museum with the Smithsonian Institution. The Center's relationship with the Smithsonian is an important one. A clear priority of the Smithsonian is to make its resources available to a wide range of cultural and educational organizations across the United States so that it becomes a truly national institution. It is in</p>	<p>Becker Decl., Exh. No. 38, Sion Dep. Tr., Dep. Exh. No. 12 (California Science Center web site page entitled "Smithsonian Affiliate Designation"); <i>id.</i>, Exh. No. 8, Rudolph Dep. Tr., 176:20-21 ["The relationship with the Smithsonian is an important relationship to the Science Center."]</p>

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<p>1 this spirit that the Affiliations Program was 2 created to foster fruitful partnerships with 3 museums and cultural organizations 4 throughout the country. As part of its rela- 5 tionship with the Smithsonian, the Science 6 Center derives several benefits and takes on 7 important responsibilities to preserve histori- 8 cal artifacts. The Center's relationship as an 9 affiliate of the Smithsonian requires that it 10 takes steps to protect the uses of the Smith- 11 sonian name in all materials related to the 12 Science Center.</p>	
<p>11 4. It is the Smithsonian's official policy that 12 intelligent design is a religious, not a scien- 13 tific, theory.</p>	<p>Lepisco Decl., Exh. B, Bates No. SI00091(10/5/09 e-mail from L. St. Thomas, Smithsonian chief spokesperson to H. Closter ["This is one of our fears about affil- iates. As you know, we cancelled an event about Intelligent Design (creationism) at MNH a couple of years ago. <i>It is against SI/MNH policy which is science and not religion.</i>"; (emphasis added.)]</p>
<p>14 5. On October 5, 2009, Linda St. Thomas, 15 the Smithsonian's chief spokesperson, con- 16 tacted Harold Closter, the Smithsonian's af- 17 filiates director. St. Thomas asked Closter to 18 contact the Center and demand that it "cease 19 and desist" its providing a forum for the 20 presentation of AFA's planned event based 21 on Smithsonian official policy.</p>	<p>Lepisco Decl., Exh. B, Bates No. SI00091(10/5/09 e-mail from L. St. Thomas, Smithsonian chief spokesperson to H. Closter ["This is one of our fears about affil- iates. As you know, we cancelled an event about Intelligent Design (creationism) at MNH a couple of years ago. It is against SI/MNH policy which is science and not re- ligion. . . . Can you tell them to cease and desist [?]"</p>

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1 6. Closter telephoned the Center and spoke
2 to Shell Amega, vice president for Commu-
3 nications. Closter advised Amega that pub-
4 licity about the AFA event appearing on the
5 Internet mentioned the Smithsonian and the
6 Center IMAX theater in conjunction with an
7 intelligent design film that AFA planned to
8 screen during its event. Amega was in-
9 formed that it was a "creationist" film and
10 that the Smithsonian Institution was
11 "alarmed" at the implication that the Center
12 "officially supports the creationist film."
13 Amega was also informed that the Smithson-
14 ian had "pulled the plug" on the screening of
15 the ID film at its facility.

Becker Decl., Exh. No. 42, Sion Dep. Tr.,
Exh. 32 (10/5/09 e-mail from S. Amega to J.
Rudolph, et al., pp. 3-4) ["The Smithsonian
institute called and was alarmed at the news
release from a creationist organization, the
Discovery Institute, below because it implied
that the Science Center officially supports
the creationist film that is set to screen on
Oct. 25. It is also alarmed with the implica-
tion that the Smithsonian is involved and
would like us to issue a correction statement
on PR newswire as to what our role is and
that we are just one of many Smithsonian
affiliates on the west coast. They said that
this group had booked at the Smithsonian to
screen the film and the Smithsonian pulled
the plug on the screening when they found
out. Please advise on how you'd like us to
proceed."]; *id.*, Exh. No. 1, Amega Dep. Tr.,
63:3-5 ["Q. Did he use the term "creationist
organization" at any time during that conver-
sation? A. Yes."]

20 7. The Foundation's vice president for
21 Food and Event Services, Chris Sion, who,
22 along with her assistant, Lori Matsunaga, had
23 negotiated the contract with AFA, believed
24 that the nature of AFA's event was to "dis-
25 pute Darwin's theory of evolution." On at
26 least three occasions, she conveyed strong
27 reservations about the Science Center's asso-
28 ciation with the event to Rudolph and her

Becker Decl., Exh. No. 9, Sion Dep. Tr.,
314:25-315:9 ["The Witness: My general
understanding is that it is a movie disputing
Darwin's theory of evolution. By Mr. Beck-
er: Q. And do you know when you first came
to that understanding? A. I recall in my con-
versation with Dr. Strom, he was explaining
that it would be a good topic for a debate,
given that this was disputing the theory of

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1 colleagues because of what she understood to
2 be its anti-Darwin content, and repeatedly
3 communicated distress over the publicity
4 generated by the Discovery Institute for the
5 event. After speaking to Rudolph, she ad-
6 vised Cynthia Pygin, the Foundation's CFO,
7 that the "main problem" was "that it is an
8 anti-Darwin/ creationist group." When the
9 event was cancelled, she was jubilant.

evolution, I believe."]; *id.*, Exh. No. 46, Sion
Dep. Tr., Dep. Exh. No. 36, ["They are plan-
ning a private IMAX screening of 'We Are
Born of Stars' *and panel discussion on
Darwinism and wanted us to 'partner' with
them. . . . I said that I wouldn't recommend
that he call you about being a 'partner'
since their topic of Darwinism and the na-
ture of their controversial approach is likely
not a good fit to partner wi a Science Cen-
ter.*"]; *id.*, Exh. No. 42, Dep. Exh. No. 32
(10/5/09 e-mail from C. Sion to S. Amega, p.
3) ["Thanks so much for bringing this to our
attention - *it's disturbing.*" (emphasis add-
ed.); *id.* ["*A science center should not even
be asked to partner wi any group associated
wi debating Darwinism - it's not our place.*"
(emphasis added.); *id.* ["[T]his is so *frus-
trating!*" (emphasis added.); *id.*, p.2, ["I am
so *bugged!!!*" (emphasis added.); *id.*, Exh.
39, Sion Dep. Tr., Dep. Exh. No. 13 (10/5/09
e-mail from C. Sion to R. Martin, p. 2) ["Get
this ... are they *crazy???*" (emphasis add-
ed.); *id.*, Exh. No. 34, Rudolph Dep. Tr.,
Dep. Exh. No. 202 (10/5/09 e-mail from C.
Sion to C. Pygin, p. 1) ["We are having is-
sues w/ a client who booked the IMAX for a
private reception and they sent a press re-
lease inferring we were a sponsor- *the main
problem is that it is an anti-Darwin/ crea-
tionist group.*" (emphasis added.); *id.*, Dep.

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	Exh. No. 49, Sion Dep. Tr., Dep. Exh. No. 44 [Wow!!!! This is great news. -- I had no idea they had agreed to cancel the film!" (emphasis added.)]
8. The Center/ Foundation received the signed Event Price Estimate from AFA on October 5.	Becker Decl., Exh. No. 15, Sion Dep. Tr., Dep. Exh. No. 10/5/09 e-mail from Sion to Rudolph noting that AFA's contract was received on October 5 ["Today we received their signed event price estimate which includes language that says when they sign the price estimate they are also agreeing to our policies and procedures."]
9. After being informed of the Smithsonian's concerns about the "creationist" aspect of the AFA event, Rudolph asked his staff to look for something in the contract with AFA to see if it could be canceled.	Becker Decl., Exh. No. 42, Sion Dep. Tr., Exh. 32 (10/5/09 e-mail from Amega to Rudolph, et al., pp. 3-4) ["Subject: Creationist organization implies that the Calif. Science Center is sponsoring Darwin film; Importance: High; Hi William and Jeff, The Smithsonian institute called and was alarmed at the news release from a creationist organization, the Discovery Institute, below because it implied that the Science Center officially supports the creationist film that is set to screen on Oct. 25. It is also alarmed with the implication that the Smithsonian is involved and would like us to issue a correction statement on PR newswire as to what our role is and that we are just one of many Smithsonian affiliates on the west coast. They said that this group had booked at the Smithsonian to screen the film and the

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Smithsonian pulled the plug on the screening when they found out. Please advise on how you'd like us to proceed.”]; *id.*, Exh. No. 13, Amega Dep. Tr., Dep. Exh. No. 211 (10/5/09 e-mail from S. Amega to C. Sion, p. 1) [“Hi Chris - Jeff just called and is wondering if they violated an agreement- like was this supposed to be a private screening or did they say it was a public screening? If they misrepresented the event, then we can cancel them. He would like to chat with you about it and will talk to you.”]; *id.*, Dep. Exh. No. 34, Rudolph Dep. Tr., Dep. Exh. No. 202 (10/5/09 e-mail from Sion to Pygin) [“We are having issues w/ a client who booked the IMAX for a private reception and they sent a press release inferring [sic] we were a sponsor- *the main problem is that it is an anti-Darwin/creationist group.* They referred to us as the west coast affiliate of the Smithsonian and it was all highly misconstrued and offensive. Jeff would like for you to help us review what our current policy language is on this subject as his inclination is to cancel their contract.” (emphasis added.)]; *id.*, Dep. Exh. No. 40, Sion Dep. Tr., Dep. Exh. No. 15 (10/6/09 e-mail from C. Pygin to C. Sion, p. 1) [“I spoke with Jeff about this and he would like to cancel the event. Please see me so that we can discuss the approach given the language in the contract.”].

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<p>10. In 2005, the Discovery Institute rented out the Smithsonian's Natural History Museum ("SI/NHM") for the screening of an ID film entitled "The Privileged Planet." The Smithsonian tried to cancel the event, ultimately allowing the screening to proceed, but refusing to accept the Discovery Institute's \$16,000 rental fee. The Smithsonian's objections to the screening of the ID film were widely reported in the Washington Post, the New Your Times, the blogosphere and elsewhere.</p>	<p>Lepiscopo Decl., Exh. B, SI000015-17 (6/2/05 <i>Washington Post</i> article); SI0000018 (10/6/09 e-mail from L. Labov to C. Samper) ["Given the flap a few years ago about the showing of "The Privileged Planet," I thought you might want to know what the Discovery Institute is saying in case you haven't seen this already."]</p>
<p>11. As the director of the west coast's largest interactive science center and museum, Rudolph would be expected to have been aware of the Smithsonian policy regarding intelligent design because he knew about the "Privileged Planet" flap involving the Smithsonian. This is especially true since Rudolph considers himself to be a "news junkie," who reads the newspaper every day, makes ample use of the Internet and follows "a lot of stuff."</p>	<p>Becker Decl., Exh. No. 8, Rudolph Dep. Tr., 266:8-11 ["I'm something of a news junkie. I read the newspaper every day; now I look on the web a lot more, too, but I tend to follow a lot of stuff. So I keep up on things."]; <i>Id.</i>, 268:9-11 ["I'm aware that there was an event at the Smithsonian and that they had some response associated with that event."]; Lepiscopo Decl., Exh. B, SI000091 (10/9/09 e-mail from L. St. Thomas to H. Closter) ["As you know, we cancelled an event about Intelligent Design (creationism) at MNH a couple of years ago."]; Lepiscopo Decl., Exh. B, SI000015-16 (<i>Washington Post</i> article) ["The news spread across science blogs – especially those dedicated to the evolution debate."]; "The New York Times picked up the story Saturday."]; Woodward Decl., Part</p>

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	X, § N ("Importance Of The NHMLAC Record Of Correspondence"), ¶ 76.
12. After reviewing the Event Policies and Procedures, Sion notified Rudolph that she had located a term in it that AFA had violated. She expressed the hope that the language of the contract would provide the Science Center with "cover" (i.e., a plausible excuse) for cancelling AFA's event because she feared that AFA would sue the Science Center.	Becker Decl., Exh. No. 37, Sion Dep. Tr., Dep. Exh. No. 1 (10/5/09 e-mail from C. Sion to S. Amega) ["They did receive an agreement w/ the following language- <i>hope this covers us well!</i> I will work it out w/ Jeff" (emphasis added.); <i>id.</i> , Exh. No. 34, Rudolph Dep. Tr., Exh. No. 202 (10/5/09 e-mail from Sion to Pygin) ["I have a feeling they will sue us."]; <i>id.</i> , Exh. No. 7, Pygin Dep. Tr., 80:2-14 ["Was there any discussion during that conversation about sending AFA a request to clarify information that was misleading in the press releases? The Witness: Can you read that back. Sorry. (record read.) The Witness: Yes. By Mr. Becker: Q. How did that subject come up? Was that -- tell me who said what about it. A. I don't remember the exact conversation. Chris was suggesting that as the approach. Q. What was your response to the suggestion that Chris made? A. Subsequent to her suggestion, I incorporated that in a draft, in a written draft. Q. Did she say that she felt that would be the best approach in lieu of canceling the event, or words to that effect? A. I believe she said words to that effect. Q. Did she tell you why she felt that way? A. <i>She did say she was concerned they would sue.</i> " (emphasis added.)]

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<p>13. Amega agreed with Sion that AFA had violated the contract.</p>	<p>Becker Decl., Exh. No. 13, Amega Dep. Tr., Exh. 211 (10/5/09 e-mail from S. Amega to C. Sion, p. 1) ["Wow- they clearly violated that part of the agreement."]</p>
<p>14. The Foundation and Rudolph specifically were advised not to cancel AFA's event, and that it would be more prudent to issue a public statement correcting any misinformation contained in the Discovery Institute press releases. Closter, the Smithsonian Institution's affiliates director, asked for such a clarification and did not recommend cancelling the event. The Foundation's public relations consultant, James Lucas at Abernathy MacGregor Group, recommended a public statement in lieu of cancellation. The Foundation's communications director, Shell Amega, also recommended against cancellation. And even Sion, due to her fear of a lawsuit, believed a clarification was more prudent than cancelling the event. In short, the cancellation was ordered despite a consensus from and against the advice of executive staff members and an outside consultant that it would be ill-advised.</p>	<p>Becker Decl., Exh. No. 37, Sion Dep. Tr., Dep. Exh. No. 11 (10/5/09 e-mail from S. Amega to J Rudolph, et al., 2:05 p.m, p. 3) ["The Smithsonian Institute [sic] called and . . . would like us to issue a correction statement on PR newswire as to what our role is and that we are just one of many Smithsonian affiliates on the west coast."]; <i>id.</i>, Exh. No. 14, Amega Dep. Tr., Dep. Exh. No. 212 (10/6/09 e-mail from H. Closter to S. Amega) ["Thanks for lending an ear. We earnestly hope that the California Science Center will provide an accurate statement to the media informing of your role (or non-role) in presenting or serving as the host site of the film on October 25."]; <i>id.</i>, Exh. No. 1, Amega Dep. Tr., 96:5-9 ["A. I called Jim Lucas and shared with him the issue and he recommended that we simply correct the misperception by letting people know when they called; that it was not necessary to cancel or put stuff on the wires.]; <i>id.</i>, Exh. No. 12, Amega Dep. Tr., Dep. Exh. No. 210 (10/5/09 e-mail from from S. Amega to J. Rudolph ["Hi Jeff and William, As I mentioned to William, after giving this some thought (especially with relation to Holly</p>

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Strom), I think we should handle this by simply providing a statement to be used by Guest Services and the Communications Dept. in response to any inquiries. There is no need to publicly fan the flames by fighting over PR Newswire or by cancelling the event. Here is my proposed statement - please review: The California Science Center regularly allows independent institutions and organizations to use the IMAX facilities for a fee. Most often, such groups choose the Science Center because of its focus on science and technology. This private event is in no way an endorsement by the Science Center and the Smithsonian Institute. The California Science Center is one of 20 Smithsonian Affiliates in California. The Smithsonian and the Science Center are not involved in any way with the program.”]; *id.*, Exh. No. 37, Sion Dep. Tr., Dep. Exh. No. 11 (10/5/09 e-mail from S. Amega to various individuals [“After giving it some thought, I have changed my mind, and I don't think cancelling the event is the way to go. Instead I think a statement correcting the misconceptions in their news release that we provide for any inquiries by a guest or the media is the best approach. I've written the statement, and I'm waiting for Jeff and William's approval.”]; *id.*, Exh. No. 47, Sion Dep. Tr., Exh. 38 (10/6/09 e-mail from C. Pygin to J.

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Rudolph with letter attachment) [“[W]e require that you issue a statement clarifying that the Smithsonian and the California Science Center have no participation in this event beyond serving as the venue in Los Angeles. The required statement of clarification is below. If you do not issue this clarification immediately to the recipients of the October 5th press release, your event will be canceled. . . . Clarification:
The Darwin Debates held at the California Science Center on October 25, 2009 are in no way endorsed by or affiliated with the California Science Center or the Smithsonian Institute but are a private event held at the location.”; *id.*, Exh. No. 7, Pygin Dep. Tr., 80:2-14 [“Was there any discussion during that conversation about sending AFA a request to clarify information that was misleading in the press releases? The Witness: Can you read that back. Sorry. (record read.) The Witness: Yes. By Mr. Becker: Q. How did that subject come up? Was that -- tell me who said what about it. A. I don't remember the exact conversation. Chris was suggesting that as the approach. Q. What was your response to the suggestion that Chris made? A. Subsequent to her suggestion, I incorporated that in a draft, in a written draft. Q. Did she say that she felt that would be the best approach in lieu of canceling the event, or

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	words to that effect? A. I believe she said words to that effect. Q. Did she tell you why she felt that way? A. <i>She did say she was concerned they would sue.</i> " (emphasis added.)]
15. On the morning of October 6, 2009, Christián Samper, the director of the SI/NHM, advised his colleagues that he intended to contact Rudolph, who he personally knew, to share "lessons" the Smithsonian had learned from the 2005 incident when the Discovery Institute rented out the SI/NHM for the screening of "The Privileged Planet." In fact, he planned to speak to Rudolph that very day.	Lepiscopo Decl., Exh. B, SI000118 (e-mail from C. Samper to J. Labov) [At 4:20 a.m. PDT, Samper wrote, "I am reaching out to Jeff Rudolph, the head of the CSC, and sharing our lessons from the Privileged Planet."]; <i>id.</i> , SI000157 [At 8:02 a.m. PDT, Samper wrote, "I plan to speak with the head of the CSC <i>today</i> , but am sure they were caught off guard. This is a typical move from the Discovery Institute, similar to the problem we had with the 'Privileged Planet' several years ago.;" (emphasis added.)]
16. Later that day, at 1:17 p.m., Defendants notified AFA that the Science Center was cancelling its event because AFA violated the contract.	Becker Decl., Exh. No. 50, Sion Dep. Tr., Exh. 45 (10/6/09 cancellation e-mail from C. Sion to A. Davis) ["According to the Event Policies and Procedures that you signed to reserve the date for the event, you agreed to submit all promotional materials to the California Science Center for review and approval prior to printing or broadcast. Because you did not obtain this approval and the press release has had significant negative ramifications, we are canceling your event at the California Science Center."]
17. On October 6, Sion wrote to Davis that "It has come to our attention that in a press	

1 release issued October 5, 2009 by the Ameri-
2 can Freedom Alliance, it is inferred [sic] that
3 the California Science Center as a Smithson-
4 ian Institute affiliate is cosponsoring the
5 Darwin Debates. Your event is a private
6 event held on the California Science Center
7 property but is not affiliated in any way with
8 the California Science Center or the Smith-
9 sonian. *This press release has damaged our
10 relationship with the Smithsonian and the
11 reputation of the California Science Center.*

12 According to the Event Policies and Proce-
13 dures that you signed to reserve the date for
14 the event, you agreed to submit all promo-
15 tional materials to the California Science
16 Center for review and approval prior to print-
17 ing or broadcast. Because you did not obtain
18 this approval and the press release has had
19 significant negative ramifications, we are
20 canceling your event *at the California Sci-
21 ence Center.*” The statement contained in
22 the letter to AFA cancelling the event that
23 AFA had issued a press release was errone-
24 ous, and Defendants knew it. AFA did not
25 issue the press releases referred to in Sion’s
26 letter. Defendants knew that the press release
27 had been issued by the Discovery Institute,
28 not AFA, because Amega’s initial e-mail ad-
vising of the Smithsonian Institution’s com-
munication with her identified the Discovery
Institute as the “creationist” organization that

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had issued the press release.	
18. The actions taken by the Smithsonian Institution and the Defendants taken as whole show a pattern of conduct that is consistent with past examples of discrimination against groups and individuals on account of complimentary expressive activity relating to the theories of intelligent design and creationism.	Woodward Decl., Part X, § N (“Importance Of The NHMLAC Record Of Correspondence”), ¶¶ 80-82.
19. Subsequent to the cancellation, Dr. Jane Pisano, the director of the nearby Natural History Museum of Los Angeles County (“NHM/LAC”), telephoned Rudolph to discuss the screening of the ID film at the IMAX Theater.	Becker Decl., Exh. No. 24, Pisano Dep. Tr., Dep. Exh. No. 106 [“Jane OPisano, (our CEO) rang Jeff Rudolph the CEO of California Science Center last night and had a chat to him about the screening of the ID film at CSC’s IMAX.” [sic]].
20. The next day, Dr. Pisano’s employee, Dr. John Long, NHM/LAC’s vice president of research and collections, informed Eugenia Scott, the director of the National Center for Science Education and a prominent national leader of the movement opposed to accepting intelligent design as a scientific theory, that he had spoken to Pisano following her telephone call with Rudolph, and that Rudolph had informed Pisano that the event had already been cancelled “as being not in line with their mission to educate the public about science.” This statement was similar to the language used by the Smithsonian in a statement it issued in 2005 regarding its position concerning the screening of “The Privi-	Becker Decl., Exh. No. 24, Pisano Dep. Tr., Dep. Exh. No. 106 [“They had in fact cancelled the event as being not in line with their mission to educate the public about science. . . .”]; Lepiscopo Decl., Exh. B, SI000015 (6/2/09 <i>Washington Post</i> article quoting a Smithsonian statement) [“We have determined that the content of the film is not consistent with the mission of the Smithsonian Institution’s scientific research.”].

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leged Planet”: “We have determined that the content of the film is not consistent with the mission of the Smithsonian Institution’s scientific research.”

DATED: May 25, 2011

THE BECKER LAW FIRM

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Attorneys for Plaintiff,
AMERICAN FREEDOM ALLIANCE

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