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9 AMERICAN FREEDOM ALLIANCE

FILED
LOS ANGELES SUPERIOR COURT

MAY 26 2011

JOHN A. CLARKE, CLERK
BY RAUL SANCHEZ, DEPUTY

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

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

15 Plaintiff,

16 vs.

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

23 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 OF UNDISPUTED
MATERIAL FACTS RE: AFA'S BREACH
OF CONTRACT CLAIM**

[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, submits this Separate Statement of Disputed and
 2 Undisputed Facts in Opposition to The Motion Of Defendants, California Science Center
 3 Foundation and Jeffrey Rudolph, For Summary Adjudication As To AFA's Breach Of Contract
 4 Claim On The Ground That No Contract Ever Formed Between The Foundation And AFA and
 5 in response to Defendants' Separate Statement of Undisputed Material Facts.

6 **DEFENDANTS' ISSUE NO. 1: THE FOUNDATION IS ENTITLED TO SUMMARY**
 7 **ADJUDICATION ON AFA'S BREACH OF CONTRACT CLAIM BECAUSE NO**
 8 **LEGALLY BINDING CONTRACT EVER FORMED BETWEEN THE**
 9 **FOUNDATION AND AFA**

| <p>9 <u>MOVING PARTY'S UNDISPUTED</u> <p>10 <u>MATERIAL FACTS AND SUPPORTING</u> <p>11 <u>EVIDENCE</u></p> </p></p> | <p>9 <u>OPPOSING PARTY'S RESPONSE AND</u> <p>10 <u>SUPPORTING EVIDENCE</u></p> </p> |
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| <p>11 1. The Foundation is a non-profit, section <p>12 501(c)(3) organization that raises funds to <p>13 support exhibits and educational programs <p>14 featured at the California Science Center, the <p>15 West Coast's largest interactive science center <p>16 and museum. <p>17 (Declaration of Christopher A. Nowlin <p>18 ("Nowlin Decl."), Ex. 20 [Dep. Ex. 200 <p>19 ("Rudolph Injunction Decl.") at ¶¶ 3, 6; Ex. 9 <p>20 [J. Rudolph Dep. Tr.] at 38:11-15.)</p> </p></p></p></p></p></p></p></p></p> | <p>Undisputed.</p> |
| <p>21 2. The Foundation designs and administers <p>22 exhibits and educational programs featured at <p>23 the Science Center. The Foundation is also <p>24 responsible for permitting private parties <p>25 access to areas within the Science Center for <p>26 after-hours private events. <p>27 (Nowlin Decl., Ex. 20 [Dep. Ex. 200] at~ 6;</p> </p></p></p></p></p></p> | <p>21 <i>Disputed.</i> Both the Foundation and the Cen- <p>22 ter are responsible for "permitting" private <p>23 parties access to areas within the Science <p>24 Center for after-hours private events. Oth- <p>25 erwise, undisputed. <p>26 <u>SUPPORTING EVIDENCE:</u> <p>27 Becker Decl., Exh. No. 32, Rudolph Dep. <p>Tr., Dep. Exh. No. 198 (IMAX Lease</p> </p></p></p></p></p></p></p> |

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| <p>1 Ex. 7 [C. Sion Dep. Tr.] at 31:12-25, 80:1- 2 7,386:16- 387:14, 400:25-402:4; Ex. 9 [J. 3 Rudolph Dep. Tr.] at 39:17-40:15, 159:14- 4 160:7, 163:15- 164:9.)</p> | <p>Agreement, p. 2, ¶ 6) ["All members of the public shall be admitted to the New IMAX Theater at such times and upon such terms as established by Foundation and approved by the Museum."]</p> |
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| <p>5 3. As one of its responsibilities, the 6 Foundation operates the Event Services 7 Department, which coordinates with private 8 parties in scheduling after-hours private 9 events at the Science Center. 10 11 (Nowlin Decl., Ex. 7 [C. Sion Dep. Tr.] at 12 25:9-25, 29:4-30:6; Ex. 13 [Dep. Ex. 8].)</p> | <p><i>Disputed.</i> The Event Policies and Procedures states that the Event Services Department is operated by the Center. Additionally, Chris Sion and Lori Matsunaga held themselves out at all relevant times as employees of, or acting on behalf of, the Center.</p> <p><u>SUPPORTING EVIDENCE:</u> 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, dam-</p> |
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age, or non-availability on the day of your 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 re-

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quirements established by the California Science *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*

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Event Manager.”; “The client and its sub-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*

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is a smoke free facility. No smoking is permitted 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 Sci-

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ence *Center's Event Manager*.”; “Any out-
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 re-
ceive 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, proce-
dures and any equipment or materials neces-
sary for your event.”; There will be an addi-
tional charge of \$50.00 per event
walkthrough over three. Please consult the
Science *Center's Event Manager* if more
than three event walkthroughs are anticipat-
ed.”; The Science *Center* does not take re-
sponsibility for deliveries or storage of mate-
rials and equipment. Any delivery to the Sci-
ence *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 responsi-
bility 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

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contracted time, it is the client's responsibility 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

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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.) The McDonald's area is included in a Science *Center* buyout (an additional staffing fee will apply)."; "Clients and vendors are not permitted to use California Science *Center* walkie-talkies or Nextel. They are welcome to rent their own and, if necessary, rent an additional radio for the Science *Center's Event Manager* at their expense." (emphasis added.); *id*, Sion Dep. Tr., Dep. Exh. No. 33 pp. 2 and 5 [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)].

4. The Event Services Department requires that all contracting parties agree to comply with the Event Services' Policies and Procedures.

(Nowlin Decl., Ex. 7 [C. Sion Dep. Tr.] at 231:5-19; Ex. 9 [J. Rudolph Dep. Tr.] at 168:5-169:11.)

Undisputed. *But see* Opposing Party's Supporting Evidence to Undisputed Material Fact No. 3, *supra*, incorporated herein.

5. On or around September 24, 2009, Christina Sion, the Foundation's Vice President of Food and Event Services, was contacted by AFA regarding scheduling a private fundraising event at the Science Center.

Undisputed.

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| <p>1 (Nowlin Decl., Ex. 7 [C. Sion Dep. Tr.] at 2 75:11-79:25; 255:25-257:22; Ex. 17 [Dep. Ex. 3 33] at p. 6.)</p> | |
| <p>4 6. On September 25, the Foundation sent 5 AFA copies of the initial Event Price 6 Estimate, the Foundation's Event Policies and 7 Procedures, and a Detailed Map of Exposition 8 Park. In the e-mail to which these documents 9 were attached, Lori Matsunaga of the 10 Foundation informed AFA representatives 11 that to proceed with booking, they would 12 have to sign and return the Event Price 13 Estimate and also include a 50% deposit when 14 returning the document.</p> <p>15 (Nowlin Decl., Ex. 11 [J. Peterson Dep. Tr.] 16 at 98:1-99:22; Ex. 13 [Dep. Ex. 15]; Ex. 17 17 [Dep. Ex. 33]; Declaration of Lori Matsunaga 18 ("Matsunaga Decl., ¶ 5, Ex. 1.)</p> | <p><i>Disputed</i> as to the implied premise of the alleged fact that AFA was required to submit a 50% deposit when returning the document. AFA was required to provide a 50% security deposit to guarantee that the Foundation would hold the reserved October 25 date open, but not to establish the formation of a contract. (See Opposing Party's Additional Undisputed Material Facts, Nos. 1-10, <i>infra.</i>) Otherwise, Undisputed.</p> |
| <p>19 7. The initial Event Price Estimate expressly 20 stated that, to secure an event date, AFA must 21 provide a 50% deposit when it returned the 22 signed Event Price Estimate and that an event 23 date would "not be held beyond ten days 24 without receipt of [AFA's] deposit and signed 25 proposal." It also designated October 25, 26 2009 as the date for AFA's event.</p> <p>27 (Matsunaga Decl., ¶ 6, Ex. 2 [Copy of initial 28 Event Price Estimate]; Declaration of</p> | <p>Disputed as to the implied premise of the al- leged fact that AFA was required to submit a 50% deposit when returning the document. AFA was required to provide a 50% security deposit to guarantee that the Foundation would hold the reserved October 25 date open, but not to establish the for- mation of a contract. (See Opposing Party's Additional Undisputed Material Facts, Nos. 1-10, <i>infra.</i>) Otherwise, Undisputed.</p> |

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| Christina Sion ("Scion Decl.") ¶ 5, Ex. 1 [Copy of initial Event Price Estimate].) | |
| 8. The Event Policies and Procedures attached to the September 25 e-mail contained a provision mandating that "[a] 50% deposit, credited towards the rental cost, is required with the signed Event Price Estimate to secure an event date." (Matsunaga Decl., ¶ 7, Ex. 3 [Copy of Event Policies and Procedures]); Sion Decl., ¶ 6, Ex. 6 [Copy of Event Policies and Procedures].) | Disputed as to the implied premise of the alleged fact that AFA was required to submit a 50% deposit when returning the document. AFA was required to provide a 50% security deposit to guarantee that the Foundation would hold the reserved October 25 date open, but not to establish the formation of a contract. (See Opposing Party's Additional Undisputed Material Facts, Nos. 1-10, infra.) Otherwise, Undisputed. |
| 9. The Foundation and AFA subsequently agreed to some additional terms after September 25. For example, they agreed that AFA would cover certain shipping and distribution costs associated with AFA's films. Additionally, to accommodate an AFA request, the Foundation was willing to allow AFA to extend the deadline for the submission of its 50% deposit to October 15, with the balance of the fee being due on October 20. (Nowlin Decl., Ex. 8 [A. Davis Dep. Tr.] at 214:9-216:12; Ex. 16 [Dep. Ex. 29]; Sion Decl., ¶ 7, Ex. 3.) | Undisputed. |
| 10. On October 1, 2009, the Foundation sent AFA a Revised Event Price Estimate, a document titled "Event Letter of Agreement," and a copy of the Event Policies and | Objection. Vague and ambiguous as to the reference to a document entitled "Revised Event Price Estimate." Subject to and without in any way waiving the foregoing objec- |

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| <p>1 Procedures.</p> <p>2</p> <p>3 (Nowlin Decl., Ex. 8 [A. Davis Dep. Tr.] at</p> <p>4 214:9-216:12; Ex. 16 [Dep. Ex. 29].)</p> <p>5</p> <p>6</p> <p>7</p> | <p>tion, and to the extent that Responding Party</p> <p>understands this alleged fact: Undisputed</p> <p>that the Foundation sent AFA an Event Price</p> <p>Estimate that contained terms that were dif-</p> <p>ferent from the terms that appear in a pro-</p> <p>posed Event Price Estimate that AFA did not</p> <p>sign and which never was made a part of the</p> <p>contract.</p> |
| <p>8 11. The Event Letter of Agreement contained</p> <p>9 a revised payment schedule dictating that</p> <p>10 AFA's 50% deposit of \$2,155 was due on</p> <p>11 October 15, with the balance of AFA's</p> <p>12 payment being due on October 20.</p> <p>13 (Nowlin Decl., Ex. 14 [Dep. Ex. 16]; Ex. 15</p> <p>14 [Dep. Ex. 19 (A. Davis Declaration in</p> <p>15 Support of AFA Application for Temporary</p> <p>16 Restraining Order)] at ¶ 6, Decl. Ex. A; Ex. 4</p> <p>17 [AFA's Third Amended Complaint- August</p> <p>18 18, 201 0] at ¶ 9, Ex. A.)</p> | <p>Undisputed.</p> |
| <p>19 12. The text of the Event Letter of Agreement</p> <p>20 expressly stated that the Event's "specific</p> <p>21 date and time will not be held beyond October</p> <p>22 2, 2009, without receipt of the signed price</p> <p>23 estimate and sales agreement." It also</p> <p>24 included a provision stating that availability</p> <p>25 could not be guaranteed past October 2</p> <p>26 "[w]ithout the group's signed Event Letter of</p> <p>27 Agreement."</p> <p>28 (Nowlin Decl., Ex. 14 [Dep. Ex. 160; Ex. 15</p> | <p>Undisputed.</p> |

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| <p>1 [Dep. Ex. 19] at ¶ 6, Decl. Ex. A.; Ex. 4 2 [AFA's Third Amended Complaint] at ¶ 9, 3 Ex. A.)</p> | |
| <p>4 13. The Revised Event Price Estimate 5 included a provision stating that AFA's 6 "specific date and time will not be held 7 beyond the [sic] October 2, 2009 without 8 receipt of the signed invoice and sales 9 agreement." 10 (Nowlin Decl., Ex. 14 [Dep. Ex. 16]; Ex. 15 11 [Dep. Ex. 19] at ¶ 6, Decl. Ex. A.); Ex. 4 12 [AFA's Third Amended Complaint] at ¶ 9, 13 Ex. A.)</p> | <p>Objection. Vague and ambiguous as to the reference to a document entitled "Revised Event Price Estimate." Subject to and with- out in any way waiving the foregoing objec- tion, and to the extent that Responding Party understands this alleged fact: Undisputed that the Event Price Estimate signed by AFA included such a provision.</p> |
| <p>14 14. The Revised Event Price Estimate did not 15 purport to incorporate any of the terms of the 16 Event Letter of Agreement. 17 (Nowling Decl., Ex. 14 [Dep. Ex. 16]; Ex. 15 18 [Dep. Ex. 19] at ¶ 6, Decl. Ex. A; Ex. 4 19 [AFA's Third Amended Complaint] at ¶ 9, 20 Ex. A.)</p> | <p>Objection. Vague and ambiguous as to the reference to a document entitled "Revised Event Price Estimate." Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: Undisputed that the Event Price Estimate signed by AFA did not purport to incorporate any of the terms of the Event Letter of Agreement.</p> |
| <p>21 15. The Revised Event Price Estimate 22 contained a provision stating that "by signing 23 this agreement you are agreeing to the terms 24 and conditions that are incorporated herein 25 and with the Event Policies and Procedures." 26 (Nowling Decl., Ex. 14 [Dep. Ex. 16]; Ex. 15 27</p> | <p>Objection. Vague and ambiguous as to the reference to a document entitled "Revised Event Price Estimate." Subject to and with- out in any way waiving the foregoing objec- tion, and to the extent that Responding Party understands this alleged fact: Undisputed that the Event Price Estimate signed by AFA,</p> |

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| <p>1 [Dep. Ex. 19] at ¶ 6, Decl. Ex. A.; Ex. 4 2 [AFA's Third Amended Complaint] at ¶ 9, 3 Ex. A.)</p> | <p>which was made part of the contract, contained a provision stating that "by signing this agreement you are agreeing to the terms and conditions that are incorporated herein and with the Event Policies and Procedures."</p> |
| <p>4 5 16. The Event Policies and Procedures sent to 6 AFA by the Foundation on October 1, 2009 7 contained a provision declaring that "[a] 50% 8 deposit, credited towards the rental cost, is 9 required with the signed Event Price Estimate 10 to secure an event date." 11 12 (Nowling Decl., Ex. 14 [Dep. Ex. 16]; Ex. 15 13 [Dep. Ex. 19] at ¶ 6, Decl. Ex. A.; Ex. 4 14 [AFA's Third Amended Complaint] at ¶ 9, 15 Ex. A.)</p> | <p>Undisputed.</p> |
| <p>16 17. Neither the Revised Event Price Estimate 17 nor the Event Policies and Procedures 18 contained terms mentioning any sort of 19 agreement to allow AFA to proceed under an 20 adjusted payment schedule under which it 21 could make its 50% deposit after returning the 22 signed Revised Event Price Estimate. 23 24 (Nowling Decl., Ex. 14 [Dep. Ex. 16]; Ex. 15 25 [Dep. Ex. 19] at ¶ 6, Decl. Ex. A.; Ex. 4 26 [AFA's Third Amended Complaint at ¶ 9, Ex. 27 A.)</p> | <p>Objection. Vague and ambiguous as to the reference to a document entitled "Revised Event Price Estimate," and as to the meaning of "make its 50% deposit." Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Disputed. The Event Policies and Procedures provided that the "requested date will be held for 10 business days, <i>by the end of which time the Science Center requires a signed contract and deposit.</i> If a signed contract and deposit have not been received within 10 business days, the date will be released to others by the California Science Center."</p> |

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| | (Emphasis added.) <u>SUPPORTING EVIDENCE:</u> Becker Decl., Exh. No. 41, Sion Dep. Tr., Dep. Exh. No. 16 (Event Policies and Procedures). |
| 18. Both the Revised Event Price Estimate and the Event Letter of Agreement required that AFA return the signed contract documents by October 2 for an event date to be secured. (Nowlin Decl., Ex. 14 [Dep. Ex. 16]; Ex. 15 [Dep. Ex. 19] at ¶ 6, Decl. Ex. A; Ex. 4 [AFA's Third Amended Complaint] at ¶ 9, Ex. A.) | Objection. Vague and ambiguous as to the reference to a document entitled "Revised Event Price Estimate." Subject to and without in any way waiving the foregoing objection, and to the extent that Responding Party understands this alleged fact: <i>Disputed</i> . The Event Price Estimate stated that " <i>Your date has been put on a 10-day courtesy hold. . .</i> " intended to reserve a particular date for AFA's event. (Emphasis in original.) The Event Price Estimate did not state that the contract would be cancelled if the deposit had not been made within the 10-day period because the deposit was intended as security for date availability, not a condition of the contract for purposes of its formation. <u>SUPPORTING EVIDENCE:</u> Becker Decl., Exh. No. 41, Sion Dep. Tr., Dep. Exh. No. 16 (Event Price Estimate); <i>id.</i> , (Event Policies and Procedures); <i>id.</i> , Exh. No. 9, Sion Dep. Tr., 245:10-246:2, 246:5-8 ["Did you have an agreement with AFA for event on the basis of the event price estimate -- the signed event price estimate and the event and procedures? Mr. Zelenay: Objection. Calls for a legal conclusion. Vague and |

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ambiguous and assumes facts. The Witness:
By signing the event price estimate, we were waiting for the letter of agreement to be signed as well. It was one of two documents we were awaiting for signature. By Mr. Becker: Q. Well, you received the event price estimate -- do you recall when you received that? A. I believe on the 5th or 6th, October 5th or 6th. Q. Was the event letter of agreement necessary to complete the contractual with AFA? The Witness: I would have proceeded working on the event with the signature from the event price estimate, continuing to request the signed letter of agreement.”]

19. AFA President Avi Davis has acknowledged that he did not believe that a final, binding contract would be entered into until AFA signed and returned the contract documents to the Foundation.

(Nowlin Decl., Ex 8 [A. Davis Dep. Tr] at 24:13-25:9, 26:5-27:12, 88:2-89:4, 190:3-191:12.) Ex. 15 [Dep. Ex. 19] at ¶ 6, Decl. Ex. A.)

Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether a contract was formed. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Improper lay opinion. (Cal.Ev. Code § 800). Legal conclusion. “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.” *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; “[A] pleader's legal characterization of a contract is not controlling, particularly when the contract is attached to the pleading.” *Morris v. Redwood Empire Bancorp* (2005) 128 Cal. App.4th 1305, 1314; “To the extent factual allegations conflict with the content

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| | <p>of the exhibits to the complaint, the Court is required to accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits." <i>Barnett v. Fireman's Fund Ins. Co.</i> (2001) 90 Cal.App.4th 500, 505. 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>20. AFA has repeatedly acknowledged that the contract consisted of three documents, one of which was the Event Letter of Agreement. (Nowlin Decl., Ex. 15 [Dep. Ex. 19] at ¶ 6, Decl. Ex. A; Ex. 4 [AFA's Third Amended Complaint] at ¶ 9, Ex. A.)</p> | <p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether a contract was formed. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Improper lay opinion. (Cal.Ev.Code § 800). Legal conclusion. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." <i>Blank v. Kirwan</i> (1985) 39 Cal.3d 311, 318; "[A] pleader's legal characterization of a contract is not controlling, particularly when the contract is attached to the pleading." <i>Morris v. Redwood Empire Bancorp</i> (2005) 128 Cal. App.4th 1305, 1314; "To the extent factual allegations conflict with the content of the exhibits to the complaint, the Court is required to accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits." <i>Barnett v. Fireman's Fund Ins. Co.</i></p> |

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(2001) 90 Cal.App.4th 500, 505. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed that AFA has alleged that the three documents formed the contract. However, *disputed* that AFA has repeatedly acknowledged that the contract consisted of three documents, one of which was the Event Letter of Agreement.

SUPPORTING EVIDENCE:

Becker Decl., Exh. No. 4, Davis Dep. Tr., 210:25-211:7 [“MR. BECKER: I'm just going to -- I'm trying not to speak in this objection but here's the problem I have. Yesterday Chris Sion testified and opened my mind up to something for the first time and that is that that third document which we've been calling a part of the contract was actually an amendment to the contract that never was signed and therefore I think it creates a question as to whether that third page, that third document, actually is a part of the contract.”]

21. On October 5, when the Foundation had still yet to receive any signed contract documents from AFA, Foundation employee Lori Matsunaga sent an e-mail to Avi Davis stating that the contract documents had to be received by the Foundation on that day.

Undisputed.

(Nowlin Decl., Ex. 16 [Dep. Ex. 29] at p.1.)

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| <p>1 22. The Foundation received a copy of the 2 Revised Event Price Estimate signed by AFA 3 President Avi Davis on the afternoon of 4 October 5, 2010. 5 6 (Nowlin Decl., Ex. 16 [Dep. Ex. 29]; Ex. 14 7 [Dep. Ex. 16]; Ex. 15 [Dep. Ex. 19] at ¶ 6, 8 Decl. Ex. A; Ex. 4 [AFA's Third Amended 9 Complaint] at ¶ 9, Ex. A; Matsunaga Decl., ¶ 10 8)</p> | <p>Objection. Vague and ambiguous as to the reference to a document entitled "Revised Event Price Estimate." Subject to and with- out in any way waiving the foregoing objec- tion, and to the extent that Responding Party understands this alleged fact: Undisputed that the Foundation received a copy of the Event Price Estimate signed by AFA Presi- dent Avi Davis on the afternoon of October 5, 2010.</p> |
| <p>11 23. AFA has not produced any evidence that 12 anyone from AFA ever signed the Event 13 Letter of Agreement and sent it to the 14 Foundation. 15 16 (Nowlin Decl., Ex. 8 [A. Davis Dep. Tr.] at 17 32:25-33:15, 209:3-210:1, 211 :18-213:20; 18 Ex. 6 [AFA's Supplemental Responses and 19 Objections to the Foundation's First Set of 20 Form Interrogatories] at p. 9, Response to 21 Form Interrogatory 17.1, number 2; Ex. 5. [22 AFA's Supplemental Responses and 23 Objections to the Foundation's Second Set of 24 Requests for Admissions] at p. 3, Suppl. 25 Resp. to RFA No.2.)</p> | <p>Immaterial. The alleged fact has no signifi- cance in determining the outcome of this case with regard to whether a contract was formed. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Whether AFA has produced any evidence that anyone from AFA ever signed the Event Letter of Agreement and sent it to the Foundation has no tendency in reason to prove or disprove the formation of a contract. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this al- leged fact: Undisputed.</p> |
| <p>26 24. AFA has never produced a signed copy of 27 the Event Letter of Agreement in response to 28 any of the Foundation's discovery demands in this litigation. (Nowlin Decl., Ex. 8 [A. Davis Dep. Tr.] at</p> | <p>Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether a contract was formed. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Whether AFA has produced a signed copy of the Event Letter of</p> |

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| <p>211: 18-213:20.)</p> | <p>Agreement in response to any of the Foundation's discovery demands in this litigation has no tendency in reason to prove or disprove the formation of a contract. 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>25. AFA has never included a copy of a signed Event Letter of Agreement in any of the purported contract documents that it has attached to its various complaints.</p> <p>(Nowlin Decl., Ex. 1 [AFA Original Complaint – Oct. 13, 2009] at ¶ 9, Ex. A; Ex. 2 [AFA First Amended Complaint – Nov. 18, 2009] at ¶ 9, Ex. A; Ex. 3 [AFA Second Amended Complaint – April 19, 2010] at ¶ 10, Ex. A; Ex. 4 [AFA Third Amended Complaint – August 18, 2010] at ¶ 9, Ex. A.)</p> | <p>Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether a contract was formed. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Whether AFA has ever included a copy of a signed Event Letter of Agreement in any of the purported contract documents that it has attached to its various complaints has no tendency in reason to prove or disprove the formation of a contract. 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>26. During the deposition of AFA President Avi Davis, the Foundation's attorney expressly requested that AFA provide a signed copy of the Event Letter of Agreement if it possessed one. AFA's attorney, William Becker, responded by saying that Mr. Davis had already searched and [had] been unable to find a signed copy of the document.</p> | <p>Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether a contract was formed. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Whether during the deposition of AFA President Avi Davis, the Foundation's attorney expressly requested that AFA provide a signed copy of the Event Letter of Agreement if it possessed one and</p> |

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| <p>1 Nowlin Decl., Ex. 8 [A. Davis Dep. Tr.] at 2 211:18-213:20.) 3 4 5 6 7 8 9</p> | <p>whether AFA's attorney, William Becker, responded by saying that Mr. Davis had already searched and [had] been unable to find a signed copy of the document has no tendency in reason to prove or disprove the formation of a contract. 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>10 27. The Foundation never received a signed 11 copy of the Event Letter of Agreement from 12 AFA. 13 (Nowlin Decl., Ex. 7 [C. Sion Dep. Tr.] at 14 230:4-12; Ex. 10 [C. Pygin Dep. Tr.] at 15 166:9-167:12; Matsunaga Decl., ¶ 9; Sion 16 Decl. ¶ 9)</p> | <p>Undisputed.</p> |
| <p>17 28. Chris Sion, the Foundation's Vice 18 President of Food and Event Services and 19 AFA's primary point of contact in seeking to 20 schedule its event at the Center, testified that 21 the Event Services Department never received 22 a signed copy of the Letter of Agreement. 23 (Nowlin Decl., Ex. 7 [C. Sion Dep. Tr.] at 24 230:4-12.) 25 26 27 28</p> | <p>Vague and ambiguous as to the meaning of "Letter of Agreement." Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether a contract was formed. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Whether Sion testified that the Event Services Department never received a signed copy of the Letter of Agreement has no tendency in reason to prove or disprove the formation of a contract. Ob. Cumulative of Moving Party's Undisputed Material Fact No. 27. This alleged fact appears to be</p> |

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| | evidence in support of No. 27. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed. |
| 29. Cynthia Pygin, the Foundation's Chief Financial Officer and a Senior Vice President of the organization, testified that the Foundation never received a signed Event Letter of Agreement and that it also did not receive a 50% deposit when AFA submitted the signed Revised Price Estimate. (Nowlin Decl., Ex. 10 [C. Pygin Dep. Tr.] at 166:9-167:12.) | Vague and ambiguous as to the meaning of "Revised Price Estimate." Lacks foundation as to a document entitled "Revised Price Estimate." Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether a contract was formed. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Whether Pygin testified that the Foundation never received a signed Event Letter of Agreement and that it also did not receive a 50% deposit when AFA submitted the signed Revised Price Estimate has no tendency in reason to prove or disprove the formation of a contract. Objection. Cumulative of Moving Party's Undisputed Material Fact No. 27. This alleged fact appears to be evidence in support of No. 27. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed. |
| 30. Avi Davis, the President of AFA and the individual who signed the Revised Event Price Estimate that was returned to the Foundation, testified that he never signed the Event Letter of Agreement. | Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether a contract was formed. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Whether Davis testified that |

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| <p>(Nowlin Decl., Ex. 8 [A. Davis Dep. Tr.] at 209:3-210:1.)</p> | <p>he never signed the Event Letter of Agreement has no tendency in reason to prove or disprove the formation of a contract. Objection. Vague and ambiguous as to the reference to a document entitled "Revised Event Price Estimate." 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>31. Avi Davis, the President of AFA and the individual who signed the Revised Event Price Estimate that was returned to the Foundation, testified he did not know and could not recall whether he ever signed and returned the Event Letter of Agreement.</p> <p>(Nowlin Decl., Ex. 8 [A. Davis Dep. Tr.] at 32:25-33:15; 211:18-213:8.)</p> | <p>Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether a contract was formed. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Whether Davis testified he did not know and could not recall whether he ever signed and returned the Event Letter of Agreement has no tendency in reason to prove or disprove the formation of a contract. Objection. Vague and ambiguous as to the reference to a document entitled "Revised Event Price Estimate." 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>32. AFA did not submit a 50% deposit when it submitted its signed Revised Event Price Estimate on October 5.</p> <p>(Nowlin Decl., Ex. 8 [A. Davis Dep. Tr.] at 33:20-22; Ex. 10 [C. Pygin Dep. Tr.] at</p> | <p>Objection. Vague and ambiguous as to the reference to a document entitled "Revised Event Price Estimate." Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed.</p> |

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| 166:9- 167:12; Ex. 16 [Dep. Ex. 29].) | |
| <p>33. No one from the Foundation ever conveyed to any AFA representative that AFA's submittal of only the signed Revised Event Price Estimate was adequate to form a contract or confirmed that AFA had locked in an event date by returning only the one signed document.</p> <p>(Matsunaga Decl., ¶ 10; Sion Decl., ¶ 10.)</p> | <p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether a contract was formed. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). Whether the Foundation conveyed to AFA that submittal of only the signed Event Price Estimate was adequate to form a contract has no tendency in reason to prove or disprove the formation of a contract. Additionally, whether the Foundation confirmed to AFA that it had locked in an event date by returning only the one signed document has no tendency in reason to prove or disprove the formation of a contract. Objection. Vague and ambiguous as to the reference to a document entitled "Revised Event Price Estimate." 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> as to the Foundation's notification to AFA that it had locked in an event date.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>On 9/25/09, Lori Matsunaga informed AFA that the Foundation had put a complimentary hold date on AFA's reservation for October 25. Becker Decl., Exh. No. 43, Sion Dep. Tr., Dep. Exh. No. 43 (9/25/09 e-mail from L. Matsunaga to AFA) ["We have put a complimentary hold on your date." The</p> |

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Event Price Estimate stated that AFA's event had been put on a courtesy hold. *Id.*, Exh. No. 41, Sion Dep. Tr., Dep. Exh. No. 16 (Event Price Estimate) [*"Your date has been put on a 10-day courtesy hold."* (emphasis in original).] It further stated that the courtesy hold would not guarantee that the October 25 date would be held beyond October 2, requiring AFA to deliver the "signed invoice and sales agreement." The Event Price Estimate was silent as to a definition/description of a "signed invoice and sales agreement." However, the Event Price Estimate incorporated by reference the terms of the Event Policies and Procedures [*"By signing this agreement you are agreeing to the terms and conditions that are incorporated herein and with the Event Policies & Procedures."*] The Event Policies and Procedures provided that [*a*] *potential client's requested date will be held for 10 business days, by the end of which time the Science Center requires a signed contract and deposit.* If a signed contract and deposit have not been received within 10 business days, the date will be released to others by the California Science Center. If a definite request from a second potential client has been received for a date on hold prior to the expiration of the 10 day period, the Science Center will contact the potential client for a right of first refusal. The client then

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| | has to 3 business days to sign a contract and make the deposit.” (Emphasis added.) <i>Id.</i> Thus, under these terms, AFA was on notice that its reserved event date was locked in for at least 10 days. |
| 34. Chris Sion from the Foundation sent AFA an e-mail at 1:21 PM on October 6 informing AFA that it would not be able to hold its event at the Center. (Nowlin Decl., Ex. 7 [C. Sion Dep. Tr.] at 385:14-386:2; Ex. 18 [Dep. Ex. 45].) | Undisputed. |

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1 Plaintiff, American Freedom Alliance, also submits the following statement of additional ma-
 2 terial facts that raise a triable issue with respect to Issue No. 1, together with references to sup-
 3 porting evidence, in opposition to Defendants' motion.

4 **PLAINTIFF'S ISSUE NO. 1: THE FOUNDATION IS NOT ENTITLED TO**
 5 **SUMMARY ADJUDICATION ON AFA'S BREACH OF CONTRACT CLAIM**
 6 **BECAUSE A LEGALLY BINDING CONTRACT WAS FORMED BETWEEN THE**
 7 **FOUNDATION AND AFA.**

| <u>ADDITIONAL MATERIAL DISPUTED FACTS</u> | <u>SUPPORTING EVIDENCE</u> |
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| 9 1. The parties to the contract for AFA's 10 event to be held at the Center's IMAX Thea- 11 ter anticipated the formation of a contract 12 with the signature of Avi Davis on the Event 13 Price Estimate <i>only</i> . 14 15 16 17 | Becker Decl., Exh. No. 18, Davis Dep. Tr., Dep. Exh. No. 29 ["We will confirm this event <i>wi</i> Avi's signature <i>on your adjusted</i> <i>Event Price Estimate</i> tomorrow."; (emphasis added.); <i>id.</i> , Exh. No. 43, Sion Dep. Tr., Dep. Exh. No. 33 ["We have put a compli- mentary hold on your date. To proceed with booking the event (no cancelation from us ☺), please <i>sign the attached EPE. . . .</i> "; (em- phasis added.)] |
| 18 2. On October 1, 2009, the Foundation sub- 19 mitted a revised Event Price Estimate to 20 AFA. 21 22 | Becker Decl., Exh. No. 18, Davis Dep. Tr., Dep. Exh. No. 29, 10/1/09 e-mail from L. Matsunaga to AFA, p. 2 ["Per the request of Chris Sion, I have attached the revised event price estimate as well as the event sales agreement."] |
| 23 3. The Event Price Estimate specified: (1) an 24 October 25, 2009, "courtesy hold" reserva- 25 tion date for AFA's use of the rented IMAX 26 theater for its event; (2) the rental price of 27 \$5,000; and (3) agreement to the terms 28 | Becker Decl., Exh. No. 41, Sion Dep. Tr., Dep. Exh. No. 16 (Event Price Estimate). |

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| would be by signing the Event Price Estimate. | |
| 4. The Event Price Estimate provided: "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." | Becker Decl., Exh. No. 41, Sion Dep. Tr., Dep. Exh. No. 16 (Event Price Estimate). |
| 5. The Event Policies and Procedures were incorporated by reference into the Event Price Estimate. | Becker Decl., Exh. No. 41 (Event Price Estimate and Event Policies and Procedures only). |
| 6. The Event Policies and Procedures provided: "Once a client's [Event Price Estimate] is signed and the Science Center's Events Department has received a deposit, an Event Manager will handle scheduling and be the liaison between the client and the Science Center." | Becker Decl., Exh. No. 41, Sion Dep. Tr., Dep. Exh. No. 16 (Event Policies and Procedures only). |
| 7. Neither the Event Price Estimate nor the Event Policies and Procedures refer to or incorporate by reference a document entitled "Event Letter of Agreement." | Becker Decl., Exh. No. 41 (Event Price Estimate and Event Policies and Procedures only). |
| 8. By signing the Event Price Estimate, AFA signified agreement to a specified date and time, and at a specified price quoted in the Event Price Estimate to which the Foundation and Center had agreed. | Becker Decl., Exh. No. 41 (Event Price Estimate and Event Policies and Procedures only). |
| 9. The Event Policies and Procedures required payment of a security deposit within 10 business days from the date of confirma- | Becker Decl., Exh. No. 41 (Event Price Estimate and Event Policies and Procedures only). |

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| 1 | tion of AFA's reservation date to AFA's res- | |
| 2 | ervation date to guarantee that the October | |
| 3 | 25 event date AFA was requesting would be | |
| 4 | held. | |
| 5 | 10. The Event Price Estimate stated that | Becker Decl., Exh. No. 41 (Event Price Es- |
| 6 | "Your date has been put on a courtesy hold, | timate only). |
| 7 | but your specific date and time will not be | |
| 8 | held beyond the October 2, 2009 without re- | |
| 9 | ceipt of the signed invoice and sales agree- | |
| 10 | ment." However, that provision did not state | |
| 11 | an automatic cancellation of the contract. | |
| 12 | The sentences following that provision in- | |
| 13 | formed AFA: "You will not forfeit your de- | |
| 14 | posit if you move your event to a different | |
| 15 | available event date. Final payment is due | |
| 16 | October 20, 2009. " (Emphasis in original.) | |
| 17 | 11. The Event Price Estimate required | Becker Decl., Exh. No. 41 (Event Price Es- |
| 18 | AFA to provide a 50% security deposit to | timate and Event Policies and Procedures |
| 19 | guarantee that the Foundation would hold the | only). |
| 20 | reserved October 25 date open. The Event | |
| 21 | Price Estimate did not say that the deposit | |
| 22 | was a term essential to the contract. | |
| 23 | 12. Under the Event Price Estimate, a <i>final</i> | Becker Decl., Exh. No. 41, Sion Dep. Tr., |
| 24 | payment on the reservation was "due 10 days | Dep. Exh. No. 16 (Event Price Estimate). |
| 25 | before the event," i.e., due October 15, 2009. | |
| 26 | 13. Lori Matsunaga notified AFA on Sep- | Becker Decl., Exh. No. 43, Sion Dep. Tr., |
| 27 | tember 25 that the October 25 date was re- | Dep. Exh. No. 33, 9/25/09 e-mail from L. |
| 28 | reserved under a "complimentary hold." | Matsunaga to J. Peterson, p. 2 ["We have put |
| | | a complimentary hold on your date."] |
| | 14. The Event Policies and Procedures | Becker Decl., Exh. No. 41, Sion Dep. Tr., |
| | provided that the "requested date will be held | Dep. Exh. No. 16 (Event Policies and Proce- |

1 for 10 business days, by the end of which
 2 time the Science Center requires a signed
 3 contract and deposit. If a signed contract and
 4 deposit have not been received within 10
 5 business days, the date will be released to
 others by the California Science Center.”

dures only).

6 15. On October 1, 2009, AFA president
 7 Avi Davis signed the Event Price Estimate.
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Becker Decl., Exh. No. 41, Sion Dep. Tr.,
 Dep. Exh. No. 16 (Event Price Estimate on-
 ly); *id.*, Exh. No. 4, Davis Dep. Tr., 219:16-
 21 [“THE WITNESS: What I believe hap-
 pened was that we sent -- we faxed in the
 document on the 2nd of October, which was
 the Friday, because we had tried on the 1st.
 We signed it on the 1st and we tried to send
 it on the 1st. We couldn't get through. We
 finally sent it on the 2nd.”]; *id.*, 315:7-11 [Q.
 Okay. And I am looking at Exhibit A at-
 tached to Exhibit 19 of your deposition. This
 is the event price estimate that you signed on
 October 1 that we have talked about before;
 correct? A. Yes.”]

19 16. On the same day, October 1, AFA
 20 transmitted the signed Event Price Estimate
 21 via fax to the Defendants, but a technical
 22 problem blocked Defendants' receipt. E-mail
 23 traffic between AFA and Defendants starting
 24 on October 1 showed both AFA's and De-
 25 fendants' personnel trying to resolve the
 technical issue. Defendants' employee, Ms.
 26 Matsunaga, confirmed on October 2 the
 27 technical difficulty was with Defendants' fax
 28

Becker Decl., Exh. No. 55 (10/2/09 e-mail
 from L. Matsunaga to A. Davis) [“Please
 send as an attachment. The fax machine is
 down. If that is not possible, please fax to:
 213-744-2528.”]; *id.*, [“Can't send as an at-
 tachment. We tried on that number Lori but
 there was no answer again (5:00 pm) Should
 we just send it by snail mail? I will be away
 for most of next week. Sarah, could you con-
 nect with Lori on Monday and somehow get

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| <p>1 machine. On that day, Davis, who was plan- 2 ning a week-long vacation the following 3 week, violated his religious obligation to re- 4 spect the Sabbath evening by notifying his 5 assistant that the contract must be delivered 6 to the Defendant Foundation.</p> | <p>the signed contract to her? Avi"]; <i>id.</i>, Exh. No. 4, Davis Dep. Tr., 218:13-17 ["We were desperate to get this to her and I guess that's why I broke the Sabbath in order to make sure it was because I was going away and I was concerned that they wouldn't have the contract."]</p> |
| <p>7 17. On Monday, October 5, the Foundation 8 notified AFA that it required receipt of the 9 agreement that day. AFA transmitted it that 10 day and the Foundation received it that day. 11 Defendants did not then object to untimely 12 acceptance or untimely delivery of same, but 13 acknowledged that AFA had signed the 14 agreement and that the Foundation had re- 15 ceived it.</p> | <p>Becker Decl., Exh. No. 55 (10/5/09 e-mail from L. Matsunaga to A. Davis) ["We must receive the agreement today."]; <i>id.</i>, Exh. No. 40, Sion Dep. Tr., Dep. Exh. No.15 (10/5/09 e-mail from C. Sion to J. Rudolph) ["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."]</p> |
| <p>16 18. The same day the Foundation received 17 the signed Event Price Estimate from AFA, 18 its vice president for Communications, Shell 19 Anega, was contacted by the Smithsonian 20 Institution's affiliates director, Harold 21 Closter, who advised her that publicity about 22 the AFA event appearing on the Internet 23 mentioned the Smithsonian and the Center 24 IMAX Theater in conjunction with an intel- 25 ligent design film that AFA planned to 26 screen during its event. Anega was in- 27 formed that it was a "creationist" film.</p> | <p>Becker Decl., Exh. No. 40, Sion Dep. Tr., Dep. Exh. No. 15 (10/5/09 e-mail from C. Sion to J. Rudolph noting that AFA's con- tract 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."]; <i>id.</i>, Exh. No. 42, Sion Dep. Tr., Dep. Exh. No. 32 (10/5/09 e-mail from S. Anega to J. Ru- dolph, et al., pp. 3-4) ["The Smithsonian in- stitute called and was alarmed at the news release from a creationist organization, the Discovery Institute. . . ."]; <i>id.</i>, Exh. No. 1, Anega Dep. Tr., 63:3-5 ["Q. Did he use the</p> |

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| | term "creationist organization" at any time during that conversation? A. Yes."] |
| 19. The Foundation's vice president for Food and Event Services, Chris Sion, who, along with her assistant, Matsunaga, had negotiated the contract with AFA, believed that the nature of AFA's event was to "dispute Darwin's theory of evolution." On at least three occasions, she conveyed strong reservations about the Science Center's association with the event because of what she understood to be its anti-Darwin content, and repeatedly communicated distress over the publicity generated by the Discovery Institute for the event. After speaking to Rudolph, she advised Cynthia Pygin, the Foundation's CFO, that the "main problem" was "that it is an anti-Darwin/ creationist group." When the event was cancelled, she was jubilant. | 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. Becker: Q. And do you know when you first came to that understanding? A. I recall in my conversation with Dr. Strom, he was explaining that it would be a good topic for a debate, given that this was disputing the theory of evolution, I believe."]; <i>id.</i> , Exh. No. 46, Sion Dep. Tr., Dep. Exh. No. 36 (10/1/09 e-mail from C. Sion to J. Rudolph) ["They are planning a private IMAX screening of 'We Are Born of Stars' <i>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 nature of their controversial approach is likely not a good fit to partner wi a Science Center.</i> "]; (10/5/09 e-mail from C. Sion to S. Amega, p. 3) ["Thanks so much for bringing this to our attention - <i>it's disturbing.</i> " (emphasis added.); <i>id.</i> [" <i>A science center should not even be asked to partner wi any group associated wi debating Darwinism - it's not our place.</i> " (emphasis added.); <i>id.</i> ["[T]his is so <i>frustrating!</i> " (emphasis added.); <i>id.</i> , p.2, ["I am so <i>bugged!!!</i> " (empha- |

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sis added.); *id.*, Exh. 13, p. 2 [“Get this ... are they *crazy???*” (emphasis added.); *id.*, Exh. No. 34, Rudolph Dep. Tr., Dep. Exh. No. 202 (100509 e-mail from C. Sion to C. Pygin, p. 1) [“We are having issues w/ a client who booked the IMAX for a private reception and they sent a press release inferring we were a sponsor- *the main problem is that it is an anti-Darwin/ creationist group.*” (emphasis added.); *id.*, Dep. 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.)]

20. After being informed of the Smithsonian Institution’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., Dep. Exh. No. 32 (10/5/09 e-mail from S. Amega to J. 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.

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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. 13, Amega Dep. Tr., Exh. 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.*, Exh. No. 34, Rudolph Dep. Tr., Dep. Exh. No. 202 (10/5/09 e-mail from C. Sion to C. 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.*, 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

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| | discuss the approach given the language in the contract.”]. |
| 21. 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. 11 (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., Dep. Exh. No. 202 (10/5/09 e-mail from C. Sion to C. 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.)] |

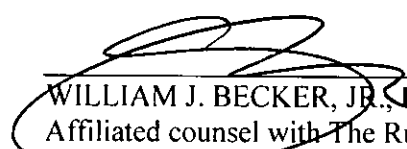
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| 22. Amega agreed with Sion's opinion that AFA had violated the contract. | Becker Decl., Exh. No. 13 (Amega Dep. Tr., Exh. 211, p. 1) ["Wow- they clearly violated that part of the agreement."] |
| 23. Defendants notified AFA on 10/6/09 that the Science Center was cancelling its event. In their notification, Defendants stated as the reason for their decision to cancel the event that AFA had 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."] |

DATED: May 25, 2011

THE BECKER LAW FIRM

By: 
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