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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

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

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

13 Plaintiff,

14 vs.

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

21 Defendants.

Case No. BC423687

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

**OPPOSITION TO DEMURRERS TO
THIRD AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF; DECLARATION OF
WILLIAM J. BECKER, JR. IN SUPPORT
THEREOF; EXHIBIT; [PROPOSED]
ORDER**

Complaint Filed: 10/14/09

Third Amended 8/18/2010

Complaint Filed:

Trial Date: June 13, 2011

Date: 10/8/2010

Time: 8:45 a.m.

Dept.: 14

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BY FAX

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This case involves allegations of conspiracy to discriminate and discrimination by a busi-
4 ness establishment (a public institution and its financial and operational partner). Defendants
5 feared Plaintiff's screening of the documentary "Darwin's Dilemma" and the subsequent panel
6 discussion would showcase a religious theory about the origin of life opposed to Darwinian evo-
7 lution theory orthodoxy. Plaintiff was granted leave to amend the Second Amended Complaint to
8 properly allege claims for Conspiracy (42 U.S.C. § 1985(3)) and Failure to Prevent Violations
9 and Conspiracy (42 U.S.C. § 1986) (collectively "conspiracy claims"), and Violation of the Un-
ruh Civil Rights Act (Civ. Code, §§ 51 and 51.5) ("Unruh Act").

10 Plaintiff's complaint alleges that Defendants conspired to deprive Plaintiff of the equal
11 protection of the laws and equal access to their facilities by cancelling the event, and then ex-
12 cused their actions by claiming Plaintiff had breached the contract. That excuse was pretextual –
13 the true reason was that Defendants discovered that Plaintiff wanted to show a film about intelli-
gent design, a subject they perceived to be religious and therefor unacceptable to them.

14 The unsettled and uncertain state of § 1985 law on conspiracy claims may render Plain-
15 tiff's § 1985 cause of action tenuous. Quite the opposite is true of Plaintiff's Unruh Act claim.
16 Contrary to Defendants' assertions, discriminatory intent may be *generally* pled, Defendants' e-
17 mails evidence Defendants' unlawful intent alone but especially in context when considering the
18 allegations of the Third Amended Complaint as a whole, and the Court may not sustain the De-
murrers based upon explicit or implicit findings of fact.

19 **II. LEGAL STANDARD AND APPLICABLE CIV. CODE SECTIONS**

20 **A. Legal Standard For Demurrers.**

21 Demurrers are disfavored. California has adopted a policy to construe the pleadings "lib-
22 erally ... with a view to substantial justice." (Code Civ. Proc., § 452). "It is error ... to sustain a
23 demurrer when the plaintiff has stated a cause of action under any possible legal theory." *Aubrey*
v. Tri-City Hosp. Dist. (1992) 2 Cal.4th 962, 967.

24 On demurrer, the sole issue the Court may resolve is whether the complaint, standing
25 alone, states a cause of action. *Gervase v Superior Court* (1995) 31 Cal.App.4th 1218, 1224. A
26 demurrer does not test the sufficiency of the evidence or other matters outside the pleading. *Four*
Star Elect. V. F & H Constr. (1992) 7 Cal.App.4th 1375, 1379. It challenges only the legal suffi-
27

1 ciency of the affected pleading, not the truth of the pleading's factual allegations nor the plead-
2 er's ability to prove them. *Cundiff v. GTE Cal., Inc.* (2002) 101 Cal.App.4th 1395, 1404-1405.
3 Demurrer proceedings do not determine the truth of disputed facts. *Fremont Indem. Co. v. Fre-*
4 *ment Gen. Corp.* (2007) 148 Cal.App.4th 97, 114-115.

5 B. *Civ. Code, § 51*

6 The Unruh Civil Rights Act provides that "... all persons ... are free and equal, and no ma-
7 ter what their sex, race, color, religion, ancestry, national origin, disability or medical condition
8 are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in
9 all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b)).

10 C. *Civ. Code, § 51.5*

11 Civ. Code, section 51.5 provides in relevant part: "No business establishment of any
12 kind whatsoever shall discriminate against, boycott or blacklist, or refuse to ... contract with ...
13 any person in this state on account of any characteristic listed or defined in subdivision (b) or (e)
14 of Section 51, or of the person's partners, members, stockholders, directors, officers, managers,
15 superintendents, agents, employees, business associates, suppliers, or customers, because the
16 person is *perceived* to have one or more of those characteristics, or because the person is associ-
17 ated with a person who has, or is *perceived* to have, any of those characteristics." (Civ. Code, §
18 51.5, subd. (a)).

19 D. *Civ. Code § 52*

20 Civ. Code, § 52 (a) provides, "Whoever denies, aids or incites a denial, or makes any dis-
21 crimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every of-
22 fense for the actual damages, and any amount that may be determined by a jury, or a court sitting
23 without a jury, up to a maximum of three times the amount of actual damage but in no case less
24 than four thousand dollars (\$4,000), and any attorney's fees that may be determined by the court
25 in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or
26 51.6."

27 **III. ARGUMENT**

28 A. *The Unruh Act Prohibits Businesses From Engaging In Unreasonable, Arbitrary Or Invidious Discrimination.*

The Unruh Act guarantees "full and equal accommodations, advantages, facilities, privi-
leges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51,

1 subd. (b)). “The Legislature’s choice of terms evidences concern not only with access to business
2 establishments, but with equal treatment of patrons in all aspects of the business.” *Koire v. Metro*
3 *Car Wash* (1985) 40 Cal.3d 24, 29 (emphasis added.) The Act applies “where unequal treatment
4 is the result of a business practice.” *Id.* at p. 29.

5 The Act does not protect exclusively against enumerated list of classes; rather, the Act is
6 “illustrative rather than exhaustive.” *Koire, supra*, 40 Cal.3d at p. 28. It is to be given “liberal
7 construction with a view to effectuating its purposes.” *Id.* The purpose of the Unruh Act was to
8 create and preserve a nondiscriminatory environment in California business establishments.
9 *Isbister v. Boys’ Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 75-76; *Koire, supra*, at p. 36 (Act
10 “prohibits all forms of stereotypical discrimination”); *In re Cox* (1970) 3 Cal.3d 205, 212 (cate-
11 gories “illustrative rather than restrictive”; “intended to prohibit all arbitrary discrimination by
12 business establishments”). In 2007 the Court reiterated the Act’s perennial importance:

13 The Act stands as a bulwark protecting each person’s inherent right to ‘full and equal’
14 access to ‘all business establishments.’ ... The Act, like the common law principles upon
15 which it was partially based, imposes a compulsory duty upon business establishments to
16 serve all persons without arbitrary discrimination.... The Act serves as a preventive meas-
17 ure, without which it is recognized that businesses might fall into discriminatory practic-
18 es.

19 *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167 (citations omitted). *Angelucci* con-
20 firmed “the Unruh Act must be construed liberally in order to carry out its purpose.” *Angelucci,*
21 *supra*, 41 Cal.4th at p. 167, citing *Koire, supra*, 40 Cal.3d at p. 28.

22 The Act’s purpose is not solely to guard against *invidious* discrimination, or discrimina-
23 tion based upon a hostility toward a particular class of people; indeed, “[t]he objective of the Act
24 is to prohibit businesses from engaging in ***unreasonable, arbitrary or invidious discrimination.***”
25 *Howe v. Bank of America* (2009) 179 Cal.App.4th 1443, 1450 (internal quotes and punctuation
26 omitted; italicized emphasis in original, bold-faced emphasis added.)

27 B. *Discriminatory Intent Under The Unruh Act May Be Pled Generally, And The*
28 *Court May Not Make Factual Findings, Either Explicitly Or Implicitly, On De-*
murrer.

On demurrer the court need not accept conclusions but must accept as true the com-
plaint’s properly pled factual allegations. See *Cundiff v. GTE Cal., Inc., supra*, 101 Cal.App.4th
at pp. 1404-05. “On demurrer, we accept as true the material facts alleged in the complaint.”
Garcia v. Four Points Sheraton LAX (2010) 10 Cal. Daily Op. Serv. 11868. The court must also
accept as true those facts that may be inferred from those expressly alleged. *Id.* The court must

1 give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.
2 *Id.* The issue is never whether the plaintiff can actually prove all of the alleged facts, and the
3 court should not concern itself with whether the plaintiff will be able to prove the facts which it
4 alleges in their complaint. *Id.*

5 Defendants rely on the Court's brief comment at the July 19, 2010, hearing that discrimi-
6 natory intent must be pled under the Act and that e-mails referred to in the complaint "don't
7 show discriminatory intent." (Demurrer Hearing Transcript at 6:23). Defendants, however, "offer
8 no authority for the proposition that discriminatory intent must be pled with particularity." *Cas-*
9 *taneda v. Burger King Corp.* (2009) 597 F.Supp.2d 1035, 1048 (denying motion to dismiss Un-
10 ruh claim for failure to state a cause of action). Indeed, Defendants' sole authority cited holds
11 merely that the allegations may not be "conclusory." (Demurrer, 6:23-25.)

12 The Court indicated a view that Defendants' e-mails, standing alone, could not establish
13 discriminatory intent. Yet both the Second Amended Complaint and the Third Amended Com-
14 plaint ("TAC") set forth a copious narrative of facts from which a reasonable inference can be
15 drawn that Defendants discriminated against Plaintiff believing that: (1) intelligent design
16 amounts to religious advocacy; (2) intelligent design is inconsistent with the Science Center's
17 mission to provide science education free of supernatural assumptions; and (3) Plaintiff's IMAX
18 fundraising event would have promoted religious speech critical of Darwin's theory of evolution.
19 The Court is obligated to examine the facts leading to these logical inferences as a whole and to
20 consider the parts in their proper context. Applying such scrutiny with legally required liberality,
21 the TAC alleges unreasonable, arbitrary and/or invidious discrimination based on religion (or the
22 perception of religion).

23 Defendants frame their argument to invoke judicial fact-finding, which is impermissible.
24 *The Court may not make factual findings on a demurrer, including "implicit" findings.* *Mink*
25 *v. Maccabee* (2004) 121 Cal.App.4th 835, 839. Here, the Court's earlier finding that the e-mails
26 "don't show discriminatory intent" appears to be limited to the quoted e-mails and does not ap-
27 pear to consider them in relationship to or in context with other material facts alleged. The record
28 seems ambiguous and incomplete on this point – such a finding amounts to a judicial determina-
tion of the email authors' state of mind – and Defendants' argument assumes that the Court's
finding of fact that the e-mails do not show discriminatory intent was based on some internal as-
pect of the e-mails. No such assumption is warranted under the Court's earlier finding because

1 the record is unclear as to the Court's justification for its finding and the parties were deprived of
2 an explanation of the Court's assumptions. Because the Court may not make factual findings on
3 demurrer, and because the record is silent as to whether the Court considered them in the context
4 of the entire complaint, taken as a whole, the Court must revisit this issue with an eye toward
5 avoiding making findings of fact, and considering the factual allegations in the aggregate.

6 As discussed more fully below, it is a *fact-finder's* role to decide whether the e-mails
7 show a discriminatory motive. Such a finding would not be part of a demurrer decision. *See Naz-*
8 *ir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286 (issues of intent and motive are not
9 readily "determinable on paper," and are "rarely appropriate for disposition on summary judg-
10 ment").

11 C. *The Facts Alleged Collectively Show Discriminatory Intent Under The Unruh Act.*

12 Viewing the e-mails *in vacuo* may or may not be enough to decide discriminatory intent.
13 They clearly reveal multiple expressions of outrage, concern, distress, embarrassment and/or
14 some other form of adversity transmitted up the command structure of the Defendants' organiza-
15 tions where, for instance, their authors protest "the *creationist* film that is set to screen on Oct.
16 25" (TAC, ¶ 17, 5:13, emphasis added) and lament how they were caught "unaware of *the nature*
17 *of the groups involved*" (TAC, 25:7-12, emphasis added). These expressions evidence Defend-
18 ants' employees' state of mind: (1) *hostility* toward the idea of "creationist" views being import-
19 ed into their work environment; (2) a belief or *perception* that intelligent design is a "creationist"
20 and therefore religious theory; and (3) the need to counteract.

21 This evidence of Defendants' employees state of mind facially denotes annoyance with-
22 Plaintiff's message, but is perhaps better understood in its proper context, bringing into stark re-
23 lief the nature of the discriminatory intent supporting an Unruh Act claim when additional facts
24 alleged in the TAC are taken into account. To begin with, the Defendants' relationship with the
25 Smithsonian Institution and that organization's experience with intelligent design cannot be di-
26 vorced from the Court's analysis. The narrative unravels as follows: The TAC alleges the event
27 was to feature a documentary film entitled "Darwin's Dilemma" that challenges evolutionary
28 theory about the fossil record and abrupt appearance of life, and a post-screening panel discus-
sion with the film's producer/director, Lad Allen, and other speakers who "propose the scientific
theory of intelligent design as an explanation for the explosion of major groups of animal life in
the Cambrian period." (TAC, ¶ 12, 4:9-13). The TAC further alleges the Smithsonian Institution,

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1 with which Defendant California Science Center is affiliated, “has a long history of discriminat-
2 ing against academic freedom for intelligent design proponents” (TAC at ¶ 44, 11:17-19) devel-
3 oped at length in the TAC’s paragraphs 47 through 49.

4 The TAC’s description of the Smithsonian’s earlier attempt to cancel the screening of an-
5 other intelligent design documentary produced and directed by Lad Allen, “The Privileged Plan-
6 et,” provides the foundation for understanding Defendants’ intentions, motives and actions by
7 comparing the prior incident to the present:

8 The Smithsonian issued a disclaimer against the EVENT [sic]¹, stating that “the
9 content of the film is not consistent with the mission of the Smithsonian Institu-
10 tion.” At that time, the same Smithsonian spokesman – Randall Kremer – object-
11 ed to “The Privileged Planet” purportedly because the film made an inappropriate
12 “philosophical conclusion.” Yet the Smithsonian made no complaints when show-
13 ing Carl Sagan’s “Cosmos” in 1996, stating a different philosophical perspective
14 that “The Cosmos is all that is, or ever was, or ever will be.”

15 (TAC at ¶ 47, 12:11-17.)

16 The facts showing the Smithsonian’s earlier attempt to disrupt a virtually identical event
17 are complemented and reinforced with additional facts describing other attempts by the Smith-
18 sonian to discriminate against intelligent design proponents. (TAC, ¶¶ 48-50). Thus, the TAC
19 sets forth specific facts describing both a history of discrimination against proponents of intelli-
20 gent design and a pattern of discrimination by the Smithsonian in particular, to include the prior
21 discrimination against the film’s producer (Ladd). Taken in context, a necessary inference may
22 reasonably be made that Defendants, answering to the Smithsonian, intended to obstruct the
23 presentation of an intelligent design documentary just as its parent affiliated institution had pre-
24 viously done, and precisely in response to the Smithsonian’s objections to the screening. The
25 Smithsonian exerted pressure on the Defendants – literally sounding an “alarm” – to act (*see*
26 quoted e-mail, *infra*: “The Smithsonian institute (sic) called and was *alarmed* at the news release
27 from a *creationist* organization.... It is also *alarmed* with the implication that the Smithsonian is
28 involved”; TAC, ¶ 17, 5:12-16, emphasis added). Defendants clamored to find a plausible basis
for cancelling the “Darwin’s Dilemma” event, just as the Smithsonian had attempted to justify its
desire to cancel the “Privileged Planet” event.

¹ The use of all-caps was unintentional and inadvertent. The TAC’s reference in this instance is to the Smithsonian event featuring “The Privileged Planet,” not to the California Science Center event featuring “Darwin’s Dilemma.”

1 The animating basis for the Defendants' discriminatory conduct is further understood by
2 taking into account the additional facts alleged in the TAC presenting the explanation for why
3 the Smithsonian, and in line with it the Defendants, would correspond with urgency their "alarm"
4 that Plaintiff's event could harm its reputation. As already seen, the intelligent design documen-
5 tary "The Privileged Planet" was publicly attacked by the Smithsonian for reaching an inappro-
6 priate "philosophical conclusion." Defendants' action also can be seen to have proceeded from a
7 *philosophical* disagreement with those advocating for intelligent design, but the issue is larger
8 still. Defendants' action is powered by an age-old schism dividing the houses of spiritualism and
9 rationalism. Any student of the Protestant Reformation, the Scientific Revolution, the Enlight-
10 enment, the French Revolution, the First Amendment, the publication of Darwin's "On the
11 Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the
12 Struggle for Life," the Scopes Trial or the *Kitzmiller v. Dover* trial senses it intuitively. In this
13 larger context, Defendants' actions must be, and indeed have been, explained as arising from the
14 timeless debate over life's origins and the nature of the universe casting science and religion as
15 enemy forces locked in perpetual ideological conflict.

14 Here, the Court must accept as true the allegation that "creationism" is "the belief that
15 life's origin is described in the book of Genesis" (TAC, ¶ 7, 18:5-6; ¶ 95, 21:8-9), and that De-
16 fendants believed that intelligent design is creationism and "on that basis a religious concept."
17 (TAC, ¶ 97, 21:23-26.) From this it must follow that the Defendants were motivated by adverse
18 attitudes toward intelligent design, revealed in e-mail correspondence, due to the perception that
19 Plaintiff's message was religious in nature and therefore conflicted with their understanding of
20 scientific education's proper role. There is no other coherent way to explain Defendants' precise
21 and deliberate use of the term "creationism" and reference to the "nature of the groups involved."

21 This conclusion is given heft in one particular e-mail:

22 The Smithsonian institute (sic) called and was *alarmed* at the news release from a *crea-*
23 *tionist* organization, the Discovery Institute, below because it implied that the Science
24 Center officially supports the *creationist* film that is set to screen on Oct. 25. It is also
25 *alarmed* with the *implication* that the Smithsonian is involved and would like us to issue
26 a correction statement on PR newswire as to what our role is and that we are just one of
27 many Smithsonian affiliates on the west coast. They said that this group had booked at
28 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.

(TAC, ¶ 17, 5:12-16 (emphasis added)).

1 Only on an understanding that the film challenged Dawinian assumptions with creationist
2 myth argument would the Smithsonian, with its history of hostility toward intelligent design, be-
3 come “alarmed” about the mere “implication” that it was somehow involved with Plaintiff’s
4 event and so concerned for its “reputation.” Yet the loftier issues are not to be adjudicated on
5 demurrer. The issues here turn on the possible interpretation of the Defendants’ communications
6 and actions. Does the Defendant’s above e-mail constitute evidence of discriminatory intent?

7 First to consider: how should such a statement be judicially evaluated? *Reid v. Google*
8 (2010) 50 Cal.4th 512, 538, 541 (“*Reid*”), held that a discrimination defendant’s statements
9 should not be viewed “in isolation,” but “should be considered with all the evidence in the rec-
10 ord.” The *Reid* court expressly followed the U.S. Supreme Court’s identical holding in *Reeves v.*
11 *Sanderson Plumbing Products* (2000) 530 U.S. 133, 153.

12 If the court finds a discrimination defendant’s statement ambiguous in its intent, then that
13 issue of intent becomes a jury question. *Reid, supra*, 50 Cal.4th at 540-541. “The task of disam-
14 biguating ambiguous utterances is for trial, not for summary judgment.” *Id., quoting Shager v.*
15 *Upjohn Co.* (7th Cir. 1990) 913 F.2d 398, 402 (discrimination defendant’s statement “may be
16 relevant evidence, with greater or less probative value depending on the precise character of the
17 remark”). In a dispositive motion the trial court “may not weigh the plaintiff’s evidence or infer-
18 ences against the defendants’ as though it were sitting as a trier of fact.” *Reid, supra*, 50 Cal.4th
19 at p. 540, *quoting Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856. Similarly, a trial
20 court in a dispositive motion may not decide that an evidentiary fact is “entitled to virtually no
21 weight” in a discrimination case, because such a decision amounts to the impermissible weighing
22 of the facts. *Reid, supra*, 50 Cal.4th at p. 540, quoting and criticizing *Horn v. Cushman & Wake-*
23 *field Western, Inc.* (1999) 72 Cal.App.4th 798, 809.

24 Next to consider: is the statement relevant evidence of discriminatory animus? The
25 emerging test of whether a statement has a “tendency to show that the decision-maker was moti-
26 vated by [unlawfully discriminatory] assumptions or attitudes” evaluates these four factors:

- 27 (1) who made the remark, i.e., a decision maker, a supervisor, or a low-level co-
28 worker;
- (2) when the remark was made in relation to the [business] decision at issue;
- (3) the content of the remark, i.e., whether a reasonable juror could view the remark
 as discriminatory; and
- (4) the context in which the remark was made, i.e., whether it was related to the deci-
 sion-making process.

1 *Galimore v. City Univ. of New York Bronx Commun. Coll.* (S.D.N.Y. 2009) 641 F.Supp.2d 269,
2 284 (near verbatim quotation), *citing Silver v. N. Shore Univ. Hosp.* (S.D.N.Y. 2007) 490
3 F.Supp.2d 354, 362 (*citing Minton v. Lenox Hill Hosp.* (S.D.N.Y. 2001) 160 F.Supp.2d 687,
4 694); *accord, Arismendez v. Nightingale Home Health Care, Inc.* (5th Cir. 2007) 493 F.3d 602,
5 607-608 (same test).

6 All four elements of this relevance test appear in the e-mail evidence here. First, the e-
7 mails contain viewpoints expressed by the self-admittedly influential Smithsonian Institution and
8 transmitted by and to Defendant's decision makers who ultimately breached the contract with
9 Plaintiff. Under *Reid, supra*, 50 Cal.4th at 542, 545, statements made by "decision makers and
10 coworkers," especially those coworkers "in a position to influence a decision maker," are rele-
11 vant.

12 Second, the e-mail was sent one day before the Defendant breached its contract with
13 Plaintiff. TAC at ¶¶ 17, 19. The almost immediate causal link strongly suggests discriminatory
14 animus. *See California Fair Employment and Housing Com'n v. Gemini Aluminum Corp.* (2004)
15 122 Cal.App.4th 1004, 1018 (one week between protected activity and adverse action supports
16 inference of retaliation); *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 341 (adverse ac-
17 tion within days of protected activity supports inference of causation (retaliation)).

18 Third, the e-mail's content expressly reveals the Smithsonian's and the writer's distaste
19 for anything "creationist" or favorably associated with "creationism." The e-mail suggests that,
20 because of the nature and identity of the Plaintiff and the film's producers, Defendant should se-
21 riously consider "pulling the plug" and breaching the contract. The e-mail expressly worries
22 about the supposed adverse effects of mere association with Plaintiff and the film. *See* TAC, ¶
23 17. The perception that intelligent design is a theory identical to the theory of creationism,
24 sometimes termed pejoratively as the creationist "myth," is central to the controversy frustrating
25 intelligent design advocates, and exemplified by Defendants' e-mail exchanges.

26 Were "creationist" in the e-mail replaced with "negro" or "female" or "homosexual," no
27 American jury could miss the hostility in the language. As the Smithsonian Institution has a his-
28 tory of discrimination against "creationist" or "intelligent design" topics and speakers, and De-
29 fendants' e-mails show a desire to follow Smithsonian's lead, the combined alleged facts would
30 be sufficient for a jury to treat the e-mail as evidence of Defendant's discriminatory intention.
31 The TAC alleges all of these facts. *See, e.g.,* TAC, ¶¶ 44-45, 47-50.

1 Defendant's e-mails evidence fear of Smithsonian's disapproval and some hypothetical
2 loss of respectability – all arising from mere association with a "creationist" film being shown at
3 the theater. That kind of irrational fear of taint harkens back 135 years to a sitting judge's con-
4 clusions about deep-seated racial prejudice in America. *See Charge to Grand Jury* (W.D.N.C.
5 1875) 1 Hughes 541, 30 F.Cas. 999, 1000-1001. The judge expressly observed fear and loathing
6 that arose when white people were in any way "associated" with black people. *Id.* The judge in
7 1875 believed no law could ever rectify that situation, but the judge was wrong, whether about
8 race or any other irrational human prejudice.

9 The Unruh Act is designed to prevent or redress the harms that such prejudice causes
10 when people are denied public accommodations on the basis of their religion or perceived reli-
11 gion. Civ. Code, § 51 subds. (b) & (e)(5). Defendants invite this Court to prevent a jury from
12 considering what Defendants' intended when they recoiled at and then foreclosed any possibility
13 of a "creationist" or "intelligent design" film being screened in their public facility – for fear of
14 the taint of association. This Court should reject Defendants' invitation.

15 D. *Conspiracy Jurisprudence Under 42 U.S.C. § 1985 Is So Unsettled And Incoher-*
16 *ent, Plaintiff Must Reluctantly Concede The Futility Of Advancing The Conspira-*
17 *cy Claims In This Action.*

18 The Court graciously granted leave to amend the conspiracy claims to more particularly
19 allege the element of "invidiously discriminatory animus" based on class.² Guided by the ex-
20 press language of § 1985 and the injunction of *Griffin v. Breckenridge* (1971) 403 U.S. 88, 96,
21 that "[l]ittle reason remains ... not to accord to the words of the statute their apparent meaning,"
22 Plaintiff amended the complaint for the purpose of detailing how Defendants conspired to de-
23 prive it of the equal protection of the laws. The amended language took account of the class-
24 based, invidiously discriminatory animus behind the conspirators' action (ill-will aimed at the
25
26
27
28

² According to the reporter's transcript, the Court stated: "Okay. Now, 1985, conspiracy, is a class and invidious
distinction [sic] based on class - it's my understanding of 1985, and there is [sic] been no allegation here -- nor I
think could there be an allegation here -- of conspiracy to have an invidious *distinction* [sic] based on class." (Tran-
script, July 19, 2010, p. 6, lines 9-14.) Plaintiff's counsel sought correction to the transcript to replace the words
"distinction" with "discrimination." The reporter thereafter advised Plaintiff's counsel that the Court had intended
the word "distinction" and not "discrimination." (See Exhibit "A," Fax dated 8/16/2010 from Roy H. Pitluk to Plain-
tiff's counsel stating: "Regarding the words 'invidious distinction' on page 6, line 10, the words are, indeed, sub-
stantive, but there was no error. *I confirmed the verbiage with Judge Terry Green.*" (Emphasis in original.)) Plain-
tiff believes the transcript remains in error and that the Court stated at the hearing "discrimination," not "distinc-
tion." On the basis of the argument of the Demurrer, this appears to be Defendants' recollection as well.

1 perceived religious nature of intelligent design). However, additional research, prompted by the
2 Demurrer, suggests the conclusion that pursuing the conspiracy claims here may be quixotic.

3 Not conceding the merit of such a challenge, Plaintiff recognizes that the current juris-
4 prudence in this area may present too high a summit to conquer. The Ninth Circuit's dicta in *But-*
5 *ler v. Elle* (9th Cir. 2002) 281 F.3d 1014, 1028, sets the bar high by suggesting that lower courts
6 should "exercise restraint in extending § 1983(5) beyond racial prejudice." *Id.*, citing *McLean v.*
7 *International Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir.1987). "In other words, § 1985(3)
8 should 'not be extended to every class which the artful pleader can contrive.'" *Id.* (citation omit-
9 ted). The Ninth Circuit appears reluctant to expand the scope of § 1985 to other classes, noting
10 that the Supreme Court has not defined the parameters of a "class" beyond race, yet observing as
11 well that "the term *unquestionably* connotes something more than a group of individuals who
12 share a desire to engage in conduct that the § 1985(3) defendant disfavors." *Id.*, quoting *Bray v.*
13 *Alexandria Women's Health Clinic* (1983) 506 U.S. 263, 269; and mentioning *United Broth. of*
14 *Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott* (1983) 463 U.S. 825, 836 (question-

15 ing whether § 1985(3) was intended to reach beyond racially-based animus) (emphasis added).
16 Plaintiff believes that it would be impractical to navigate this camel through the eye of
17 such a needle. For these reasons, Plaintiff requests that the Fifth Cause of Action for Conspiracy
18 and the Sixth Cause of Action for Failure to Prevent Violations and Civil Conspiracy be dis-

19 **IV. CONCLUSION**

20 For the above reasons, Plaintiff respectfully requests that the Court overrule the Demurrer
21 to the Seventh Cause of Action for Violation of the Unruh Civil Rights Act. Plaintiff addition-
22 ally requests that the Fifth Cause of Action for Conspiracy and the Sixth Cause of Action for Fail-
23 ure to Prevent Violations and Civil Conspiracy be dismissed without prejudice.

24 DATED: September 25, 2010

THE BECKER LAW FIRM

25 By:


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