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9 AMERICAN FREEDOM ALLIANCE

FILED
LOS ANGELES SUPERIOR COURT

MAY 26 2011

JOHN A. CLARKE, CLERK
BY RAUL SANCHEZ, DEPUTY

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

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

14 Plaintiff,

15 vs.

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

22 Defendants.

Case No. BC423687

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

PLAINTIFF'S RESPONSE TO
DEFENDANTS CALIFORNIA SCIENCE
CENTER FOUNDATION'S AND
JEFFERY RUDOLPH'S SEPARATE
STATEMENT RE: CLAIMS ASSERTED
UNDER THE U.S. CONSTITUTION AND
CALIF. CONSTITUTION

[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

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26 Plaintiff, American Freedom Alliance, submits this Separate Statement of Disputed and
27 Undisputed Facts in Opposition to The Motion Of Defendants, California Science Center
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1 Foundation and Jeffrey Rudolph, For Summary Adjudication Motion For Summary Adjudication
2 On American Freedom Alliance's Claims Asserted Under The United States Constitution And
3 California Constitution and in response to Defendants' Separate Statement of Undisputed
4 Material Facts.

5 **ISSUE NO. 1: THE FOUNDATION DEFENDANTS ARE ENTITLED TO SUMMARY**
6 **ADJUDICATION BECAUSE THEY ARE NOT STATE ACTORS.**

7 **MOVING PARTY'S UNDISPUTED**
8 **MATERIAL FACTS AND SUPPORTING**
9 **EVIDENCE**

7 **OPPOSING PARTY'S RESPONSE AND**
8 **SUPPORTING EVIDENCE**

9 1. Jeffrey Rudolph testified that: "As
10 President of the California Science Center
11 Foundation, I chose to cancel the [AFA]
12 event."
13 Ochsenein Decl., Ex. 10 [Rudolph Dep. Tr.]
14 at 98:10-12; *see also id.*, Ex. 10 [Rudolph
15 Dep. Tr.] at 256:13-257:4 [testifying that
16 "[t]he decision to cancel the event was my
17 decision."]

Objection. Immaterial. The alleged fact that
Rudolph testified to the subordinate fact has
no significance in determining the outcome
of this case with regard to whether Defend-
ants are state actors. Objection is also made
on the ground that the only proof of this al-
leged material fact is the statement of the on-
ly witness to the fact. Code.Civ. Proc.,
§437c(e); *see Overland Plumbing, Inc. v*
Transamerica Ins. Co. (1981) 119
Cal.App.3d 476, 483 [trial court did not
abuse its discretion by failing to reject decla-
rations of sole witness to facts for reasons of
credibility]. Subject to and without in any
way waiving the foregoing objections, and to
the extent that Responding Party understands
this alleged fact: Undisputed that Jeffrey Ru-
dolph testified as alleged. Undisputed that
Rudolph made an executive decision to can-
cel the AFA event based intelligence pre-
sented to him by his staff. **Disputed** that Ru-

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California Science Center have spent considerable resources to build a reputation as a highly regarded and respected science institution, we are very attentive to ensure that private groups do not appropriate the reputation of the California Science Center for their own benefit.”; “The California Science Center and the Foundation is one of the oldest and most successful public-private partnerships in the State of California. The Foundation funds design and development of exhibitions and education programs at the California Science Center. The Foundation also manages and arranges for the use of areas within the Science Center for private events.”]; *id.*, Exh. No. 8, Rudolph Dep. Tr., 291:21-292:16 [“The second issue was the reputation of the California Science Center, which is the most valuable thing we have is our name and our reputation, and we protect that in everything we do; at least we attempt to protect that in everything we do is what I should say. So it’s not unique to private events, but we do an exhibit with others, like the Mummies exhibit we just completed, or Body Worlds before that or America AM or any exhibit where there’s a significant marketing campaign, our contract will provide strong provisions that we have approval of all publicity, marketing efforts, et cetera, and we exercise that. And we are

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1 very vigilant about it, because we care about
2 how our name is presented and the integrity
3 of our institution, what's attributed to us and
4 what isn't. We have a private event, we have
5 not reviewed the program, we have not had
6 anything to do with it, not reviewed the film
7 -- and as I said earlier, i still haven't -- to
8 represent that as something we are presenting
9 and saying we will premiere it is putting our
10 name at risk with something that we've not
11 signed on to.”; emphasis added.]

Undisputed.

12 2. The Foundation is a non-profit, section
13 501(c)(3) organization that raises funds to
14 support exhibits and educational programs
15 featured at the California Science Center (the
16 “Science Center”), the West Coast’s largest
17 interactive center and museum.

18 Ochsensbein Decl., Ex. 32 [Dep. Ex. 200] ¶¶
19 3, 6; Ochsensbein Decl., Ex. 10 [Rudolph Dep.
20 Tr.] at 38:11-15.

21 3. The Foundation designs and administers
22 exhibits and educational programs featured at
23 the Science Center. The Foundation is also
24 responsible for contracting with private
25 parties to use areas within the Science Center
26 for private events.

Undisputed.

27 Ochsensbein Decl., Ex. 32 [Dep. Ex. 200], ¶ 6;
28 Ex. 10 [Rudolph Dep. Tr.] at 39:17-40:15,

1 159:14-22.

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3 4. Pursuant to its lease, the Foundation is
4 solely responsible for the operation of the
5 IMAX theater.

6 Ochsenbein Decl., Ex. 10 [Rudolph Dep. Tr.]
7 at 71:19-72:4, 163:15-164:9; Ex. 31 [Dep. Ex.
8 198]; *see also id.*, Ex. 4 [Strom Dep. Tr.] at
9 193:14-17 ["Q. And does the Science Center
10 have any involvement in the booking of
11 special events at the Science Center IMAX
12 theater, to your knowledge? A. It does not."];
13 *id.*, Ex. 5 [Sion Dep. Tr.] at 386:15-387:12
14 [addressing responsibility for leasing the
15 IMAX for private events].

Disputed. The Lease Agreement, not specifically identified as such by Defendants but obliquely referenced at "Ex. 31 [Dep. Ex. 198]," does not contain explicit language referencing "operation." However, it expressly provides that the Foundation does not enjoy exclusive use of the theater facilities and expressly entrusts Defendant Center with final authority over policies restricting public access to the theater. These provisions delegate a division of operational responsibility between the Foundation and the Center.

SUPPORTING EVIDENCE:

Becker Decl., Exh. No. 32, Rudolph Dep. Tr., Dep. Exh. No. 198, (IMAX Lease Agreement) ["IMAX Lease Agreement: "Museum ... grants to Foundation *the non-exclusive right* to utilize the Multi-purpose and Conference room facilities ... for meetings or functions of the Foundation, its support groups, and its sponsors and donors upon such terms as [the Center] may, acting reasonably, require." p. 2; emphasis added; "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 [California Science Center].*" *id.*, p. 2, ¶ 6; emphasis added.]

1 5. The Foundation and Center have entered
2 into a Joint Operation Agreement (“JOA”).
3 The JOA does not establish any restrictions
4 on the subject matter or content of private
5 events held at the Science Center.

Undisputed.

6 Ochsensbein Decl., Ex. 30 [Dep. Ex. 194]; *id.*,
7 Ex. 12 [Pygin Dep. Tr.] at 149:8-19; *id.*, Ex.
8 13 [Tateishi Dep. Tr.] at 56:2-13; *id.*, Ex. 10
9 [Rudolph Dep. Tr.] at 75:11-76:8.

10 6. The Foundation and Science Center have
11 also entered into a separate lease agreement
12 regarding the IMAX theater. The lease
13 agreement requires the Foundation to comply
14 with all applicable state and federal laws.
15 However, the IMAX theater lease does not
16 incorporate any policies regarding the subject
17 matter of private events to be held at the
18 facility. A provision of the lease disclaims
19 any requirement that the Foundation “acquire
20 or show any specific film.”

Undisputed that the Foundation and Science
Center have also entered into a separate lease
agreement regarding the IMAX theater. Un-
disputed that the lease agreement requires the
Foundation to comply with all applicable
state and federal laws. Undisputed that a
provision of the lease disclaims any require-
ment that the Foundation “acquire or show
any specific film.” **Disputed** that the IMAX
theater lease does not incorporate any poli-
cies regarding the subject matter of private
events to be held at the facility. The Center’s
approval is required to establish policies re-
lating to public admission to the facility

21 Ochsensbein Decl., Ex. 31 [Dep. Ex. 198] at §
22 7, 15; Ex. 12 [Pygin Dep. Tr.] at 148:7-
23 148:21; Ex. 10 [Rudolph Dep. Tr.] at 160:2-
24 162:8.

SUPPORTING EVIDENCE:

Becker Decl., Exh. No. 32, Rudolph Dep.
Tr., Dep. Exh. No.198, (IMAX Lease
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

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established by Foundation *and approved by the [California Science Center]*; emphasis added.]

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4 7. The Foundation also provides services to
5 the Science Center pursuant to various
6 services contracts. There are also a number of
7 agreements pertaining to the lease of the
8 Phase II building to the Science Center by the
9 Foundation.

Undisputed.

10 Ochsensbein Decl., Ex. 12 [Pygin Dep. Tr.] at
11 146:19-147:2.

12 8. Foundation employees are paid directly by
13 the Foundation for their work on behalf of the
14 Foundation. Foundation employees do not
15 receive public employee benefits and are not
16 classified as civil servants as a result of their
17 employment by the Foundation.

Undisputed as to those employees who are
not also employed by the Center. *Disputed* as
to those employees also employed by the
Center, such as Jeff Rudolph and Tony
Budrovich.

SUPPORTING EVIDENCE:

18 Pygin Decl., ¶ 3; Ochsensbein Decl., Ex. 5
19 [Sion Dep. Tr.] at 398:4-15; *id.*, Ex. 4 [Strom
20 Dep. Tr.] at 192:13-16.

Becker Decl., Exh. No. 31, Rudolph Dep.
Tr., Dep. Exh. No. 195 (“Governance” page
from the California Science Center web site).

21 9. The Foundation’s Board of Trustees
22 currently consists of 83 members. Nine of
23 these members are also members of the Board
24 of Directors of the Science Center.

Undisputed.

25 Pygin Decl., ¶ 4; *see also* Ochsensbein Decl.
26 Ex. 10 [Rudolph Dep. Tr.] at 88:5-10 [“Q.
27 There are a hundred trustees; is that right? A.
28 No. Q. How many are there? A. There are

1 authorized to be a hundred. There are not --
2 the number is a moving target. It's
3 approximately 85 now."].

4 10. The Science Center receives no funding
5 from the Foundation.

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7 Ochsenein Decl., Ex. 13 [Tateishi Dep. Tr.]
8 at 55:2-6.

Disputed. Defendants' asserted Undisputed
Material Fact No. 2, *supra*, contradicts this
purported. Further, both parties provide
resources and work together jointly to secure
necessary funding for building construction
and exhibit fabrication for the Science
Center. The Foundation assumes primary,
but not exclusive, responsibility for fund
raising and making significant monetary
contributions toward the Center.

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13 SUPPORTING EVIDENCE:

14 Moving Party's Undisputed Material Fact
15 No. 2, *supra* ["The Foundation is a non-
16 profit, section 501(c)(3) organization that
17 raises funds to support exhibits and educa-
18 tional programs featured at the California
19 Science Center (the "Science Center"), the
20 West Coast's largest interactive center and
21 museum."]; Becker Decl., Ex. No. 30, Ru-
22 dolph Dep. Tr., Ex. 194 (JOA) ["[I]n ac-
23 cordance with applicable law and tax re-
24 strictions, both parties agree to provide re-
25 sources and to work together jointly *to se-*
26 *ecure necessary funding* for building con-
27 struction and exhibit fabrication of the Pro-
28 ject (as hereinafter defined), and any other
current and future Science Center projects

1 identified in the Master Plan or other projects
2 that are mutually agreed to that are consistent
3 with Center and Foundation's mission.... [I]t
4 is recognized that the *Foundation is assum-*
5 *ing primary responsibility for fund raising*
6 *and making significant monetary contribu-*
7 *tions toward the Project....”]; id., Exh. No.*
8 *32, Rudolph Dep. Tr., Dep. Exh. 198 (IMAX*
9 *Lease Agreement); The Center is supported*
10 *by the Foundation under a public-private*
11 *partnership relationship. id., Exh. No. 31,*
12 *Rudolph Dep. Tr, Exh. 195, (California Sci-*
13 *ence Center web site “Governance” page)*
14 *[“The California Science Center is a public-*
15 *private partnership. As a department of the*
16 *State of California, the California Science*
17 *Center is administered by a nine-member*
18 *board of directors appointed by the Gover-*
19 *nor. The not-for-profit California Science*
20 *Center Foundation provides support for Sci-*
21 *ence Center exhibits and programs.”]; id.,*
22 *Exh. No. 33, Rudolph Exh. No. 200 (Ru-*
23 *dolph Decl., ¶ 6, 2:9-10) [“The California*
24 *Science Center and the Foundation is one of*
25 *the oldest and most successful public-private*
26 *partnerships in the State of California.”]; id.,*
27 *Exh. No. 10, Tateishi Dep. Tr., 54:15-21*
28 *[“Q. Is the California Science Center a public*
private partnership between the State of Cali-
fornia and the not-for-profit California Sci-
ence Center or Foundation?... The Witness:

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We have been referred to -- we have been referred as such, yes.”]; *id.*, Exh. No. 25, Pygin Dep. Tr., Dep. Exh. No. 219, (Foundation Report On Audit Of Financial Statements For The Year Ended June 30, 2010, p. 23, Note 13- Commitments And Contingencies) [“Phase II Construction and Lease with State The Foundation has undertaken a project to design and construct Phase II of the Science Center. Phase II of the Science Center includes, among other things, the addition of approximately 146,000 square feet to the existing Howard F. Ahmanson building on land leased from the State, which more than doubles the amount of exhibit space. The addition includes the new Ecosystems exhibits and support areas, expansion of existing galleries and administrative office space. The total Phase II budget is approximately \$143.6 million, of which Foundation-funded design, construction and construction management of the building approximate \$115.4 million. The remaining \$28.2 million primarily relates to \$8.4 million of building design funded by the State and \$19.8 million for exhibits. Through the end of June 2010, the Foundation had spent \$138.86 million on the Phase II project including the \$8.4 million of building design funded by the State. The Phase II project is near completion. The Phase II project is a public/private partner-

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ship between the State of California and the Foundation. The State funded \$8.4 million of building design. The balance of the building cost and all of the exhibit design and fabrication has been provided by the Foundation and partially financed by the issuance of tax-exempt bonds (see Note 9). The Foundation had primary responsibility for the construction of the Phase II project. In August 2006, the State and the Foundation executed a lease agreement whereby the State will lease the completed Phase II building for payments totaling \$45.9 million over 25 years with payments commencing at beneficial use and occupancy of the Phase II building. At the end of the lease term, ownership of the building will revert to the State. The State accepted beneficial use and occupancy of the Phase II building on June 15, 2009. Lease payments are due monthly in arrears.”]; This relationship enables the state to provide a public service. Becker Decl., Exh. No. 32, Rudolph Dep. Tr., Dep. Exh. No. 198, (Lease Agreement) [“for the benefit of the general public”]; Agreements between the Foundation and the Center are made for the purpose of implementing its common mission to stimulate curiosity and inspire science learning in everyone by creating fun, memorable experiences. *Id.*, Exh. No. 30, Rudolph Dep. Exh. No. 194 (JOA) [“Center

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11. Prior to engaging in any discussions with the Foundation, AFA negotiated with the Bridge to hold its Event there. AFA also considered holding its event at CityWalk and – if necessary – at the University of Southern California, where AFA’s event was ultimately held. AFA did not contact the Foundation until after its Event at the Bridge was cancelled.

Ochsenbein Decl., Ex. 14 [Peterson Dep. Tr.] at 34:20-36:24, 51:16-53:6, 75:1-10, 194:3-196:16; *id.*, Ex. 6 [Davis Dep. Tr.] at 57:20-58:10, 104:22-105:23, 114:11-115:10; *id.*, Ex. 9 [Bylsma Dep. Tr.] at 52:7-54:21, 289:22-290:1; *id.*, Ex. 27 [Dep. Ex. 179]; TAC, ¶ 27.

12. In making the decision to cancel the Event, Rudolph did not consult with any employees of the Science Center.

Ochsenbein Decl. Ex. 10 [Rudolph Dep. Tr.] at 257:8-258:21, 260:23-261:10, 262:10-263:21; *id.*, Ex. 15 [Dep. Ex. 11]; *id.*, Ex. 24 [Dep. Ex. 15]; *id.*, Ex. 33 [Dep. Ex. 205]

and Foundation share one common mission: ‘We aspire to stimulate curiosity and inspire science learning in everyone by creating fun, memorable experiences, because we value science as an indispensable tool for understanding our world, accessibility and inclusiveness, and enriching people’s lives.’”]

Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether Defendants are state actors for purposes of establishing liability under 42 U.S.C. § 1983. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed.

Undisputed. Discovery has disclosed that Rudolph only consulted with Foundation employees.

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13. Rudolph is paid by the Science Center for Undisputed.
his work as President and CEO of the Science
Center. He is paid by the Foundation for his
work as President of the Foundation. Rudolph
keeps separate track of his time spent on
Foundation business and time working for the
Science Center.

Ochsenbein Decl., Ex. 10 [Rudolph Dep. Tr.]
at 30:13-19, 33:20-23; Rudolph Decl. Exs. 1,
2.

14. On October 5, 2009, Harold Closter of the Undisputed.
Smithsonian Institution contacted Shell
Amega, a Foundation employee, regarding a
press release discussing the Event. Prior to
that time, the Foundation was unaware that
any press releases or other publicity relating
to the Event had been released. Closter did
not ask the Foundation to cancel the Event,
only requesting that the Foundation "issue a
correction statement."

Ochsenbein Decl., Ex. 15 [Dep. Ex. 11]; *id.*,
Ex. 11 [Amega Dep. Tr.] at 49:10-53:23.

15. Rudolph did not consult with Objection. Immaterial. The alleged fact has
representatives of the Smithsonian prior to no significance in determining the outcome
cancelling the Event. of this case with regard to whether
Defendants are state actors for purposes of

1 Ochsenbein Decl., Ex. 10 [Rudolph Dep. Tr.]
2 at 280:3-7.

liability pursuant to 42 U.S.C. § 1983.
Irrelevant. (Cal.Ev.Code §§ 210, 350-351).
The alleged fact has no tendency in reason to
prove or disprove whether Defendants are
state actors. Subject to and without in any
way waiving the foregoing objections, and to
the extent that Responding Party understands
this alleged fact: Undisputed that Rudolph
did not *personally* consult with
representatives of the Smithsonian prior to
cancelling the Event. *Disputed* that Rudolph
did not consult with representatives of the
Smithsonian prior to cancelling the Event
through employees under his supervision
communicating with Smithsonian Institution
officials and reporting those communications
with Rudolph.

16 SUPPORTING EVIDENCE:

17 Becker Decl., Exh. No. 37, Sion Dep. Tr.,
18 Dep. Exh. No. 11, (10/5/09 e-mail from S.
19 Amega to J. Rudolph) [“The Smithsonian
20 institute called and was *alarmed* at the news
21 release from a creationist organization, the
22 Discovery Institute, below because it implied
23 that the Science Center officially supports
24 the creationist film that is set to screen on
25 Oct. 25. It is also *alarmed* with the
26 implication that the Smithsonian is involved
27 and would like us to issue a correction
28 statement on PR newswire as to what our
role is and that we are just one of many

Smithsonian affiliates on the west coast. They said that this group had booked at the Smithsonian to screen the film and the Smithsonian pulled the plug on the screening when they found out. Please advise on how you'd like us to proceed.”]; *id.*, Exh. No. 14, Amega Dep. Tr., Dep. Exh. No. 212, (10/5/09 e-mail from H. Closter to S. Amega) [“Thanks for lending an ear. We earnestly hope that the California Science Center will provide an accurate statement to the media informing of your role (or non-role) in presenting or serving as the host site of the film on October 25. The press release we talked about distorts the relationship between the Smithsonian Institution and the California Science Center by prominently featuring the Smithsonian in the title line and playing up the Affiliate relationship in a way that implies that the California Science Center is a west coast branch of the Smithsonian, and that the film showing is a Smithsonian event. Although we are most proud of our relationship with California Science Center, the Smithsonian, as you know, has no role in any of the decision making processes of your organization, and certainly has no say in films, public programs, and exhibitions. When you issue a statement, you might also note that California Science Center is one of 20

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Smithsonian Affiliates in California out of 165 nationally. A list is attached. Please keep me informed of your next steps. We are concerned that this not be represented as a Smithsonian event or program or anything with which we have any involvement. We appreciate very much any steps that you take to clarify the situation. I will be in travel the next four days, but can be reached on my cell phone, 202-425-9010, if you wish to discuss further.”]

16. Beginning on October 5, 2009, representatives of the Los Angeles Country Natural History Museum and other individuals engaged in e-mail discussion regarding the Event. In these discussions, the participants expressed concerns regarding the subject matter of the Event. None of these e-mails reached Rudolph until after the Event was cancelled. Nor was Rudolph contacted by employees of the Natural History Museum until after the cancellation.

Ochsenbein Decl., Ex. 20 [Dep. Ex. 35 (Sion)]; *see id.*, Ex. 10 [Rudolph Dep. Tr.] at 275:8-275:25 [“Q. Do you recall speaking to Dr. Jane Pisano of the Natural History Museum on or about October 8 regarding the cancellation? A. I do. Did you initiate a telephone call or did she? A. She did. Q. Do you recall what she discussed with you during

Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether Defendants are state actors for purposes of liability pursuant to 42 U.S.C. § 1983. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). The alleged fact has no tendency in reason to prove or disprove whether Defendants are state actors. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed.

1 that telephone call? A. Generally, without
2 giving specific language, I do. Q. What was
3 discussed? A. My recollection is that she
4 called to discuss the event, expressed to me
5 that staff members of hers had talked to her
6 and she was calling me regarding that. I
7 believe that I told her that the event has
8 already been canceled, so I'm not sure there's
9 anything to talk about, and that was about the
10 extent of the discussion."]; *id.*, Ex. 8 [Long
11 Dep. Tr.] at 56:14-17 ["Q. Did you personally
12 contact anyone at the Science Center about
13 the showing of Darwin's Dilemma in October
14 2009? A. No, I didn't."].

15 17. The Foundation's Board of Trustees were
16 [sic] not consulted prior to Rudolph's
17 decision to cancel the Event and never voted
18 on whether to cancel the Event.

19 Ochsenein Decl., Ex. 10 [Rudolph Dep. Tr.]
20 at 95:9-96:8; *see also id.*, Ex. 4 [Strom Dep.
21 Tr.] at 192:17-24 ["Q. There's also been
22 testimony about a Board meeting that
23 occurred at the Foundation, I believe on
24 October 7; isn't that correct? A. Correct. Q.
25 And to your knowledge, that Board meeting
26 occurred after the AFA event was canceled;
27 isn't that right? A. Correct."].

28 18. Except for fees paid pursuant to
contractual relationships between the

Objection. Immaterial. The alleged fact has
no significance in determining the outcome
of this case with regard to whether Defend-
ants are state actors for purposes of liability
pursuant to 42 U.S.C. § 1983. Irrelevant.
(Cal.Ev.Code §§ 210, 350-351). The alleged
fact has no tendency in reason to prove or
disprove whether Defendants are state actors.
Subject to and without in any way waiving
the foregoing objections, and to the extent
that Responding Party understands this al-
leged fact: Undisputed.

Objection. Vague and ambiguous as to the
meaning of "fees" and "revenue." Subject to

1 Foundation and Science Center, the
2 Foundation receives no revenue from the
3 Science Center.

4 Pygin Decl., ¶ 5.

18 19. The Foundation – and not the Science
19 Center – is a named party on the Event
20 Services Agreement that pertains to the Event.
21 Only Foundation employees were involved in
22 the negotiations with AFA to host the Event.

23 Ochsenbein Decl., Ex. 17 [Dep. Ex. 16]: *id.*,
24 Ex. 5 [Sion Dep. Tr.] at 402:5-403:9.

and without in any way waiving the forego-
ing objections, and to the extent that Re-
sponding Party understands this alleged fact:

Disputed.

SUPPORTING EVIDENCE:

5 Becker Decl., Exh. No. 25, Pygin Dep. Tr.,
6 Dep. Exh. No. 219, (Foundation Report On
7 Audit Of Financial Statements For The Year
8 Ended June 30, 2010, p. 24, Note 13- Com-
9 mitments And Contingencies) [“Under Sales-
10 Financing Method lease accounting, the pre-
11 sent value of the lease payments \$27.6M,
12 was recognized *as revenue* during the year
13 ended June 30, 2009, the year the lease pay-
14 ments commenced.” (emphasis added.)]; *id.*,
15 (p. 4, Statement of Activities, Support and
16 Revenue Report), [showing revenue derived
17 from the leased IMAX Theater and Non-
18 Operating Revenue characterized as interest
19 income from the Phase II lease.]

20 Objection. Lacks foundation as to “the Event
21 Services Agreement that pertains to the
22 Event.” Subject to and without in any way
23 waiving the foregoing objection, and to the
24 extent that Responding Party understands
25 this alleged fact: Undisputed that only
26 Foundation employees were involved in the
27 negotiations with AFA to host the Event.
28 However, they held themselves out as Center
employees and were referred to in the
contract as “Center Event Manager,” not

TT/12/EB
25/27/11

1 Foundation Event Manager. Their e-mail
2 signatures also identified them solely as
3 representatives of the Center, not the
4 Foundation. *Disputed* that the Foundation –
5 and not the Science Center – is a named
6 party on the Event Services Agreement that
7 pertains to the Event. The Event Price
8 Estimate and the Event Policies and
9 Procedures refer only to the Center.

10 SUPPORTING EVIDENCE:

11 Becker Decl., Exh. No. 41, Sion Dep. Tr.,
12 Dep. Exh. No.16, (Event Price Estimate) [“If
13 you would like to proceed with booking your
14 event at the California Science Center, please
15 sign below and return .. By signing this
16 agreement you are agreeing to the terms and
17 conditions that are incorporated herein and
18 with the Event Policies & Procedures.”]; *id.*,
19 (Event Policies and Procedures) [“To assure
20 your event functions smoothly at the
21 California Science *Center*, please review the
22 following policies and procedures. Once a
23 client's Event Price Estimate is signed and
24 the Science *Center's* Events Department has
25 received a deposit, an Event Manager will
26 handle scheduling and be the liaison between
27 the client and the Science *Center*.”]; “The
28 California Science *Center* can not be held
responsible for equipment malfunction,
damage, or non-availability on the day of
your event.”; “All clients and outside

11/27/11

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

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1 Science *Center*... By signing the Event
2 Price Estimate you acknowledge that the
3 California Science *Center* is not responsible
4 for policing your fire code adherence and is
5 not responsible for the refunding of rental
6 fees due to the closure of an event by a Fire
7 Marshall.”; “The California Science *Center*
8 is not responsible for any damage or loss of
9 articles placed or left in the California
10 Science *Center* prior to, during or following
11 an event.”; “The Science *Center* will charge
12 a \$35.00 processing fee for any check
13 returned for insufficient funds. If a check is
14 returned, a cashier's check or credit card
15 payment will be required.”; “California
16 Science *Center* personnel are not responsible
17 for moving, setting up, or taking down any
18 equipment that does not belong to the
19 Science *Center* with the exception of
20 banners. All requests for movement of
21 Science *Center* owned furniture and
22 equipment must go through the California
23 Science *Center's Event Manager*. All non-
24 Science *Center* items must be removed
25 immediately following the event.”; “Set-
26 up/staging of events is only permitted to take
27 place within the Donald P. Loker Conference
28 *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*

1 *Event Manager.*”; “The client and its sub-
2 contractors (caterer, event co., decor co.,
3 etc.) are responsible for removal of all
4 personal and company property within that
5 time unless other arrangements are made in
6 advance with the California Science *Center’s*
7 *Event Manager.*”; “No candles or open
8 flames are permitted inside the Science
9 *Center* unless a permit from the Fire
10 Marshall is submitted to the Event Manager
11 2 weeks prior to the event. ... Absolutely no
12 pins, nails, staples or tapes of any kind are
13 permitted on any walls, ceilings or floors on
14 the Science *Center* property. No
15 pyrotechnics are permissible on Science
16 *Center* property. No helium balloons (air-
17 filled OK) are permissible inside the Science
18 *Center*. No objects can be hung from the
19 ceiling without express prior permission and
20 assistance from the Science *Center*
21 (additional fees may apply). Also, no glitter,
22 sequins, confetti, fake snow, etc. is allowed
23 on the Science *Center* property. Decorations
24 are not allowed in the exhibit halls. The
25 client is responsible for removing or causing
26 the removal of all decorations immediately
27 following the event. Nothing is allowed in
28 the Big Lab fountain. Only the Science
Center can hang banners. The Science
Center will hang (2) banners for free -
additional banners will be hung for \$50.00

per banner.”; “The California Science *Center* is a smoke free facility. No smoking is 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

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1 Science *Center* used to heat or cook food
2 must be approved in advance by the
3 California Science *Center's Event*
4 *Manager.*"; "Any outside caterer must attend
5 a final event walkthrough with the Science
6 *Center's Event Manager* and the client at
7 least one week before the event."; "The
8 California Science *Center's Event Manager*
9 must receive a copy of the permit at least one
10 day before your event."; "Once the Letter of
11 Agreement has been signed, the Science
12 *Center's Event Manager* will arrange an on-
13 site event walkthrough with the client and
14 any caterer to discuss plans, policies,
15 procedures and any equipment or materials
16 necessary for your event."; "There will be an
17 additional charge of \$50.00 per event
18 walkthrough over three. Please consult the
19 Science *Center's Event Manager* if more
20 than three event walkthroughs are
21 anticipated."; The Science *Center* does not
22 take responsibility for deliveries or storage of
23 materials and equipment. Any delivery to the
24 Science *Center* must be met by a
25 representative of the client and arranged in
26 advance with the Science *Center's Event*
27 *Manager.*"; "Any guest management
28 function at an event, e.g. nametags, entry
restrictions, early entry, registration, etc. is
solely the responsibility of the client and not
the responsibility of California Science

1 *Center staff.*”; “While the Event Manager
2 will inform the client when the event is
3 approaching the end of the contracted time, it
4 is the client's responsibility to make sure all
5 guests leave the California Science *Center*
6 by the end of the contracted event time.
7 Clients will be required to sign an overtime
8 contract if their guests are in the California
9 Science *Center* more than 15 minutes past
10 the end of the contracted event time.”;
11 “Under no circumstance is an outside
12 company permitted to provide a security
13 function on California Science *Center*
14 property.”; “The IMAX Theater is not
15 included in a Science *Center* buyout and will
16 still be open to the public during regular
17 IMAX hours (currently 9:00 A.M.-9:00
18 P.M.) unless contracted for separately.”;
19 “Electricity in the California Science *Center*
20 is limited to approximately (2) 20 amp
21 circuits per floor in the central atrium.”; “The
22 following spaces are available for rent in the
23 California Science *Center*: Edgerton Court,
24 Disney Court, the Donald P. Loker
25 Conference *Center*, the World of Life,
26 Creative World 2nd Floor, Creative World
27 3rd Floor, Sky Court Gallery, Weingart
28 Special Exhibits Gallery, Lorsch Family
Pavilion, Science Plaza, the Rose Garden
Cafe dining area, and the *IMAX Theater.*”;
“When renting the entire California Science

TT/12/58
25/27/11

Center (buyout), all areas above excluding the IMAX Theater are included in your rental agreement and are available for use. The IMAX Theater is not included in a Science *Center* buyout and will 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)].

20. None of the agreements between the Foundation and Science Center grant the Foundation the right to contract on the Science Center's behalf. Ochsenein Decl., Ex. 31 [Dep. Ex. 198]; *id.*, Ex. 31 [Dep. Ex. 194]; *see also id.*, Ex. 5 [Sion Dep. Tr.] at 398:16-21 [noting witness lacked "the authority to enter into contracts on behalf of the California Science Center"].

Undisputed that the agreements between the Foundation and the Science Center do not expressly state that they grant the Foundation the right to contract on the Science Center's behalf. *Disputed* that the Foundation was not authorized to enter into a contract with AFA on behalf of the Center. The Event Price Estimate and the Event Policies and Procedures, which formed the contract between the Foundation and AFA, refer only

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11/27/11

to the Center. Moreover, the individuals responsible for negotiating the contract, Sion and Matsunaga, held themselves out to be Center employees.

SUPPORTING EVIDENCE:

See Plaintiff's Supporting Evidence, Response to Undisputed Material Fact No. 19, *supra*, incorporated herein.

21. There are separate position descriptions for the President of the Foundation and President and CEO of the Science Center. The position description for the President and CEO of the Science Center indicates that the individual "may accept employment and remuneration" from the Foundation. The position description for the President of the Foundation makes no reference to the Science Center. The Foundation is under no legal obligation to hire the President of the Science Center.

Undisputed.

Ochsenbein Decl., Ex. 28 [Dep. Ex. 190]; *id.*, Ex. 29 [Dep. Ex. 191].

22. In its discovery responses, AFA has provided a list of facts allegedly connecting the Foundation and the Science Center. These include, *inter alia*, "work[ing] together jointly to secure necessary funding for building construction and exhibit fabrication," pooling resources for efficiency, coordination regarding exhibits and the revenue from

Objection. Immaterial. Whether AFA has provided a list of facts in its discovery responses has no significance in determining the outcome of this case with regard to whether Defendants are state actors for purposes of establishing liability under 42 U.S.C. § 1983. Irrelevant. (Cal.Ev.Code §§ 210, 350-351). The asserted "fact" is a

1 special exhibits, the Foundation's operation of
2 gift centers in the Science Center, and other
3 contractual terms. Moving party reserves all
4 of its objections on this evidence, including
5 objections on the grounds that it is hearsay,
6 lacks foundation, is not properly
7 authenticated, is improper opinion, and is
8 irrelevant.

9 Ochsenein Decl., Ex. 2.; *see also id.*, Ex. 3
10 [responding to interrogatory requesting "all
11 facts supporting or otherwise related to the
12 contention made in your Third Amended
13 Complaint that 'Defendant Foundation's
14 actions are attributable to the State of
15 California'"].

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preemptive reference to Plaintiff's
anticipated evidence in opposition to a fact
that has not been asserted. 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 provided, *inter
alia*, the quoted discovery response.

Disputed that the list of facts "allegedly"
connects the Foundation to the Center. No
such qualification has been asserted by AFA.
AFA has affirmatively asserted this fact as
one among many facts establishing the close
nexus between the Foundation and the
Science Center. Undisputed that the Moving
Party is reserving its objections.

SUPPORTING EVIDENCE:

Becker Decl., Exh. 51 (Plaintiff's
Supplemental Responses to Requests for
Admission and supplemental Response to
Form Interrogatory No. 17.1).

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11/27/11

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

<u>ADDITIONAL MATERIAL DISPUTED FACTS</u>	<u>SUPPORTING EVIDENCE</u>
PLAINTIFF'S ISSUE NO. 1: THE FOUNDATION DEFENDANTS ARE NOT ENTITLED TO SUMMARY ADJUDICATION BECAUSE THEY ARE STATE ACTORS.	
1. As president and CEO of the California Science Center, a California state agency (the "Center"), Jeffrey Rudolph reigns over the "the West Coast's largest interactive science center and museum" as a public official serving the public welfare. (UMF ¶).	Becker Decl., Exh. No. 33, Rudolph Dep. Tr., Dep. Exh. No. 200 (Rudolph Decl.)
2. Rudolph directs the California Science Center Foundation, a "public benefit" corporation "created to function as an auxiliary" to the Center with its "primary purpose" of promoting science education through the Center's exhibits, programs and activities	Becker Decl., Exh. No. 29, Dep. Tr., Dep. Exh. No. 193 (Bylaws) ["The CALIFORNIA SCIENCE CENTER FOUNDATION is a nonprofit corporation, created to function as an auxiliary to the CALIFORNIA SCIENCE CENTER. Its primary purpose is the promotion of education through the development and Expansion of the Science Center's exhibit and educational programs and scientific activities."]
3. The Center and the Foundation form one of the oldest and most successful public-private partnerships in California.	Becker Decl., Exh. No. 33, Dep. Exh. No. 200 (Rudolph Decl.) ¶ 6, 2:9-10.
4. Rudolph simultaneously holds the positions of President of the Foundation and President and CEO of the Center with similar re-	Becker Decl., Exh. No. 28, Rudolph Dep. Tr., Dep. Exh. No. 192 (CSC web site bio); <i>id.</i> , Exh. No. 31, Rudolph Dep. Exh. No.

11/22/58

1 sponsibilities and duties.

195, (web site "Governance" information);
id., Exh. No. 26, Rudolph Dep. Tr., Dep.
Exh. No. 190 CSCF Position Description,
"Summary" heading); *id.*, Exh. No. 27,
Rudolph Dep. Tr., Dep. Exh. No. 191 (CSC
Duty Statement).

6 5. The Center and Foundation share a "com-
7 mon mission" to aspire to stimulate curiosity
8 and inspire science learning in everyone by
9 creating fun, memorable experiences. Section
10 C of the recitals, states: "Center and Founda-
11 tion share one common mission," and in Sec-
12 tion F refers to the "Center and Foundation's
13 mission" in the singular, again denoting their
14 unified mission. Under the JOA, the two enti-
15 ties exchange "mutual covenants" to provide
16 supplies, manpower, maintenance, operations,
17 etc., all toward advancing their common ob-
18 jective. Contractually the Center retained con-
19 siderable authority to approve or direct activi-
20 ties that involved the facilities' operations and
21 the Foundation's receiving revenue. § 4,
22 subs. (d)-(f), states:

Becker Decl., Exh. No. 30, Rudolph Dep.
Tr., Dep. Exh. No. 200 (JOA) ["We aspire to
stimulate curiosity and inspire science learn-
ing in everyone by creating fun, memorable
experiences, because we value science as an
indispensable tool for understanding our
world, accessibility and inclusiveness, and
enriching people's lives[.]", *id.*, Exh. No. 33,
Rudolph Dep. Exh. No. 200 (Rudolph Decl.,
¶ 6, 2:9-10).

21 "(d) *Foundation* may be allowed to charge
22 for special exhibits if mutually agreed to
23 by a resolution of Center's Board of Direc-
24 tors and the Foundation's Board of Trus-
25 tees . . . any *revenue received* by the Foun-
26 dation pursuant to these operations at the
27 Science Center as authorized herein shall
be applied to improvement of the exhibit
and educational programs of the Founda-
tion in a manner and *for purposes satisfac-*
tory to Center"; "(e) *Foundation shall raise*
and provide funds, as agreed upon by *both*

parties to bring and promote mutually agreeable exhibits to Center. No exhibits shall be installed on the Premises by Foundation unless the plans, . . . the subject matter, the financial arrangements, such as if any fees will be charged for the exhibit's use or viewing, or, any other conditions affecting the transaction have been approved by Center's Executive Director or his or her designee."; "(f) Center shall provide stage materials, supplies and equipment normally required by the Foundation in order to install, remove, maintain and dismantle exhibits for display. Center agrees to maintain such exhibits to the extent funding is available and approved as necessary for this purpose. If exhibits require more staff, materials, supplies and equipment than normally associated with such exhibits, subject to available funding and approval as necessary, the parties shall mutually agree, in writing, which entity will provide funds for the additional costs."

6.

7. The Foundation funds design and development of exhibitions and education programs at the Center.

Becker Decl., Exh. No. 33, Dep. Exh. No. 200 (Rudolph Decl.) ¶ 6, 2:10-11.

8. The Foundation manages and arranges for the use of areas within the Center for private events.

Becker Decl., Exh. No. 33, Dep. Exh. No. 200 (Rudolph Decl.) ¶ 6, 2:11-13.

9. The Center and Foundation have a number of agreements that govern the relationship, including a lease relating to the IMAX Theater and a JOA. The IMAX Lease Agreement recites *no exchange of money as consideration*. Rather, that Agreement states the Center and Foundation exchanged promises concerning maintenance, operations, etc.:

Becker Decl., Exh. No. 25, Pygin Dep. Tr., 146:8-10 ["There are several contracts between the Foundation and the Science Center that define the relationship."]; *id.*, Exh. No. 30, Rudolph Dep. Tr., Dep. Exh. 194 (JOA); *id.*, Exh. No. 32, Rudolph Dep. Tr., Dep. Exh. No.198 (Lease Agreement).

"In consideration for the Foundation's

1 agreement to amend and restate the lease
2 dated December 8, 1981, and the sub-
3 lease dated August 8, 1983, and other mu-
4 tual covenants herein contained, Museum
hereby leases to Foundation the New
IMAX Theater. . . .”

5 Similarly, under the JOA, the two entities ex-
6 change “mutual covenants” to provide sup-
7 plies, manpower, maintenance, operations,
8 etc., all toward advancing their common ob-
9 jective. Contractually the Center retained con-
10 siderable authority to approve or direct activi-
11 ties that involved operations in the facilities
12 and receiving revenue into the Foundation
coffers

13 10. The Center owns the IMAX Theater, and
14 the Foundation leases it, and manages and
15 arranges for the use of Center areas, including
for private events.

Becker Decl., Exh. No. 32, Rudolph Dep.
Tr., Dep. Exh. No. 198 (Lease Agreement).

16 11. Under the Lease Agreement, the Founda-
17 tion must allow all members of the public to
18 be admitted to the IMAX Theater upon terms
19 established by the Foundation, but the Center
20 (known in the lease as the “Museum”) must
21 approve those terms.

Becker Decl., Exh. No. 32, Rudolph Dep.
Tr., Dep. Exh. No. 198 (Lease Agreement, ¶
6).

22 12. As Foundation president, Rudolph is re-
23 quired to provide leadership and strategic di-
24 rection for the planning, organizing, develop-
ing, operating and expansion of, *inter alia*, the
25 IMAX Theater.

Becker Decl., Exh. No. 26, Rudolph Dep.
Tr., Dep. Exh. No. 190 (Foundation Position
Description).

26 13. As Center president, he is required to
27 provide leadership and strategic direction for

Becker Decl., Exh. No. 27, Rudolph Dep.
Tr., Dep. Exh. No. 191 (Center Position

<p>1 the planning, design and implementation of 2 the Center's Master Plan.</p>	<p>Description).</p>
<p>3 14. He is also responsible for Center policy 4 and operations.</p>	<p>Becker Decl., Exh. No. 27, Rudolph Dep. Tr., Dep. Exh. No. 191 (Center Position Description).</p>
<p>5 15. He is the "public face" of both entities 6 (e.g., media relations, external affairs, gov- 7 ernmental relations, public speaker).</p>	<p>Becker Decl., Exh. No. 27, Rudolph Dep. Tr., Dep. Exh. No. 191 (Center Position Description); <i>id.</i>, Exh. No. 26, Rudolph Dep. Tr., Dep. Exh. No. 190 (Foundation Position Description).</p>
<p>8 9 10 16. Plaintiff American Freedom Alliance 11 ("AFA") entered into a contract to rent the 12 IMAX Theater for an October 25, 2009, fund- 13 raiser featuring the screening of two films and 14 a panel discussion.</p>	<p>Becker Decl., Exh. No. 41, Sion Dep. Tr., Dep. Exh. No. 16 (Event Price Estimate ("EPE") and Event Policies and Procedures ("EPP")); <i>id.</i>, Exh. No. 50, Sion Dep. Tr., Dep. Exh. No. 45 (10/6/09 e-mail from C. Sion to A. Davis – cancellation no- tice)[“According to the Event Policies and Procedures that you signed, you agreed to submit. . . .”]; <i>id.</i>, Exh. No. 40, Dep. Exh. No. 15 (e-mail from C. Sion to C. Pygin) [“We are having issues w/ a client <i>who</i> <i>booked the IMAX Theater. . . .</i> Jeff would like for you to help us review what our cur- rent policy language is on this subject as his inclination is <i>to cancel their contract. . . .</i> Is <i>our language</i> explicit enough for us to w/stand a lawsuit if it comes?... Here is the email chain below as well as the press re- lease, <i>our contract</i> and policies attached.” (emphasis added)]; <i>id.</i>, Dep. Exh. No. 11 [“They did receive an agreement w/ the fol-</p>

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lowing language- hope this covers us well!"]; *id.*, (10/6/09 e-mail from C. Sion to J. Rudolph) ["Hi Jeff, Below is the language that we call out in our agreement regarding printed materials for third party events. The client received a copy of these policies and procedures when they received their event price estimate. *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.*"; emphasis added.]; *id.*, (10/6/09 e-mail from C. Pygin to C. Sion) "Please see me so that we can discuss the approach *given the language in the contract.*" (emphasis added)].

17. The contract directly benefits the Center, and the Center is identified as its beneficiary. The contract also states that the Event Services Manager is a "Center," not a "Foundation," official. And the Event Services Department personnel, Chris Sion and Shell Amega, whether or not they are employees of the Foundation, serve in positions that are established for the benefit of the Center and held themselves out as such. Additionally, the Center web site promotes the IMAX Theater as a Center, not a Foundation, attraction.

Becker Decl., Exh. No. 43, Sion Dep. Tr., Dep. Exh. No. 33 (e-mail signature blocks for L. Matsunaga, pp. 2 and 6) ["Lori Matsunaga, Event Services California Science Center"] and C. Sion ["Vice President, Food & Event Services, California Science Center"]; *id.*, 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."]; *id.*, Event Policies and Procedures ["To assure

05/27/11

your event functions smoothly at the California Science *Center*, please review the following policies and procedures. 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*.”; “The California Science *Center* can not be held responsible for equipment malfunction, damage, 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

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the California Science *Center* and the California Science *Center's* property. Client assumes full responsibility for theft, loss or damage to any property and equipment brought to the California Science *Center* by you, your subcontractors, vendors, agents, or invitees. Contracts made directly with your vendors are solely between you and your vendor. Clients are to ensure that all vendors review and agree to comply with all requirements established by the California 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 fur-

11/12/98

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niture and equipment must go through the California Science *Center's Event Manager*. All non-Science *Center* items must be removed immediately following the event.”; “Set-up/staging of events is only permitted to take place within the Donald P. Loker Conference *Center* and Wallis Annenberg Building or in the service hallways during Science *Center* operational hours.”; “Set-up/staging times are determined by the Science *Center's Event Manager*.”; “The client and its subcontractors (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

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allowed on the Science *Center* property. Decorations are not allowed in the exhibit halls. The client is responsible for removing or causing the removal of all decorations immediately following the event. Nothing is allowed in the Big Lab fountain. Only the Science *Center* can hang banners. The Science *Center* will hang (2) banners for free - additional banners will be hung for \$50.00 per banner.”; “The California Science *Center* is a smoke free facility. No smoking is 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

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Center for a buyout is 4,000.”; “The California Science *Center* encourages the use of our in-house caterer, Kensington Caterers, which can be reached by calling (323) 935-4300.”; “The Science *Center’s Event Manager* will determine upon request how many jack-stands will be needed *outside* exhibit galleries.”; “Equipment brought to the Science *Center* used to heat or cook food must be approved in advance by the California Science *Center’s Event Manager*.”; “Any *outside* caterer must attend a final event walkthrough with the Science *Center’s Event Manager* and the client at least one week before the event.”; “The California Science *Center’s Event Manager* must receive a copy of the permit at least one day before your event.”; “Once the Letter of Agreement has been signed, the Science *Center’s Event Manager* will arrange an on-site event walkthrough with the client and any caterer to discuss plans, policies, procedures and any equipment or materials necessary for your event.”; “There will be an additional charge of \$50.00 per event walkthrough over three. Please consult the Science *Center’s Event Manager* if more than three event walkthroughs are anticipated.”; The Science *Center* does not take responsibility for deliveries or storage of materials and equipment. Any delivery to the Sci-

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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 responsibility of the client and not the responsibility of California Science *Center staff*.”; “While the Event Manager will inform the client when the event is approaching the end of the contracted time, it is the client's 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 Confer-

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ence *Center*, the World of Life, Creative World 2nd Floor, Creative World 3rd Floor, Sky Court Gallery, Weingart Special Exhibits Gallery, Lorsch Family Pavilion, Science Plaza, the Rose Garden Cafe dining area, and the *IMAX Theater*.”; “When renting the entire California Science *Center* (buyout), all areas above excluding the IMAX Theater are included in your rental agreement and are available for use. The IMAX Theater is not included in a Science *Center* buyout and will 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.*, Exh. No. 43, 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.”]); *id.*, Dep. Exh. No. 9 (IMAX Theater web page on the California Science Center web site) [“*The Science Center is always bringing in new and exciting IMAX films,*

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18. Under various provisions of the Lease Agreement and JOA, the Center makes the Foundation use of the IMAX Theater conditional upon certain conditions and pre-approvals.

but you may click here to see which films are currently showing.” (emphasis added.)]

Becker Decl., Exh. No. 30, Rudolph Dep. Tr., Dep. Exh. No. 194 (JOA) and Exh. No. 32, Rudolph Dep. Tr., Dep. Exh. No.198 (Lease Agreement) [The Center grants the Foundation a non-exclusive right” to utilize the Multi-purpose and Conference room facilities of the IMAX Theater. The Center authorizes the Foundation’s use of the IMAX Theater to be coordinated with any other use required by Center of the ticket sales areas. The Center requires the Foundation to obtain Center’s written permission prior to making structural changes and improvements to the IMAX Theater. The Center requires the Foundation to obtain Center’s written permission prior to removing any improvements from the leased premises or waste, destroy or modify those improvements. The Center requires the Foundation to obtain The Center’s approval of terms established by the Foundation for public admission to the IMAX Theater. The Foundation is “created to function as an auxiliary” to the Center. “Its primary purpose is the promotion of education through the development and expansion of the Science Center’s exhibit and educational programs and scientific activities.”

The Foundation’s “principal office is fixed and located at The Center.” The Science

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Center consists of "Phase I Facilities, Air and Space Gallery, Parking Structure, Wallis Annenberg Building for Science Learning and Innovation, Phase II Facilities, the IMAX Theater and any other future Science Center facilities." The Center and Foundation "share one common mission: "We aspire to stimulate curiosity and inspire science learning in everyone by creating fun, memorable experiences, because we value science as an indispensable tool for understanding our world, accessibility and inclusiveness, and enriching peoples" lives." The Center and Foundation "work together jointly to secure necessary funding for building construction and exhibit fabrication" for various projects. Under its Phase II leases, the Foundation operates Center facilities, the ownership of which will transfer to the Center upon expiration of the Phase II, Leases. The Center may enter into other agreements with the Foundation for services regarding the Science Center. Both the Center and the Foundation "identify activities of common interest whereby efficiency, through consolidation or pooling of resources, can be achieved." The Center provides the necessary staff to manage and development and selection of core and special exhibits mutually agreeable to the Center and Foundation that further the mission of the Center. The exhibits may be

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displayed in areas designated by the Center. The Foundation is authorized to charge for special exhibits if mutually agreed to by the boards of the Center and Foundation. In general, any revenue received by the Foundation from special exhibits is applied to the improvement of the exhibit and educational programs of the Foundation "in a manner and for purposes satisfactory to Center." Revenue received by the Foundation pursuant to operations of the Science Center is required to be applied to improvement of the exhibit and educational programs of the Foundation in a manner and for purposes satisfactory to Center. The Foundation is required to raise and provide funds as agreed upon by both the Center and the Foundation "to bring and promote mutually agreeable exhibits to the Center." The Center is required to provide staff, materials, supplies and equipment normally required by the Foundation in order to install, remove, maintain and dismantle exhibits for display. The Foundation is required to provide and implement staff-intensive educational programs mutually agreeable to the Center and the Foundation. The Foundation may charge fees for educational programs subject to the Center's executive director's approval. In general, any revenue received by the Foundation from educational programs is applied to the

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improvement of the exhibit and educational programs of the Foundation "in a manner and for purposes satisfactory to Center." The Foundation may operate, manage and maintain gift centers in the Science Center. The Center has an interest in its relationship with the Foundation to provide for the sale of gifts, books, souvenirs and other items "compatible with reinforcing the mission of [the] Center and Foundation." The Foundation must consult with the Center staff on the acquisition of new merchandise. Proceeds from the gift centers are used for direct and overhead costs related to operations, maintenance, improvement and development of the gift centers and for the support of educational programs "in a manner and for purposes satisfactory to Center." Proceeds from The Center's Explorastor gift shop support the Center. The Center and Foundation jointly equip, operate and market conference facilities and premises for the public or private use of individuals and groups to hold small to large-scale events, including, but not limited to, educational programs, small conventions and conferences and dinners. An annual budget for expenses related to events require the written mutual agreement of the Foundation and the Center. The Foundation may use the Center's employees to efficiently operate the conference facilities and the premises.

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Food service providers retained by the Foundation are subject to the prior approval of the Center's executive director. Contracts entered into between the Foundation and a food service provider is subject to the prior written approval of the Center's executive director. The Foundation or its food service providers is required to recruit, train, supervise, direct, discipline and discharge personnel working in Center food service facilities. The Foundation is required to screen food service employee applicants to reduce the possibility of hiring persons who would "pose a risk to Center of the Science Center." Proceeds from the food services operation are used repayment of the investment, operations, overhead, etc., of the food services operation. After the investment has been repaid, remaining funds are to be used by the Foundation "in a manner and for purposes satisfactory to Center." The Center and the Foundation are jointly responsible for policies relating to the Science Center logo. Changes to building structures require the consent of the Center. The Center requires the Foundation to furnish it with a certificate of insurance indicating that the Foundation carries general liability insurance with limits of bodily injury and property damage liability. In addition, the certificate is required to include liability for injury resulting from the sale of products

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furnished by the Foundation or by any person claiming under or through it. The Center and Foundation conduct certain activities of common interest, including exhibits, educational programs, lectures, guest services, administration, operations, building construction, and similar activities.”]

ISSUE NO. TWO: THE FOUNDATION DEFENDANTS ARE ENTITLED TO SUMMARY ADJUDICATION BECAUSE THERE IS NO EVIDENCE OF INTENTIONAL DISCRIMINATION.

<u>MOVING PARTY’S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE:</u>	<u>OPPOSING PARTY’S RESPONSE AND SUPPORTING EVIDENCE:</u>
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23. Rudolph, in response to a question asking for “the reason that factored into your decision to cancel the contract for the AFA event,” testified that “the press statements put out were in violation of our policies and procedures that were potentially harmful to the reputation of the Science Center and to our relationship with the Smithsonian. I believe that violated our agreement, and ... I felt that the best course of action was to cancel the event.” The subject matter of the Event was not a consideration in his decision to cancel.

Objection. Irrelevant. (Cal.Ev.Code §§ 210, 350-351) as to whether Rudolph gave such testimony. The alleged fact constitutes the *evidence* supporting the subordinate *fact* to which Rudolph testified (i.e., that he believed the press releases violated the Event Policies and Procedures, etc.), not the fact itself. On the same basis, this alleged fact is vague and ambiguous. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed that Rudolph provided the quoted testimony. Undisputed that Rudolph believed that the press releases were potentially harmful to the reputation of the Science *Center* and to its

Ochsenbein Decl., Ex. 10 [Rudolph Dep. Tr.] at 281:6-23.

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relationship with the Smithsonian. Undisputed that Rudolph cited to the contract as the basis for cancelling AFA's event, thereby recognizing the existence and formation of a contract. *Disputed* as to the subordinate fact that Rudolph cancelled the event due to a violation of the agreement. Rudolph consulted with staff members to locate language in the contract with AFA that would serve as a pretext for cancelling the event. The true reason for the decision to cancel the event was that Rudolph held the view and/or adopted the view of the Smithsonian Institution that the press releases implied that the Science Center officially supported a "creationist" film and sought to protect the Center's reputation against claims that it supported "creationism." Rudolph also believed that the press releases were potentially harmful to the Science Center's relationship with the Smithsonian, because the Smithsonian was "*alarmed*" at the news release from a creationist organization" and the "implication that the Smithsonian is involved" with allowing a "creationist" film to be shown at a Smithsonian affiliated museum. *Disputed* that the "subject matter" of the event was not a consideration in his decision to cancel. Rudolph cancelled the event on the basis of its content after being informed that the Smithsonian Institution was alarmed that a crea-

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05/27/11

tionist film was to be presented at one of its affiliate museums. Cancellation based on a contract term was pretextual. (See Plaintiff's Statement of Additional Undisputed Facts).
SUPPORTING EVIDENCE:
Becker Decl., Exh. 37, Sion Dep. Tr., Dep. Exh. No. 11, (10/5/09 e-mail from C. Sion to J. Rudolph) ["A science center should not even be asked to partner w/ any group associated w/ *debating Darwinism – it's not our place....*"]; *id.*, Exh. No. 38, Sion Dep. Tr., Dep. Exh. No. 13, (10/5/09 e-mail from S. Amega to J. Rudolph) ["*Creationist* organization implies that the Calif. Science Center is sponsoring *Darwin film*"; "The Smithsonian Institute called and was *alarmed* at the news release from a creationist organization, the Discovery Institute, below [sic] because it *implied that the Science Center officially supports the creationist film* that is set to screen on Oct. 25."]; *id.*, Dep. Exh. No. 40, Dep. Exh. No. 15, (10/5/09 e-mail from C. Sion to C. Pygin) ["*[T]he main problem* is that it is an *anti-Darwin/creationist group.*" (emphasis added.); *id.*, Exh. No. 46, Sion Dep. Tr., Dep. Exh. No. 36 (10/1/09 e-mail from C. Sion to J. Rudolph) ["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 w/ a*

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Science Center.” (emphasis added.); *See*, generally, Woodward Decl. (opinion that contract basis for cancellation was pretextual); *id.*, ¶¶ 92-95, Part X (“Rudolph’s Public Explanation For The Cancellation”) [“Rudolph stated in deposition testimony that he cancelled AFA’s event because the Discovery Institute’s issuance of press releases violated “our policies and procedures that were potentially harmful to the reputation of the Science Center and to our relationship with the Smithsonian.” His concern was stated to be one of misappropriation of the CSC’s name. But the misappropriation of intellectual property, even if it were the case in this instance, does not automatically lend itself to harm or even *potential* harm (i.e., speculative harm) in the absence of some defining characteristic of the disseminated information and an explanation for the type of harm that is to be anticipated. For example, if a newspaper incorrectly reports that an automobile manufacturer is recalling its vehicles due to a malfunctioning component, such a report has the potential, if untrue, to result in serious economic consequences to the manufacturer as public resistance to buying its vehicles arises as a result of the erroneous report. Rudolph expresses the concern that a statement indicating that the screening of a particular film implied sponsorship, ergo, poten-

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tial harm to the CSC does not internally establish a logical conclusion. Consider the following syllogism: Premise A: A press release states "Smithsonian Institution Affiliated Science Center Will Premiere Intelligent Design Film." Premise B: Smithsonian Institution affiliated Science Center (true) will *not* premiere intelligent design film. Conclusion: Premise A is untrue because the Smithsonian Institution affiliated Science Center will not premiere intelligent design film. Nothing in this logical formula addresses the harm factor. Now consider the following alternative syllogism: Premise A: A press release states "Smithsonian Institution Affiliated Science Center Will Premiere Intelligent Design Film." Premise B: Smithsonian Institution affiliated Science Center rejects intelligent design as scientifically valid, and stakes its reputation on this viewpoint. Conclusion: The Science Center will likely feel that its reputation has been harmed by having itself associated with a viewpoint it rejects. Only under such a logical argument would it be possible to lose face with the public, if the perception of a harmful association with a particular viewpoint is taken into consideration. Rudolph's other point is that the violation of the CSC's policies and procedures would be potentially harmful to its relationship with the SI. The

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evidence already examined convinces me that SI's anti-ID official policy would indeed prove harmful to CSC should CSC allow itself to be associated with ID, and such harm arises purely from a hostility to the ID viewpoint, not from some objective standard or criteria. If the SI's policy were to bar African-Americans from its facilities, or gays, or Christians, or Muslims, it would certainly harm the CSC's relationship with the SI if it were to allow these classifications to have access at its facilities because the association affects the SI's reputation. Nevertheless, using this extreme but historically plausible analogy, the "harm our relationship" argument would never justify the discriminatory action taken."}]

24. In late September 2009, Chris Sion at the Foundation was contacted by AFA regarding scheduling a private fundraising event at the California Science Center. Over the next few days, the Foundation and AFA arranged to book a private event at the IMAX theater on October 25, 2009.

Ochsenbein Dec I., Ex. 5 [Sion Dep. Tr.] at 75:11-78:9, 96:8-98:20; *id.*, Ex. 6 [Davis Dep. Tr.] at 83:25-84:2.

Undisputed.

25. During discussions about scheduling the Event, the Foundation Defendants were aware

Objection. Vague and ambiguous as to the meaning of "subject matter" and "nature."

05/27/11

1 that AFA planned to show the movie "Dar-
2 win's Dilemma" and that the Event involved a
3 discussion of Darwinism. AFA witnesses tes-
4 tified that the Foundation was aware of the
5 subject matter of the Event. Joe Peterson testi-
6 fied that the Foundation was aware of the na-
7 ture of the Event from the first meeting.

8 Ochsenein Decl., Ex. 5 [Sion Dep. Tr.] at
9 144:7-145:24, 403:19-406:4; *id.*, Ex. 6 [Davis
10 Dep. Tr.] at 152:1-153:2, 154:10--15; *id.*, Ex.
11 14 [Peterson Dep. Tr.] at 76:16-77:10, 157:1-
12 4.

Subject to and without in any way waiving
the foregoing objections, and to the extent
that Responding Party understands this
alleged fact: Undisputed that during
discussions about scheduling the Event, the
Foundation Defendants were aware that AFA
planned to show the movie "Darwin's
Dilemma" and that the Event involved a
discussion of Darwinism. **Disputed** that AFA
witnesses testified that the Foundation was
aware of the "subject matter" of the Event.
Sion testified that she first became aware of
the title, not its "subject matter," of the film
"Darwin's Dilemma" during discussions
about scheduling the Event. Davis testified
that Lori Matsunaga was aware of the title,
not the "subject matter." Davis also testified
that he expected Matsunaga and Sion should
knew "what the films were about" because it
was "their responsibility to find out what was
going to be shown on their screen," but did
not testify of having any personal knowledge
as to whether they knew what the "subject
matter" of the films were. **Disputed** that Joe
Peterson testified that the Foundation was
aware of the "nature" of the Event as
involving a discussion of Darwinism from
the first meeting. Peterson stated that he told
Sion that AFA was a "conservative
organization," but he did not specify that
Sion knew that the event involved a

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	discussion of Darwinism. <u>SUPPORTING EVIDENCE:</u> See Moving Parties' supporting evidence, ¶ 25.
26. Because it was a private event, Foundation witnesses testified that they had no concerns about the content or nature of the Event and continued to negotiate with AFA. Ochsenein Decl. Ex. 10 [Rudolph Dep. Tr.] at 324:16-23; <i>id.</i> , Ex. 5 [Sion Dep. Tr.] at 406:1-9; <i>id.</i> , Ex. 24 [Dep. Ex. 156].	Objection. Irrelevant. (Cal.Ev.Code §§ 210, 350-351) as to whether Foundation witnesses gave such testimony. The alleged fact constitutes the <i>evidence</i> supporting the subordinate <i>fact</i> to which the Foundation witnesses testified (i.e., that they had no concerns, etc.), not the fact itself. On the same basis, this alleged fact is vague and ambiguous. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Disputed . Neither Rudolph nor Sion testified that that they had no concerns about the content or nature of the Event. Rudolph testified that " generally , a private event doesn't bother us ... because it is a private event," but qualified his statement in the context of this event and limited his response to the question's time frame. Sion also qualified her statement as to the "content" of the Event, without commenting on the "nature" of the event. Moreover, Sion repeatedly conveyed her concern about the content and nature of the event. She 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 Sci-

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ence 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. On the basis of the information given to him, Rudolph could not have overlooked the nature of the event or its content in making an executive decision to cancel it.

SUPPORTING EVIDENCE:

Becker Decl., Exh. No. 8, Rudolph Dep. Tr., 324:16-23 ["Q. Did you have any concerns at that time about the content or nature of the event? A. Not *specifically*, as it -- a private event really -- *I shouldn't say without any limitation*, but by stating that, just a use of our facilities. *There may -- you know, I guess it could be something objectionable*, but *generally*, no."; emphasis added.]; *id.*, Exh. No. 9, Sion Dep. Tr., 406:1-9: ["Q. Did the content of the program matter to you as you were continuing to negotiate with AFA? Becker: Vague and ambiguous. The Witness: No, it did not. By Zelenay: Q. Why was that? Becker: Vague and ambiguous. The Witness: We *generally* don't concern ourselves with

11/22/08
11/27/11

the content of third-party events.”; emphasis added.]; *id.*, 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.”]; *id.*, 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’ *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.*”]; *id.*, Exh. No. 42, Sion Dep. Tr., Dep. Exh. No. 32 (10/5/09 e-mail from C. Sion to S. Amega, et al., p. 3) [“Thanks so much for bringing this to our attention - *it's disturbing.*” (emphasis added.); *id.* [“*A science center should not even be asked to partner wi any group associated wi debating Darwinism - it's not our place.*” (emphasis added.); *id.*, [“[T]his is so *frustrating!*” (emphasis added.); *id.*, p.2, [“I am so *bugged!!!*”; emphasis added.]; *id.*, Exh.

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No. 39, Sion Dep. Tr., Dep. Exh. No. 13 (10/5/09 e-mail from C. Sion to R. Martin, p. 2) ["Get this ... are they *crazy???*"; emphasis added.]; *id.*, Exh. No. 40, Dep. Exh. No. 15 (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 we were a sponsor- *the main problem is that it is an anti-Darwin/ creationist group.*"; emphasis added.]; *id.*, Exh. No. 49, Sion Dep. Tr., Decl. Exh. No. 44 [*Wow!!!!* This is great news. – I had no idea they had agreed to cancel the film!"]; emphasis added.]

27. On October 5, 2009, the same day that it received an executed Event Price Estimate from AFA, the Foundation became aware of press releases that were issued relating to the Event.

Ochsenbein Decl., Ex. 15 [Dep. Ex. 11]; *id.*, Ex. 11 [Ameqa Dep. Tr.] at 49:10-53:23; *id.*, Ex. 10 [Rudolph Dep. Tr.] at. 183:2-184:1.

Undisputed.

28. The Foundation Defendants believed that these press releases improperly implied that the California Science Center and the Smithsonian Institution were sponsoring the Event.

Ochsenbein Decl., Ex. 10 [Rudolph Dep. Tr.] at 288:16-289-10; *id.*, Ex. 26 [Dep. Ex. 165].

Objection. Vague and ambiguous as to the meaning of "Foundation Defendants." Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed that Rudolph believed that the press releases improperly implied that the California Science Center

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	<p>and the Smithsonian Institution were sponsoring the Event. Disputed that Defendant Foundation can hold a belief. The Foundation is a business entity and cannot formulate a “belief.” <i>See</i> Defendants’ Undisputed Material Fact ¶ 2.</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>Defendants’ Undisputed Material Fact ¶ 2: [“The Foundation is a non-profit, section 501(c)(3) organization that raises funds to support exhibits and educational programs featured at the California Science Center (the “Science Center”), the West Coast’s largest interactive center and museum.”].</p>
<p>29. Because none of the press releases were [sic] ever submitted to the Foundation’s Event Services Office, Foundation Defendants believed that the issuance of these press releases violated the Event Services’ Policies and Procedures. On this basis, Rudolph made the decision to cancel the Event.</p> <p>Ochsenbein Decl., Ex. 10 [Rudolph Dep. Tr.] at 281:6-23; <i>id.</i>, Ex. 5 [Sion Dep. Tr.] at 254:2-255:3; <i>id.</i>, Ex. 12 [Pygin Dep. Tr.] at 75:21 77:7, 100:24-103:1]; <i>id.</i>, Ex. 9 [Bylsma Dep. Tr.] at 232:16-21; <i>id.</i>, Ex. 6 [Davis Dep. Tr.] at 191:1-11.</p>	<p>Objection. Vague and ambiguous as to the meaning of “Foundation Defendants.” Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Disputed that Defendant Foundation can hold a belief. The Foundation is a business entity and cannot formulate a “belief.” <i>See</i> Defendants’ Undisputed Material Fact ¶ 2. Undisputed that Rudolph believed that the press releases violated the Event Services’ Policies and Procedures. Disputed that Rudolph made the executive decision to cancel AFA’s event on that basis. Rudolph consulted with staff members to locate language in the contract with AFA that would serve as a pretext for</p>

1 cancelling the event. The true reason for the
2 decision to cancel the event was that
3 Rudolph believed or adopted the belief that
4 the press releases implied that the Science
5 Center officially supported a “creationist”
6 film and sought to protect the Center’s
7 reputation against claims that it supported
8 “creationism.” Rudolph also believed that the
9 press releases were potentially harmful to the
10 Science Center’s relationship with the
11 Smithsonian, because the Smithsonian was
12 “alarmed at the news release from a
13 creationist organization” and the
14 “implication that the Smithsonian is
15 involved” with allowing a “creationist” film
16 to be shown at a Smithsonian affiliated
17 museum. *Disputed*. The Foundation is a
18 business entity and cannot formulate a
19 “belief.” See Defendants’ Undisputed
20 Material Fact ¶ 2.

21 SUPPORTING EVIDENCE:

22 Becker Decl., Exh. No. 37, Sion Dep. Tr.,
23 Dep. Exh. No. 11 (10/5/09 e-mail from Sion
24 to Rudolph) [“A science center should not
25 even be asked to partner w/ any group
26 associated w/ *debating Darwinism – it’s not*
27 *our place....*”]; *id.*, Dep. Exh. No. 39, Sion
28 Dep. Tr., Dep. Exh. No. 13 (10/5/09 e-mail
from S. Amega to J. Rudolph) [“*Creationist*
organization implies that the Calif. Science
Center is sponsoring *Darwin film*”; “The

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Smithsonian Institute called and was **alarmed** at the news release from a creationist organization, the Discovery Institute, below [sic] because it **implied that the Science Center officially supports the creationist film** that is set to screen on Oct. 25.”]; *id.*, Exh. No. 40, Sion Dep. Tr., Dep. Exh. No. 15 (10/5/09 e-mail from C. Sion to C. Pygin) [“**[T]he main problem** is that it is an **anti-Darwin/ creationist group.**”]; emphasis added.]; *id.*, Dep. Exh. No. 46, Sion Dep. Tr., Dep. Exh. No. 36, (10/1/09 e-mail from Sion to Rudolph) [“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 w/ a Science Center.**” (emphasis added.)]; Defendants’ Undisputed Material Fact ¶ 2 [“The Foundation is a non-profit, section 501(c)(3) organization that raises funds to support exhibits and educational programs featured at the California Science Center (the “Science Center”), the West Coast’s largest interactive center and museum.”]; *See*, generally, Woodward Decl. (opinion that contract basis for cancellation was pretextual); *id.*, ¶¶ 89-98.

30. Shell Amega testified that she used the term “creationist” in an e-mail “[b]ecause	Objection. Irrelevant. (Cal.Ev.Code §§ 210, 350-351) as to whether Amega gave such
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[she] was conveying Harold [Closter's] concerns and so [she] used his terminology." Ochsenein Decl., Ex. 11 [Ameqa Dep. Tr.] at 64:10-16.

testimony. The alleged fact constitutes the *evidence* supporting the subordinate *fact* to which Ameqa testified (i.e., that she adopted Closter's terminology), not the fact itself. On the same basis, this alleged fact is vague and ambiguous. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed that Ameqa provided the quoted testimony at her deposition. **Disputed** as to the alleged subordinate fact that Ameqa had not adopted the term "creationist" as her own description.

SUPPORTING EVIDENCE:

Woodward Decl., ¶¶ 12 (pejorative meaning of the term "creationist") and 50 (Ameqa's adoption of the terminology used by Closter without attribution to him).

31. Foundation witnesses testified that Rudolph made the decision to cancel the Event. Ochsenein Decl., Ex. 12 [Pygin Dep. Tr.] at 108:10-109:15; *id.*, Ex. 11 [Ameqa Dep. Tr.] at 155:16-21; *id.*, Ex. 5 [Sion Dep. Tr.] at 355:10-356:8, 406:14-18; *id.*, Ex. 10 [Rudolph Dep. Tr.] at 98:9-12, 256:13-257:4 [testifying that "[t]he decision to cancel the event was my decision."]

Objection. Irrelevant. (Cal.Ev.Code §§ 210, 350-351) as to whether Foundation witnesses gave such testimony. The alleged fact constitutes the *evidence* supporting the subordinate *fact* to which Foundation witnesses testified (i.e., that Rudolph made the decision to cancel the Event), not the fact itself. On the same basis, this alleged fact is vague and ambiguous. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed that Foundation witnesses testified that Rudolph made the

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executive decision to cancel the Event. Undisputed that Rudolph made the executive decision to cancel the Event.

32. When asked what AFA's allegation that the Foundation's cancellation of the Event was based on the content of the program, Avi Davis answered:

The fact is that we know that nothing we did regarding our performance of the contract could have led to an accusation of violation. Nothing. We performed our part of the contract. We signed it. We prepared our materials. We were going to submit it. Nothing we did was possibly-- could possibly have done it. The only reason for that film to be canceled was because the people who owned that cinema didn't want it shown and were not happy about the content."

Ochsenbein Decl., Ex. 6 [Davis. Dep. Tr.] at 144:21-147:16 [Q. You understand there's an allegation in this lawsuit that you've made that the basis for the cancellation was the content of the program, don't you sir? A. Absolutely. Q. Okay. And what do you base that allegation on? ... The fact is that we know that nothing we did regarding our performance of the contract could have led to an accusation of violation. Nothing. We performed our part of the contract -- we

Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether the Foundation Defendants cancelled AFA's event on the basis of an intentionally discriminatory motive. Irrelevant (Cal.Ev.Code §§ 210, 350-351) as to whether Davis gave such testimony. The alleged fact made subordinate to the fact that Davis gave the quoted testimony is unclear. Accordingly, this alleged fact is vague and ambiguous to such an extent that it is impossible to dispute or not dispute it. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed that Davis testified as alleged.

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1 signed it, we prepared our materials, we were
2 going to submit it. Nothing we did was
3 possibly -- could possibly have done it. The
4 only reason for that film to be canceled was
5 because the people who owned that cinema
6 *didn't* want it shown and were not happy
7 about the content"]; *see also id.*, Ex. 6 [Davis
8 Dep. Tr.] at 355:5-364:8 [discussing reasons
9 for believing "intense outside pressure"
causes the cancellation].

10 33. When asked whether there was "anything
11 ... upon which you're basing your belief that
12 the real reason for the cancellation ... was that
13 [the Foundation] did not want to have an open
14 debate on intelligent design," Peter Bylsma
15 answered "No."

16 Ochsenbein Decl., Ex. 9 [Bylsma Dep. Tr.] at
17 265:19-266:9 ["Q. Is there anything else that
18 you're relying on in terms of telling me that
19 you believe the real reason for the
20 cancellation was that the Foundation *didn't*
21 want to have that open debate other than
22 what's in [the cancellation e-mail]? MR.
23 BECKER: And whatever I may have
24 discussed with you in *confidence*. Q. I don't
25 want to know what Becker discussed with
26 you. So I'm not asking for that. So is there
27 anything, other than what Becker may have
told you, upon which you're basing your
belief that the real reason for the cancellation

Objection. Immaterial. The alleged fact has
no significance in determining the outcome
of this case with regard to whether the Foun-
dation Defendants cancelled AFA's event on
the basis of an intentionally discriminatory
motive. Irrelevant. (Cal.Ev.Code §§ 210,
350-351) as to whether Bylsma gave such
testimony. The alleged fact constitutes the
evidence supporting the subordinate *fact* to
which Bylsma testified (i.e., that Bylsma
lacked a basis for believing that the Founda-
tion did not want to have an open debate on
intelligent design). Subject to and without in
any way waiving the foregoing objections,
and to the extent that Responding Party un-
derstands this alleged fact: Undisputed that
Davis testified as alleged.

1 by the Science Center Foundation was that
2 they did not want to have an open debate on
3 intelligent design. A. No.”] *see also id.*, at Ex.
4 10 at 272:21-273:3 [“Q. Okay. What I’m after
5 is, did anybody show you or tell you anything
6 that was either a document or a conversation
7 specifically from the California Science
8 Center Foundation or the Science Center
9 itself that when you read it or heard about it,
10 you said ‘Yeah, that’ – ‘that – that tells me
11 that they cancelled for content’? A. No.”].

12 34. When asked for facts that support the
13 view that the Foundation engaged in
14 discriminatory conduct, Joe Peterson testified:

15 Well, the discriminatory act was cancel-
16 ling the event. Birds of a feather flock to-
17 gether. They are all cut from the same
18 cloth. And the Smithsonian in particular I
19 had come to find out about - I forget the
20 name of the scientist who had basically
21 had his whole career torpedoed because
22 he dared to say something positive about
23 intelligent design.” ... I had no conversa-
24 tions with Foundation employees. We did
25 ask Joel Strom what went on in the board
26 meeting ... But he didn’t really have any
27 information about the detail. ... So - okay.
28 I would just say that, if you listen to the
news sources that I like to listen to [they]
talk about how Darwinian evolution is

Objection. Immaterial. The alleged fact has
no significance in determining the outcome
of this case with regard to whether the Foun-
dation Defendants cancelled AFA’s event on
the basis of an intentionally discriminatory
motive. Irrelevant. (Cal.Ev.Code §§ 210,
350-351) as to whether Peterson gave such
testimony. The alleged fact made subordinate
to the fact that Peterson gave the quoted tes-
timony is unclear. Accordingly, this alleged
fact is vague and ambiguous to such an ex-
tent that it is impossible to dispute or not
dispute it. Subject to and without in any way
waiving the foregoing objections, and to the
extent that Responding Party understands
this alleged fact: Undisputed that Peterson
testified as alleged. The alleged fact consti-
tutes the *evidence* supporting the subordinate
fact to which Peterson testified (i.e., that

1 promulgated throughout the public school
2 system and so on. It is hostile towards op-
3 posing viewpoints. Anybody on the street
4 will tell you that. ... Because I can say
5 there is plenty of evidence there that it is
6 much more than just DI's press release
7 that drove the California Science Center
8 to execute this blatant act of discrimina-
9 tion against us.

10 Ochsenbein Decl., Ex. 14 [Peterson Dep. Tr.]
11 at 153:14-158:3 ["Q. I was trying to clarify
12 because your answer before talked about the
13 Smithsonian. So I was trying to understand
14 what facts you believe there are to support a
15 view that the Foundation engaged some some
16 [sic] sort of discriminatory act that it wasn't --
17 A. Well, the discriminatory act was cancelling
18 the event. Birds of a feather flock together.
19 They are all cut from the same cloth. And the
20 Smithsonian in particular I had come to find
21 out about -- I forget the name of the scientist
22 who had basically had his whole career
23 torpedoed because he dared to say something
24 positive about intelligent design. ... Q. But do
25 you have any other facts to support the view
26 that the Foundation engaged in some sort of
27 discriminatory conduct? Were there any
28 conversations you had with Foundation
employees that imply that to you or anything
like that? A. I had no conversations with

Bylsma lacked a basis for believing that the
Foundation did not want to have an open de-
bate on intelligent design. Subject to and
without in any way waiving the foregoing
objections, and to the extent that Responding
Party understands this alleged fact: Undis-
puted that Davis testified as alleged.

1 Foundation employees. We did as Joel Strom
 2 what went on in the board meeting But he
 3 *didn't* really have any information about the
 4 detail....Q. Yes. I was just going to ask is
 5 there anything else, any other facts that lead
 6 you to that conclusion? ... THE WITNESS:
 7 So – okay. I would just say that, if you listen
 8 to the news sources that I like to listen to
 9 [they] talk about how Darwinian evolution is
 10 promulgated throughout the public school
 11 system and so on. It is hostile towards
 12 opposing viewpoints. Anybody on the street
 13 will tell you that....Q. BY MR. ZELENAY:
 14 Yes. It's – I am just trying to understand for
 15 myself where your view comes from with
 16 respect that issue. But if you don't have
 17 anything further to add in terms of the actual
 18 facts that lead you-- ... A. Because I can say
 19 there is plenty of evidence there that it is
 20 much more than just DI's press release that
 21 drove the California Science *Center* to
 22 execute this blatant act of discrimination
 23 against us."].

21 35. In their depositions, Foundation witnesses
 22 denied the existence of a policy whereby the
 23 advancement, promotion, or discussion of
 24 intelligent design is prohibited.

25 Ochsenein Decl., Ex. 12 [Pygin Dep. Tr.] at
 26 154:9-16; *id.*, Ex. 10 [Rudolph Dep. Tr.] at
 27 131:18-25, 169: 19-170:22; *id.*, Ex. 5 [Sion

Objection. Irrelevant. (Cal.Ev.Code §§ 210,
 350-351) as to whether Foundation witnesses
 gave such testimony. The alleged fact consti-
 tutes the *evidence* supporting the subordinate
fact to which Foundation witnesses testified
 (i.e., that no such policy exists). Subject to
 and without in any way waiving the forego-
 ing objections, and to the extent that Re-

05/27/11

1 Dep. Tr.] at 66:15-67:13; *see also id.*, Ex. 10
2 [Rudolph Dep. Tr.] at 238:5-15 [“Q. Sure. Do
3 you believe it’s inappropriate for the
4 California Science *Center* to permit debates
5 concerning the theory of evolution? MR.
6 ONO: Vague and ambiguous; incomplete
7 hypothetical; calls for speculation. MR.
8 DENNIS: I join those. THE WITNESS: My
9 answer would be that I do not think it’s
10 inappropriate. I think that our policies and
11 practices and everything we’ve done,
12 including in this case, would have allowed a
13 private event to go ahead and debate whatever
14 they want, if it’s a private event.”]

sponding Party understands this alleged fact:
Undisputed that in their depositions, Founda-
tion witnesses denied the existence of such a
policy. **Disputed** that such a policy did not
exist at the time AFA’s event was cancelled.
SUPPORTING EVIDENCE:

Becker Decl., Exh. No. 37, Sion Dep. Tr.,
Dep. Exh. No. 11, (10/5/09 e-mail from C.
Sion to J. Rudolph) [“A science center
should not even be asked to partner w/ any
group associated w/ *debating Darwinism –*
it’s not our place....”]; *id.*, Exh. No. 39,
Dep. Exh. No. 13, (10/5/09 e-mail from S.
Amega to J. Rudolph) [subject: “**Creationist**
organization implies that the Calif. Science
Center is sponsoring *Darwin film*”; “The
Smithsonian Institute called and was
alarmed at the news release from a
creationist organization, the Discovery
Institute, below [sic] because it **implied that**
the Science Center officially supports the
creationist film that is set to screen on Oct.
25.”]; *id.*, Dep. Exh. No. 40, Sion Dep. Tr.,
Dep. Exh. No. 15, (10/5/09 e-mail from C.
Sion to C. Pygin) [“**[T]he main problem** is
that it is an **anti-Darwin/creationist group.**”
(emphasis added.)]; *id.*, Exh. No. 46, Sion
Dep. Tr., Dep. Exh. No. 36, (10/1/09 e-mail
from C. Sion to J. Rudolph) [“I said that I
wouldn’t recommend that he call you about
being a “partner” since their topic of

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Darwinism and the nature of their controversial approach *is likely not a good fit to partner w/ a Science Center.*" (emphasis added.); Defendants' Undisputed Material Fact ¶ 2: ["The Foundation is a non-profit, section 501(c)(3) organization that raises funds to support exhibits and educational programs featured at the California Science Center (the "Science Center"), the West Coast's largest interactive center and museum."]; *See, generally*, Woodward Decl. (opinion that contract basis for cancellation was pretextual); *id.*, ¶¶ 89-98.

36. Beginning on October 5, 2009, representatives of the Los Angeles Country Natural History Museum and other individuals were engaged in e-mail discussion regarding the Event. In these discussions, the participants expressed concerns regarding the subject matter of the Event. None of these e-mails reached Rudolph until after the Event was cancelled.

Ochsenbein Decl., Ex. 20 [Dep. Ex. 35 (Sion)].

Undisputed.

37. Rudolph testified that he "had a general understanding" as to the nature of the Event based on an October 1, 2009 e-mail from Chris Sion.

Objection. Irrelevant. (Cal.Ev.Code §§ 210, 350-351) as to whether Rudolph gave such testimony. The alleged fact constitutes the *evidence* supporting the subordinate *fact* to

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2 Ochsenein Decl., Ex. 10 [Rudolph Dep. Tr.]
3 at 323:23-15; *id.*, Ex. 21 [Dep. Ex. 36
4 (Sion)].

which Rudolph testified (i.e., he had a
general understanding as to the nature of the
Event based on an October 1, 2009, e-mail.),
not the fact itself. On the same basis, this
alleged fact is vague and ambiguous. Subject
to and without in any way waiving the
foregoing objections, and to the extent that
Responding Party understands this alleged
fact: Undisputed as to Rudolph's testimony.
Undisputed as to the subordinate fact that on
October 1, 2009, Rudolph had a general
understanding of the nature of the Event
based on an October 1, 2009, e-mail from
Chris Sion. ***Disputed*** as to the implied root
fact that Rudolph did not have a specific
understanding of the nature of the Event.

15 SUPPORTING EVIDENCE:

16 Becker Decl., Exh. 46, Sion Dep. Tr., Dep.
17 Exh. No. 36 (10/1/09 e-mail from C. Sion to
18 J. Rudolph) ["Hi Jeff, Just an FYI that Joel
19 called me last night to lobby for better pric-
20 ing for a group his wife, Holly, is involved
21 with (American Freedom Alliance). ***They are***
22 ***planning a private IMAX screening of "We***
23 ***Are Born of Stars" and panel discussion of***
24 ***Darwinism and wanted us to "partner" with***
25 ***them. . . . I said that I wouldn't recommend***
26 ***that he call you about being a "partner"***
27 ***since their topic of Darwinism and the na-***
28 ***ture of their controversial approach is likely***
not a good fit to partner w/ a Science Cen-

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	<i>ter. . . .</i> (emphasis added.)]
<p>38. AFA witness Joe Peterson testified that Chris Sion was supportive of having a “conservative” event and Avi Davis testified that Foundation employees were “very, very enthusiastic” about the Event, never expressing concerns about the content.</p> <p>Ochsenbein Decl., Ex. 14 [Peterson Dep. Tr.] at 76:16-77:10; <i>id.</i>, Ex. 6 [Davis Dep. Tr.] at 155:4-156:5.</p>	<p>Objection. Irrelevant. (Cal.Ev.Code §§ 210, 350-351) as to whether Peterson and Davis gave such testimony. The alleged facts constitute the <i>evidence</i> supporting the subordinate <i>facts</i> to which they testified (i.e., that Sion supported a conservative event and was enthusiastic about it), not the fact itself. On the same basis, this alleged fact is vague and ambiguous. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed as to Peterson’s general testimony. Disputed as to Davis’ testimony. Davis testified that Foundation employees were enthusiastic about the putative evolution theory friendly film “We Are Born of the Stars.” He did not testify that they were enthusiastic about the Event or the intelligent design film “Darwin’s Dilemma.” Disputed that Davis testified that Foundation employees never expressed concerns about the content, only that they never told him in a conversation or an e-mail the words, “You know, I’m really concerned about the content of your program. I’m not sure we want to show this?”</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>Becker Decl., Exh. No. 4, Davis Dep. Tr., 155:22-24 [“They were very, very enthusiastic <i>about We Are Born of Stars</i>. Very enthu-</p>

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siastic about it.” (emphasis added.); *id.*, 155:25-156:5 [“Q. Did anybody on the staff of the Foundation prior to the cancellation tell you in a conversation or an E-mail to you, ‘ You know, I’m really concerned about the content of your program. I’m not sure we want to show this’? A. No.”]

39. AFA witnesses testified that the Foundation employees, particularly Sion, were aggressively trying to get the contract finalized so the Event could take place. Ochsenein Decl., Ex. 6 [Davis Dep. Tr.] at 154:16-19 [“Q. They were encouraging you to get your contract in and signed, right? A. They were encouraging us to show two films for a fee at their facility.”], 177:22-179:2 [“Chris Sion in this case was all over us. She was determined that we were going to do this event. She was absolutely determined that we were -- MR. BECKER: Avi, I’m going to stop you. You’re not--”]; *see also id.*, Ex. 14 [Peterson Dep. Tr.] at 147:9-148:6 [describing Sion as a “very accommodating, wonderful person”]; *id.* Ex. 19 [Dep. Ex. 34] [Sion states on September 30 that “it would be great to get this wrapped up today.”]

Objection. Irrelevant. (Cal.Ev.Code §§ 210, 350-351) as to whether AFA witnesses gave such testimony. The alleged fact constitute the *evidence* supporting the subordinate *fact* to which they testified (i.e., that the Foundation was aggressively trying to get the contract finalized so the Event could take place), not the fact itself. On the same basis, this alleged fact is vague and ambiguous. The alleged fact mischaracterizes the evidence. Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: **Disputed** that AFA witnesses testified that the Foundation employees, particularly Sion, were “aggressively” trying to get the contract finalized so the Event could take place. **SUPPORTING EVIDENCE:** Ochsenein Decl., Ex. 6 [Davis Dep. Tr.] at 154:16-19 [“Q. They were encouraging you to get your contract in and signed, right? A. They were encouraging us to show two films for a fee at their facility.”], 177:22-179:2

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["Chris Sion in this case was all over us. She was determined that we were going to do this event. She was absolutely determined that we were -- MR. BECKER: Avi, I'm going to stop you. You're not--"]; *see also id.*, Ex. 14 [Peterson Dep. Tr.] at 147:9-148:6 [describing Sion as a "very accommodating, wonderful person"]; *id.* Ex. 19 [Dep. Ex. 34] [Sion states on September 30 that "it would be great to get this wrapped up today."]

40. The Foundation orally agreed to modify its standard payment terms in an effort to assist the AFA and in response to a request by AFA.

Ochsenbein Decl., Ex. 5 [Sion Dep. Tr.] 224: 18-225:10, 229:2-14; *id.*, Ex. 6 [Davis Dep. Tr.] at 118:9-119:9; *id.* Ex. 21 [Dep. Ex. 36 (Sion)].

Disputed. The Foundation orally *negotiated* a change in the standard payment terms. The Foundation required AFA to execute a written amendment to the contract before the new payment terms would take effect.

SUPPORTING EVIDENCE:
Becker Decl., Exh. No. 41, Sion Dep. Tr., Dep. Exh. No. 16, (Unsigned California Science Center Letter of Agreement) ["**By signing this agreement**, the group agrees to the following terms and conditions. . . ." (emphasis added.); "**By signing this agreement** you are agreeing to the terms and conditions that are incorporated herein and with the Event Policies & Procedures." (emphasis added.); *id.*, Davis Exh. No. 29 (9/30/09 e-mail from C. Sion to L. Matsunaga) ["I agreed to adjust the payment terms to 50% deposit due 10/15/09 and final payment due 10/20/09 by credit card. **We will confirm this event w/ Avi's signature on your adjust-**

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05/27/11

	<i>ed Event Price Estimate tomorrow.”]</i>
<p>41. Chris Sion and Cynthia Pygin recommended that Rudolph request a correction relating to an unapproved press release rather than cancelling the Event.</p> <p>Ochsenbein Decl., Ex. 23 [Dep. Ex.38 (Sion)]; <i>id.</i>, Ex. 12 [Pygin Dep. Tr.] at 80:2-21, 83:19-84:6, 99:10-20; <i>id.</i>, Ex. 5 [Sion Dep. Tr.] at 185:11-18.</p>	Undisputed.
<p>42. Foundation witnesses testified that the Event was cancelled as a result of the unapproved press releases.</p> <p>Ochsenbein Decl. Ex. 5 [Sion Dep. Tr.] at 118:18-120:8, 327:13-18, 328:24-329:2; <i>id.</i>, Ex. 12 [Pygin Dep. Tr.] at 100:24-103:1; <i>id.</i>, Ex.10 [Rudolph Dep. Tr.] at 302:19-303:19; <i>see also id.</i> Ex. 19 [Dep. Ex. 32] [Ameqa expresses belief that AFA violated the Promotional Materials provision.]; <i>id.</i> Ex. 22 [Dep. Ex. 37 (Sion)] [indicating unapproved press releases were reason for cancellation]; <i>id.</i>, Ex. 7 [Pisano Dep. Tr.] at 41:19-43:1 [“Q. All right. The e-mail continues referring to your conversation, quote: ‘Had a chat to him about the screening of the I.D. film at California Science Center’s IMAX.’ The next sentence: ‘They had, in fact, canceled the event as not being’ - I’m sorry- ‘as being not</p>	<p>Objection. Irrelevant. (Cal.Ev.Code §§ 210, 350-351) as to whether Foundation witnesses gave such testimony. The alleged fact constitutes the <i>evidence</i> supporting the subordinate <i>fact</i> to which Foundation witnesses testified (i.e., that that the Event was cancelled as a result of the unapproved press releases). Subject to and without in any way waiving the foregoing objections, and to the extent that Responding Party understands this alleged fact: Undisputed as to Foundation witnesses’ testimony. Disputed as to the implied subordinate fact that the Event was cancelled “as a result of the unapproved press releases.”</p> <p><u>SUPPORTING EVIDENCE:</u></p> <p>Becker Decl., Exh. 37, Sion Dep. Tr., Dep. Exh. No. 11, (10/5/09 e-mail from C. Sion to J. Rudolph) [“A science center should not even be asked to partner w/ any group</p>

1 in line with their mission to educate the public
2 about science, so it is not going ahead, we do
3 not need to send a letter or respond any
4 further,' period. These are the words
5 apparently of John Long in an e-mail. Does he
6 have it correct here that Dr. Rudolph told you
7 that they canceled the event because it was
8 not in line with their mission? MR.

9 ZELENAY: Objection. Vague. Calls for
10 hearsay. MR. STAUBER: Same objection.
11 Subject to that, Dr. Pisano, you can answer.

12 THE WITNESS: No BY MR. STEVENS:
13 Q. And your answer is that John Long has it
14 incorrect, is that right? MR. STAUBER:

15 Counsel, the answer was 'No,' unequivocally
16 'No.' BY MR. STEVENS: Q. I'm asking if
17 that's what you mean by incorrect. A. That is
18 correct."]; *id.*, Ex. 8 [Long Dep. Tr.] at 96:5-
19 24 ["Q. The next sentence says, 'They had in
20 fact canceled the event as not being in line
21 with their mission to educate the public about
22 science.' And I'll stop there. Is that what Dr.

23 Pisano told you? MR. ONO: Calls for
24 hearsay. THE WITNESS: No, she did not tell
25 me that. That was something that I was
26 surmising. It's purely from me. BY MR.
27 STEVENS: Q. Well, what did Dr. Pisano tell
28 you? A. From memory, she just told me that
they had canceled it. She *didn't* actually give
me a reason. Q. So you added that fact that it
was not in line with their mission? That was

associated w/ *debating Darwinism – it's not
our place...*" (emphasis added.)]; *id.*, Dep.
Exh. No. 13, (10/5/09 e-mail from S. Amega
to J. Rudolph) ["subject: **Creationist**
organization implies that the Calif. Science
Center is sponsoring **Darwin film**"; "The
Smithsonian Institute called and was
alarmed at the news release from a
creationist organization, the Discovery
Institute, below [sic] because it **implied that**
the Science Center officially supports the
creationist film that is set to screen on Oct.
25."]; *id.*, Exh. 15, (10/5/09 e-mail from C.
Sion to C. Pygin) ["**[T]he main problem** is
that it is an **anti-Darwin/ creationist group.**"
(emphasis added.); *id.*, Exh. No. 46, Sion
Dep. Tr., Dep. Exh. No. 36, (10/1/09 e-mail
from C. Sion to J. Rudolph) ["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 w/ a Science Center."
(emphasis added.); Defendants' Undisputed
Material Fact ¶ 2 ["The Foundation is a non-
profit, section 501(c)(3) organization that
raises funds to support exhibits and
educational programs featured at the
California Science Center (the "Science
Center"), the West Coast's largest interactive
center and museum."]

<p>1 from your own surmise? A. I was guessing it, 2 yes. Q. You <i>didn't</i> actually know? A. I 3 didn't.”]</p>	<p><i>See</i>, generally, Woodward Decl. (opinion that contract basis for cancellation was pre- textual); <i>id.</i>, ¶¶ 89-98.</p>
<p>4 43. Cynthia Pygin testified that she never 5 discussed the subject matter of the Event with 6 Rudolph prior to his decision to cancel. 7 Ochsenein Decl., Ex. 12 [Pygin Dep. Tr.] at 8 69:8-20, 78:7-14.</p>	<p>Objection. Irrelevant. (Cal.Ev.Code §§ 210, 350-351) as to whether Pygin gave such testimony. The alleged fact constitutes the <i>evidence</i> supporting the subordinate <i>fact</i> to which Pygin testified (i.e., that she never discussed the subject matter of the Event with Rudolph prior to his decision to cancel). 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>. Pygin testified that she did not discuss “anti-Darwin/creationist terms with Jeff” prior to receiving the October 5, 2009, 9:34 p.m., e-mail that stated that “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 <i>anti-Darwin/creationist group</i>.” She also testified that she doesn’t recall a conversation with Rudolph regarding intelligent design. SUPPORTING EVIDENCE: Ochsenein Decl., Ex. 12 [Pygin Dep. Tr.] at 69:8-20, 78:7-14.</p>
<p>9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 44. In an e-mail dated October 7, 2009, 26 Peterson states: “Whomever at [sic] wrote the 27 copy on the Discovery institute press releases</p>	<p>Objection. Immaterial. The alleged fact has no significance in determining the outcome of this case with regard to whether the</p>

05/27/11

1 should have his head examined ... I thought
2 the problem was buried in the text of the
3 documents ... NOT THE HEADLINES. Talk
4 about waving a red flag in front of a bull. It
5 seems like they were deliberately trying to
6 screw this up!!!”

7 Ochsenbein Decl., Ex. 25 [Dep. Ex. 163],
8 emphasis in the original.

Foundation Defendants cancelled AFA’s
event on the basis of an intentionally
discriminatory motive. Irrelevant
(Cal.Ev.Code §§ 210, 350-351) as to whether
Peterson made a statement in an email. The
alleged fact constitutes the *evidence*
supporting the subordinate *fact* that forms the
content of Peterson’s e-mail message.
Subject to and without in any way waiving
the foregoing objections, and to the extent
that Responding Party understands this
alleged fact: Undisputed that Peterson stated
the quoted matter in an e-mail.

14 45. In its interrogatory responses, AFA
15 suggests that documents and testimony from
16 Chris Sion and documents obtained from the
17 Natural History Museum of Los Angeles
18 County demonstrate the existence of such a
19 “policy,” noting that the “unanimity of
20 position suggests a policy.” Moving party
21 reserves all of its objections on this evidence,
22 including objections on the grounds that it is
23 hearsay, lacks foundation, is not properly
24 authenticated, is improper opinion, and is
25 irrelevant.

26 Ochsenbein Decl., Ex. 3.

Objection. Immaterial. The alleged fact has
no significance in determining the outcome
of this case with regard to whether the Foun-
dation Defendants cancelled AFA’s event on
the basis of an intentionally discriminatory
motive. Irrelevant (Cal.Ev.Code §§ 210, 350-
351) as to whether “AFA suggests” the al-
leged subordinate fact. The asserted “fact” is
a preemptive reference to Plaintiff’s antici-
pated evidence in opposition to a fact that
has not been asserted. Lacks foundation as to
the nature of a “policy.” Subject to and with-
out in any way waiving the foregoing objec-
tions, and to the extent that Responding Party
understands this alleged fact: Undisputed
that Plaintiff responded to Interrogatory re-

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quests. Undisputed that the Moving Party has tendered a reservation of rights to later assert objections. *Disputed* that AFA "suggests" anything in its Interrogatory responses, much less the existence of the undescribed "policy."
SUPPORTING EVIDENCE:
Ochsenbein Decl., Ex. 3.

Plaintiff, American Freedom Alliance, also submits the following statement of additional material facts that raise a triable issue with respect to Issue No. 2, together with references to supporting evidence, in opposition to Defendants' motion.

<u>ADDITIONAL MATERIAL DISPUTED FACTS</u>	<u>SUPPORTING EVIDENCE</u>
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PLAINTIFF'S ISSUE NO. TWO: THE FOUNDATION DEFENDANTS ARE NOT ENTITLED TO SUMMARY ADJUDICATION BECAUSE THERE IS AMPLE EVIDENCE OF INTENTIONAL DISCRIMINATION.

18. Rudolph was made aware of AFA's event when Chris Sion, the Foundation vice president of Food and Event Services, advised him on Thursday, October 1, 2009, that Joel Strom, then the Center's Board Chairman, had suggested that the Center "partner" with AFA in sponsoring the event. She told Rudolph that AFA was planning a private IMAX screening of "We Are Born of Stars" and panel discussion of Darwinism and wanted the Center to "partner" with them. She advised Rudolph that she had recommended to Strom that he not call Rudolph

Becker Decl., Exh. No. 46, Sion Dep. Tr., Dep. Exh. No. 36, (10/1/09 e-mail from C. Sion to J. Rudolph) ["Just an FYI that Joel called me last night to lobby for better pricing for a group his wife, Holly, is involved with (American Freedom Alliance). They are planning a private IMAX screening of 'We Are Born of Stars" and panel discussion on Darwinism and wanted us to 'partner" with them. I said I already extended an incredibly generous discount as they were in a panic to schedule here after they were displaced from The Bridge and I met The Bridge's pricing. They

1 about being a "partner" "since *their topic of*
2 *Darwinism and the nature of their contro-*
3 *versial approach* is likely *not a good fit to*
4 *partner with a Science Center...."* Rudolph
5 never responded to Sion's e-mail and did not
6 question her about what she meant by AFA's
7 "topic of Darwinism" or "controversial ap-
8 proach." Sion did not state that an *IMAX*
9 *Theater* or a *foundation* should not partner
10 with a group debating Darwinism, but lim-
11 ited her comment to the fact that a *science*
12 *center* should not be so involved.

just keep asking for more and more things
from us (a dinner reception, more time in the
theater, an extra screening, help selling their
tickets, shipping the film from Toronto etc)
and don't want to pay anything more for these
additional services. I explained to Joel how
much we have already done for them and that
we cannot do any more. As a courtesy I ad-
justed our payment terms so they can pay
closer to the event so he was happy with that.
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 contro-
versial approach is likely not a good fit to
partner w/ a Science Center (plus we have no
money either!). I don't think he will call you.
He was very nice and thanked me for helping
them as much as we have already. The event
is scheduled for Sunday, 10/25/09 at 5:30 PM.
Thanks, Chris"]; Rudolph Dep. Tr., 228:3-6
["So you never spoke to her about what she
meant by 'controversial approach'; is that
right? A. I never spoke to her -- I don't believe
I did. I don't believe I did."]

19. The Center is designated as an affiliated
museum with the Smithsonian Institution.
The Center's relationship with the Smithson-
ian is an important one, and the Center
boasts of it on its website. The Center de-
rives several benefits and assumes important
responsibilities in this relationship.

Rudolph Dep. Tr., 176:17-21 ["The relation-
ship with the Smithsonian is an important re-
lationship to the Science Center."]; Sion Dep.
Tr., Dep. Exh. No. 12 [Smithsonian Affiliate
Designation web page on the California Sci-
ence Center website];

1 20. The Center's relationship as an affiliate
2 of the Smithsonian requires that it takes steps
3 to protect the uses of the Smithsonian name
4 in all materials related to the Center.

Becker Decl., Exh. No. 33, Rudolph Dep. Tr.,
Dep. Exh. No. 200, Rudolph Decl., ¶ 12, 4:5-
10 ["The California Science Center's relation-
ship as an affiliate of the Smithsonian requires
that it takes steps to protect the uses of the
Smithsonian name in all materials related to
the Science Center. If we had been given the
promotional materials in advance for the AFA
program we would have to run them by the
Smithsonian for their approval, as well as our
own, and we would have rejected the wording
in the promotional materials."]; *id.*, Exh. No.
8, Rudolph Dep. Tr., 98:10-12 ["As president
of the California Science Center Foundation I
chose to cancel the event based on the facts
provided to me and the information I ob-
tained."]

16 21. On October 5, 2009, at 9:10 a.m. PDT
17 (12:10 p.m. EDT), the Smithsonian's Direc-
18 tor of the Office of Communications and Ex-
19 ternal Affairs, Evelyn Lieberman, received a
20 "Google News Alert" stating, "The debate
21 over Darwin will come to California on Oc-
22 tober 25th, when the Smithsonian Institu-
23 tion's west coast. . . ." This information
24 stirred Smithsonian officials into immediate-
25 ly acting to control the presumed effect of
26 this publicity. Lieberman forwarded the alert
27 to the Smithsonian's chief spokesperson,
Linda St. Thomas, who contacted the Direc-
28 tor of Affiliates, Harold Closter, and Direc-

Lepiscopo Decl., Exh. B, Bates No. SI000092,
(10/5/09 e-mail from E. Lieberman to L. St.
Thomas) ["What is this?"]; *id.*, *passim*, see
e.g., Bates Nos. 182, 183, 188, 189, 190, 191,
193].

<p>1 tor of Public Affairs, Randall Kremer.</p>	
<p>2 22. St. Thomas advised them: "This is one 3 of our <i>fears about affiliates</i>. As you know, 4 we cancelled an event about Intelligent De- 5 sign (<i>creationism</i>) at [the Smithsonian Mu- 6 seum of Natural History] a couple of years 7 ago. <i>It is against SI/MNH policy which is</i> 8 <i>science and not religion.</i>" (Emphasis add- 9 ed.) She requested that Closter and Kremer 10 contact the Center, with a request sounding 11 more like a demand: "Can you tell them to 12 <i>cease and desist</i> [?]" (Emphasis added.)</p>	<p>Lepiscopo Decl., Exh. B, Bates Nos. 191 (un- redacted version) and 173, 176, 180 (redacted versions), (10/5/09 e-mail from H. Closter to S. Amega)</p>
<p>13 23. In another e-mail, St. Thomas remarked, 14 "Wow, they let <i>anybody</i> rent their theater!!" (Emphasis added.)</p>	<p>Lepiscopo Decl., Exh. B, Bates No. 175 (un- redacted version) and No. 85 (redacted ver- sion), (10/5/09 e-mail from H. Closter to S. Amega)</p>
<p>15 24. Following St. Thomas' urgent request to 16 tell the Center to "cease and desist," Closter 17 promptly telephoned the Center and spoke to 18 Shell Amega, vice president for Communi- 19 cations. He asked her to issue a statement to 20 the media clarifying the Center's role in 21 connection with the event and its role as an 22 affiliate. When the call had ended, Amega e- 23 mailed Rudolph and copied various Center 24 and Foundation officials memorializing what 25 Closter had told her. The subject line of the 26 e-mail addressed the content of what she un- 27 derstood to be the AFA event: "<i>Creationist</i> organization implies that the Calif. Science Center is sponsoring <i>Darwin film</i>." (Empha-</p>	<p>Becker Decl., Exh. No. 39, Sion Dep. Tr., Dep. Exh. No. 13, (10/5/09 e-mail from S. Amega to J. Rudolph), et al.; <i>id.</i>, Exh. No. 1, Amega Dep. Tr. 51:2-7 ["Q. When Mr. Closter called you, did he introduce himself initially? A. Yes. Q. Did he tell you the pur- pose of his call? Mr. Zelenay: Objection. Vague. THE WITNESS: He called to express a concern."]; <i>id.</i>, Exh. No. 35, Rudolph, Dep. Tr., Dep. Exh. No. 203, (10/5/09 e-mail from H. Closter to S. Amega); <i>id.</i>, Exh. No. 23, Lu- cas Dep. Tr., Dep. Exh. No. 187 (forwarded 10/5/09 e-mail from S. Amega to J. Lucas).</p>

11/22/09

1 sis added.) Amega's e-mail was denoted
2 "Importance: High" and used the term "crea-
3 tionist" to describe the subject matter and
4 content of the film she understood would be
5 shown at AFA's event. She advised Rudolph
6 that Closter was "*alarmed*" at a news release
7 from a "*creationist* organization, the Dis-
8 covery Institute" because it implied that the
9 Center "officially supports the *creationist*
10 film."(Emphasis added.) She added that
11 Closter was also "alarmed" by the event's
12 association with the Smithsonian. Finally,
13 she noted that the Smithsonian had "pulled
14 the plug" on a screening of "the film" when
15 they found out that it was a creationist film.
16 She asked for direction on how to proceed.

15 25. The term "creationist" is often used in a
16 pejorative sense. It represents a hostility to-
17 ward the idea that the universe, life, and
18 mankind exist as a result of a deliberate plan,
19 and an executing of that plan, by a trans-
20 cendent agent, who has a purpose for their
21 existence. Yet this idea of "intelligent pur-
22 pose and plan" is sufficiently ancient, and
23 sufficiently tied to great scientists of the past
24 (Galileo, Newton, Kepler, Boyle, Maxwell),
25 that another, more distasteful nuance is evi-
26 dent in the use of the term "creationist." That
27 pejorative nuance includes a mix-and-match
28 hodgepodge of related negative ideas such as
"fundamentalist" (in religious belief), "su-

Woodward Decl, ¶ 12; see also Pl.'s Supp.
Evid. To ¶ 44, *infra* (testimony of Dr. John
Long equating ID with "pseudoscience").

11/5/27/11

1 perstitious,” “ignorant and uneducated,” “an-
2 ti-scientific,” and “anti-intellectual.”

3 26. In 2005, the Discovery Institute had
4 rented out the Smithsonian’s Natural History
5 Museum (“SI/NHM”) for the screening of an
6 ID film entitled “The Privileged Planet.” The
7 Smithsonian did not “pull the plug” on the
8 screening, but tried to, issuing a statement
9 proclaiming that “[w]e have determined that
10 the content of the film is not consistent with
11 the mission of the Smithsonian Institution’s
12 scientific research.” Ultimately the Smith-
13 sonian backed off of this effort and allowed
14 the screening of “The Privileged Planet” to
15 proceed, but refused to accept the Discovery
16 Institute’s \$16,000 rental fee. The Smithson-
17 ian’s objections to the screening of the ID
18 film were widely reported in the *Washington*
19 *Post*, the *New York Times*, the blogosphere
20 and elsewhere.

Lepiscopo Decl., Exh. B, Bates Nos. 11-12
(Discovery Institute report) and 15-16 (*Wash-
ington Post* report).

21 27. As director of the west coast’s largest
22 interactive science center and museum, a
23 “news junkie,” who reads the newspaper
24 every day, makes ample use of the Internet
25 and follows “a lot of stuff,” Rudolph was
26 aware of the “Privileged Planet” flap involv-
27 ing the Smithsonian.

Becker Decl., Exh. No. 8, Dep. Tr., Rudolph
266:8-11 [“Honestly, I’m something of a news
junkie. I read the newspaper every day; now I
look on the web a lot more, too, but I tend to
follow a lot of stuff. So I keep up on things.”];
id., Exh. No. 33, Dep. Exh. No. 200 (Rudolph
Decl, ¶ 3; *id.*, Exh. No. 28, Dep. Exh. No. 192
(Web Profile).

28 28. At 2:16 p.m. PDT, Closter advised
29 Kremer and St. Thomas that he had spoken
30 to Amega and that, where they hitherto were

Lepiscopo Decl., Exh. B, Bates No. 190,
(10/5/09 e-mail from H. Closter to R. Kremer,
L. St. Thomas)

11/27/09

1 clueless, as a result of his phone call, "[t]hey
2 *are, of course concerned now* and confer-
3 ring on next steps." (Emphasis added.)

4 29. Closter memorialized the conversation
5 in an e-mail to Amega, emphasizing his re-
6 quest (i.e., demand) that the Center issue a
7 statement distancing the Smithsonian from
8 the event and stating that the Smithsonian
9 was "*concerned that this not be represented*
10 *as a Smithsonian event or program or any-*
11 *thing with which we have any involve-*
12 *ment.*" (Emphasis added.) Amega passed the
13 e-mail along with the press releases to Ru-
14 dolph at 2:28 p.m.

Becker Decl., Exh. Nos. 14, Amega Dep. Tr.,
Dep. Exh. No. 212, Lepiscopo Decl., Exh. B,
Bates Nos. 126-27, and Becker Decl., Exh.
No. 23, Lucas Dep. Tr., Dep. Exh. No. 187
(10/5/09 e-mail from H. Closter to S. Amega)
[“Thanks for lending an ear. We earnestly
hope that the California Science Center will
provide an accurate statement to the media
informing of your role (or non-role) in pre-
senting or serving as the host site of the film
on October 25. The press release we talked
about distorts the relationship between the
Smithsonian Institution and the California
Science Center by prominently featuring the
Smithsonian in the title line and playing up
the Affiliate relationship in a way that implies
that the CSC is a west coast branch of the
Smithsonian, and that the film showing is a
Smithsonian event. Although we are most
proud of our relationship with esc, the Smith-
sonian, as you know, has no role in any of the
decision making processes of your organiza-
tion, and certainly has no say in films, public
programs, and exhibitions. When you issue a
statement, you might also note that CSC is
one of 20 Smithsonian Affiliates in California
out of 165 nationally. A list is attached. Please
keep us informed of your next steps. *We are*

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concerned that this not be represented as a Smithsonian event or program or anything with which we have any involvement. We appreciate very much any steps that you take to clarify the situation. I will be in travel the next four days, but can be reached on my cell phone, 202-452-9010, if you wish to discuss further. Thanks.”; emphasis added.]

30. Sometime prior to 3:04 p.m., Amega called Jim Lucas, the Center’s public relations consultant employed with the Center’s “crisis firm,” The Abernathy MacGregor Group (“AMG”).

Becker Decl., Exh. No. 16, Amega Dep. Tr., Dep. Exh. No. 217 (10/8/09 e-mail from S. Amega to J. Rudolph) [“Subject: Recommendations from the Crisis firm; Here is what Abernathy and Macgregor suggest. . . .”]; *id.*, Exh. No. 23, Lucas Dep. Tr., Dep. Exh. No. 187 (10/5/09 e-mail from S. Amega to J. Lucas) (forwarding e-mail from Closter); *id.*, Exh. No. 1, Amega Dep. Tr., 96:5-9 [“I called Jim Lucas and shared with him the issue and he recommended that we simply correct the misperception by letting people know when they called; that it was not necessary to cancel or put stuff on the wires.”].

31. Lucas recommended issuing a statement and not cancellation.

Becker Decl., Exh. No. 1, Amega Dep. Tr., 96:19-22 [“You called Jim Lucas and he suggested that the event not be canceled; is that right? A. Yeah. He suggested that we simply correct it by letting people know when they called.”]

32. AMG promotes its “crisis communications” practice for when “unplanned circumstances threaten public perception of an or-

Becker Decl., Exh. Nos. 21-22, Lucas Dep. Tr., Dep. Exh. Nos. 185-186 (“Crisis Communications profiles”).

<p>1 ganization or business.”</p>	
<p>2 33. Although Amega had earlier favored 3 cancelling the event, Lucas persuaded her to 4 reverse her recommendation to Rudolph and 5 to instead recommend against cancellation. 6 Accordingly, she drafted a statement for Ru- 7 dolph’s review.</p>	<p>Becker Decl., Exh. Nos. 37 and 42, Dep. Tr., Sion Dep. Tr., Dep. Exh. Nos. 11 and 32, (e- mail from S. Amega to C. Sion, W. Harris) [“Hi everyone, After giving it some thought, I have changed my mind and don't think cancel- ling the event is the way to go. Instead, I think a statement (correcting the misconceptions in their news release) that we provide for any inquiries, by a guest or the media, is the best approach. I have written the statement and am waiting for Jeff and William's approval. – Shell.”]</p>
<p>12 34. Sion, who previously had drawn Ru- 13 dolph’s attention to the content and view- 14 point of AFA’s event, described the situation 15 as “disturbing,” and repeated her belief that 16 “[a] science center should not even be 17 asked to partner with any group associated 18 with debating Darwinism - it’s not our 19 place.” Sion did not state that an <i>IMAX The-</i> 20 <i>ater</i> or a <i>foundation</i> should not be asked to 21 partner with a group associated with debat- 22 ing Darwinism, but limited her comment to 23 the fact that a <i>science center</i> should not be so involved.</p>	<p>Becker Decl., Exh. No. 37, Sion Dep. Tr., Dep. Exh. No. 11, (10/5/09 e-mail from C. Sion to S. Amega, W. Harris)</p>
<p>24 35. At 4:25 p.m., Amega notified Sion that 25 Rudolph had just called her and “was won- 26 dering if AFA violated an agreement – like 27 was this supposed to be a private screening or did they say it was a public screening? If</p>	<p>Becker Decl., Exh. Nos. 37 and 42, Sion Dep. Tr., Dep. Exh. Nos. 11 and 32.</p>

11/27/09

1 they misrepresented the event, then we can
2 cancel them.” Amega told Sion that Rudolph
3 wished to consult with her about it that even-
4 ing.

5 36. Sion wrote to Rudolph at 5:32 p.m. in-
6 forming him of “language that we call out in
7 our agreement regarding printed materials
8 for third party events.” She additionally in-
9 formed him that AFA had “received a copy
10 of these policies and procedures when they
11 received their event price estimate,” and that
12 she had received AFA’s “signed event price
13 estimate which includes language that says
14 when they sign the price estimate they are
15 also agreeing to our policies and proce-
16 dures.” *Id.* She did not refer to an Event Let-
17 ter of Agreement or AFA’s failure to sign
18 another document.

19 37. Moments later, Sion then notified
20 Amega that AFA had received the agreement
21 with the Promotional Materials language.
22 She added, “[H]ope this *covers us well!* I
23 will work it out with Jeff.” (Emphasis added;
24 e-mail shorthand spelled out for clarity).

25 38. After meeting with Rudolph, Sion ad-
26 vised the Foundation’s CFO, Cynthia Pygin,
27 that Rudolph was inclined to cancel AFA’s
28 contract. She informed Pygin that, “[T]he
main problem is that it is an *anti-*
Darwin/creationist group.” (Emphasis add-
ed.) Sion expressed concern that AFA would

Becker Decl., Exh. No. 40, Sion Dep. Tr.,
Dep. Exh. No. 15, (10/5/09 e-mail from C.
Sion to J. Rudolph).

Becker Decl., Exh. No. 37, Sion Dep. Tr.,
Dep. Exh. No. 11, (10/5/09 e-mail from C.
Sion to S. Amega).

Becker Decl., Exh. No. 40, Dep. Exh. No. 15
(10/5/09 e-mail from C. Sion to C. Pygin)
[“Importance: High; Hi Cynthia, We are hav-
ing 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

11/12/09
11/27/09

1 sue the Center and asked Pygin to advise
2 whether the contract language was strong
3 enough to withstand a lawsuit.
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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 incli-
nation is to cancel their contract. I have a feel-
ing they will sue us. To make matters more
complicated, they were referred to us by Joel
Stromm as his wife sits on this crazy board ...
Is our language explicit enough for us to
w/stand a lawsuit if it comes? Here is the
email chain below as well as the press release,
our contract and policies attached. Do you
have time in the morning to discuss w/ Jeff
and me? Thanks so much, Chris.”]

14 39. The following morning, on October 6,
15 Pygin reported to Sion that she had spoken
16 to Rudolph and that he indeed had made the
17 decision to cancel the event. She asked Sion
18 to see her to discuss “*the approach* given the
19 *language in the contract.*” (Emphasis add-
ed.)

Becker Decl., Exh. No. 40, Sion Dep. Tr.,
Dep. Exh. No. 15, (10/5/09 e-mail from C.
Pygin to C. Sion).

20 40. Sion believed around this time that can-
21 cellation might lead to a lawsuit, and devel-
22 oped with Pygin a proposed letter to AFA
23 asking AFA to issue a public correction.
24

Becker Decl., Exh. No. 7, Pygin Dep. Tr.,
80:18-24 [“Q. Did she say that she felt that
would be the best approach in lieu of cancel-
ing the event, or words to that effect? A. I be-
lieve she said words to that effect. Q. Did she
tell you why she felt that way? A. She did say
she was concerned they would sue.”]

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26 41. The Defendants’ efforts in responding to
27 the issue triggered by the Smithsonian’s
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Becker Decl., Exh. No. 39, Sion Dep. Tr.,
Dep. Exh. No. 13 [“drama!!!! I have never

1 cease and desist demand had created an at-
2 mosphere of "drama," the likes of which Si-
3 on had never before witnessed.

seen anything like this."]; *id.*, Exh. No. 9, Si-
on Dep. Tr., 187:23-25 ["There was a lot of
discussion about a third-party event, the likes
of which I've never seen before."]; *id.*, 188:9-
11 ["The drama I'm referring to is the amount
of conversation that we had as an organization
about a third-party event."]

7 42. On the morning of October 6, Christián
8 Samper, SI/NHM director, wrote of his in-
9 tention to contact Rudolph, whom he per-
10 sonally knew, that day to share "lessons" the
11 Smithsonian had learned from the 2005
12 "Privileged Planet" incident.

Lepiscopo Decl., Exh. B, Bates No. SI000126,
(10/5/09 e-mail from C. Samper to R. Kre-
mer) ["Thanks Randall. Is the CSC where Jeff
Rudolph is the Director? If so, I know him
well through [American Association of Muse-
ums] and can reach out to him."]; *id.*, Bates
No. SI000118 and SI000121 ["I am reaching
out to Jeff Rudolph, the head of the CSC, and
sharing our lessons from the Privileged Plan-
et."]; Bates No. SI000157, SI000159,
SI000161 ["I plan to speak with the head of
the CSC today, but am sure they were caught
off guard. This is a typical move from the
Discovery Institute, similar to the problem we
had with the "Privileged Planet" several years
ago."]

21 43. Later that day, Defendants advised AFA
22 that they were cancelling their event on the
23 basis that AFA violated the contract. Ru-
24 dolph made the executive decision to cancel
25 it.

Becker Decl., Exh. No. 50, Dep. Tr., Sion
Dep. Tr., Dep. Exh. No. 45, (10/6/09 e-mail
from S. Sion to A. Davis) ["It has come to our
attention that in a press release *issued October
5, 2009 by the American Freedom Alliance*,
it is inferred [sic] that the California Science
Center as a Smithsonian Institute affiliate is
cosponsoring the Darwin Debates. Your event

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05/27/11

	<p>is a private event held on the California Science Center property but is not affiliated in any way with the California Science Center or the Smithsonian. <i>This press release has damaged our relationship with the Smithsonian and the reputation of the California Science Center.</i> 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 <i>at the California Science Center.</i>”; emphasis added.]; <i>id.</i>, Exh. No. 33, Rudolph Dep. Tr., Dep. Exh. No. 200 (Rudolph Decl., ¶ 13, 4:14-15) [“. . . I decided to cancel the event. . . .”]</p>
<p>44. Sion’s representation that AFA had issued a press release was erroneous. Defendants knew that the press release had been issued by the Discovery Institute, not AFA, because Amega’s initial e-mail advising of the Smithsonian’s communication with her identified the Discovery Institute as the “creationist” organization that had issued the press release. (<i>see, supra</i>, UMF ¶ 24) [“She advised Rudolph that Closter was “alarmed” <i>at a news release from</i> a “creationist organization, <i>the Discovery Institute</i>”” (em-</p>	<p><i>See</i> Plaintiff’s UMF ¶ 24, <i>supra</i>, incorporated herein)</p>

1 phasis added.)).

2 45. The following day, Dr. Jane Pisano, the

3 director of the nearby Natural History Muse-

4 um of Los Angeles County ("NHM/LAC"),

5 telephoned Rudolph to protest the ID film

6 screening. Just after the call, she told her col-

7 league, Dr. John Long, that Rudolph told her

8 he had cancelled the event "as being not in

9 line with their mission to educate the public

10 about science." This statement was strikingly

11 similar to the language used by the Smith-

12 sonian in the statement it issued in 2005 re-

13 garding "The Privileged Planet." *See, supra,*

14 (UMF ¶ 25) ["We have determined that the

15 content of the film is not consistent with the

16 mission of the Smithsonian Institution's sci-

17 entific research."]

Becker Decl., Exh. No. 24, Dep. Tr., Pisano
Dep. Exh. No. 106 (10/9/09 e-mail from J.
Long to E. Scott, pp. 1-2) ["Hi All, Jane O.
Pisano, (our CEO) *rang Jeff Rudolph the*
CEO of California Science Center last night
and had a chat to him *about the screening of*
the ID film at CSC's IMAX. *They had in fact*
cancelled the event as being not in line with
their mission to educate the public about sci-
ence, so it is not going ahead, we do not need
send a letter or respond any further. Genie, I
realize this is not the best outcome you may
have wanted but it is somewhat comforting of
us who are neighbours [sic] to the CSC to
know they have *pulled the plug on it alter*
finding out about it. Apparently the IMAX
was booking events without CSC knowing
about all of them, and *when they found* out
they immediately cancelled the event. It is still
up on the ID website and this is another issue
but should be changed soon (we hope). Well
done to everyone who became involved and
passionate about this issue, and especially to
Jody for drafting the excellent letter. I'm sure
that as a team of concerned scientists we can
work together in future if another ID or *pseu-*
doscience issue arises requiring our re-
sponse." emphasis added.]

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26 46. Sion recognized that scientists are hos-

27 tile to anything that challenges Darwinian

Becker Decl., Exh. No. 45, Sion Dep. Tr.,
Dep. Exh. No. 35; *id.*, Exh. No. 9, Sion Dep.

05/27/11

1 orthodoxy when she observed, "Scientists
2 sure get pissed off about this subject," mean-
3 ing Darwin.

Tr., 276: 22-277:2 ["And in your response to
the string of e-mails below that, you say, 'very
interesting. scientists sure get pissed off about
this subject.' What subject are you referring to
there? A. At this point, I believe I'm discuss-
ing Darwin."]

7 DATED: May _____, 2011

THE BECKER LAW FIRM

By: _____
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Attorneys for Plaintiff,
AMERICAN FREEDOM ALLIANCE

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