William J. Becker, Jr., Esq. (SBN 134545)
THE BECKER LAW FIRM
11500 Olympic, Blvd., Suite 400
Los Angeles, California 90064
Phone: (310) 636-1018
Fax: (310) 765-6328

Affiliated counsel with:
The Rutherford Institute
Post Office Box 7482
Charlottesville, VA 22906-7482

Attorneys for Plaintiff, AMERICAN FREEDOM ALLIANCE

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

AMERICAN FREEDOM ALLIANCE, a nonprofit corporation;

Plaintiff,

vs.

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

Defendants.

Case No. BC423687

BY FAX

Hon. Terry A. Green, Department. 14

REQUEST FOR JUDICIAL NOTICE [REPLY RE: DEMURRER TO CROSS-COMPLAINT]

[Reply Brief Filed Concurrently Herewith]

Complaint Filed:	10/14/2009
TAC Filed:	10/8/2010
Cross-Complaint Filed:	11/8/2010
Hearing Date:	2/23/2011
Hearing Time:	8:45 a.m.
Hearing Dept.:	14
Trial:	6/13/2011

Pursuant to Section 430.30 of the California Code of Civil Procedure, sections 452 and 453 of the California Evidence Code and California Rules of Court, rules 3.1113(l) and 3.1306(c), Plaintiff American Freedom Alliance requests that the Court take judicial notice of the

following document, which is attached as an exhibit hereto, in ruling on Plaintiff's Demurrer to Defendant California Science Center Foundation's Amended Complaint.

No.	Exhibit
1	Pl.Opp.to Demurrer filed July 6, 2010, p.7, lns. 8-11

I. THE COURT MAY TAKE JUDICIAL NOTICE OF COURT RECORDS IN THIS CASE.

When ruling on a demurrer, the trial court must consider not only the complaint itself, but also, "any matter of which the court is required to or may take judicial notice[.]" (Cal. Code. Civ. Proc. § 430.30(a).) Further, "a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless." (Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604.) Section 452 of the Evidence Code provides that it is appropriate for a court to take judicial notice of "[r]ecords of ... any court in this state" as well as "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Cal. Evid. Code§ 452(d) & (h).) Judicial notice is mandated for matters that comport with the requirements of Evid. Code§§ 452 and 453, provided that the requesting party: (1) gives adequate notice to the adverse party; and (2) includes sufficient information to enable the Court to take judicial notice. (See Cal. Evid. Code §§ 452, 453.)

Plaintiff's Opposition to the Demurrer of the Defendant California Science Center Foundation, filed on July 6, 2010, is contained within the Court's record on file in this lawsuit and is in every respect subject to judicial notice.

II. CONCLUSION

For the above reasons, the Court is respectfully requested to take judicial notice of the document identified.

DATED: February 12, 2011

THE BECKER LAW FIRM

By: /s/
WILLIAM J. BECKER, JR., ESQ.
Attorneys for Plaintiff,
AMERICAN FREEDOM ALLIANCE

THE BECKER LAW FIRM
11500 Olympic Blvd., Suite 400
Los Angeles, California 90064

EXHIBIT 1

William J. Becker, Jr., Esq. (SBN 134545)
THE BECKER LAW FIRM
11500 Olympic, Blvd., Suite 400
Los Angeles, California 90064
Phone: (310) 636-1018
Fax: (310) 765-6328

Attorneys for Plaintiffs,
AMERICAN FREEDOM ALLIANCE and ADRIAN (AVI) DAVIS

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Defendants.

Case No. BC423687

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

OPPOSITION TO DEMURRER TO SECOND AMENDED COMPLAINT OF CALIFORNIA SCIENCE CENTER FOUNDATION AND JEFFREY RUDOLPH; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; REQUEST FOR JUDICIAL NOTICE; EXHIBIT

Complaint Filed:	10/14/09
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TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD HEREIN:

COME NOW Plaintiffs AMERICAN FREEDOM ALLIANCE and ADRIAN (AVI) DAVIS) and respond to Defendants' Demurrer to the Second Amended Complaint ("SAC") as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

"The First Amendment to the United States Constitution provides that 'Congress shall make no law ... abridging the freedom of speech....' " *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1147. "This fundamental right to free speech is 'among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.' " *Id.* (citation omitted.) "Numerous decisions have recognized our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " *Id.* (citation omitted.) Plaintiffs, a non-profit educational 501(c)(3) organization and its president, entered into an agreement to lease the California Science Center's IMAX theater to screen the documentary science film *Darwin's Dilemma*, a film exploring the "Cambrian Explosion," described as the geologically-sudden appearance of dozens of major complex animal types in the fossil record without any trace of the gradual transitional steps Charles Darwin had predicted. The gravamen of this action is Plaintiffs' claim that, responding to pressure from their parent affiliate, the Smithsonian Institution, and activists opposed to intelligent design, Defendants engaged in an unconstitutional deprivation of Plaintiffs' First Amendment right of expression in a public forum by terminating the contract and cancelling the event.

Defendants California Science Center Foundation ("Foundation") and Jeffrey Rudolph, individually and in his official capacity[1] as President and CEO of the California Science Center Foundation ("Rudolph") ("collectively referred to herein as "Defendants" or "Foundation") have demurred to all causes of action asserted by Plaintiff Adrian (Avi) Davis ("Davis") on the ground that he lacks standing. Defendants have additionally demurred to the First Cause of Action

[1] Rudolph is also sued individually and in his official capacity as President and CEO of the Defendant California Science Center Foundation.

against Rudolph and the, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh causes of action.[2]

II. ARGUMENT

A. Plaintiff Adrian (Avi) Davis Has Standing To Pursue The Claims In This Case.

1. *Davis Has Standing To Assert Constitutional And Statutory Civil Rights Claims.*

Standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case or controversy requirement; and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction. *Elk Grove Unified School Dist. v. Newdow* (2004) 542 U.S. 1, 11-12. In recognition that "the First Amendment needs breathing space," the Supreme Court has relaxed the prudential requirements of standing in the First Amendment context. *See Broadrick v. Oklahoma* (1973) 413 U.S. 601, 612. Where, for example, a plaintiff raises an overbreadth challenge to a statute under the First Amendment, standing arises "not because [the plaintiff's] own rights of free expression are violated, but because of a judicial prediction or assumption that the [challenged statute's] very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612.

Indeed, the Supreme Court has acknowledged that "in First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech." *Eisenstadt v. Baird* (1972) 405 U.S. 438, 446. For example, in *Moose Lodge No. 107 v. Irvis* (1965) 407 U.S. 163, 168, the Court held that where a system of screening applicants for admission to the bar had a chilling effect upon the free exercise of the rights of speech and association of students who would be required to antici-

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[2] The Second Amended Complaint alleges causes of action for (1) Breach of Contract; (2) Breach of Implied Covenant of Good Faith and Fair Dealing; (3) Tortious Interference with Contract; (4) Violation of the First Amendment to the United States Constitution (Speech) (42 U.S.C. § 1983); (5) Violation of the First Amendment To The United States Constitution (Association) (42 U.S.C. § 1983); (6) Conspiracy (42 U.S.C. § 1985(3)); (7) Failure to Prevent Violations and Civil Conspiracy (42 U.S.C. § 1986); (8) Violation of the Fourteenth Amendment's Equal Protection Clause; (9) Violation of the Unruh Civil Rights Act (Civil Code §§ 51 and 51.5); (10) Violation of the California Constitution, Art. 1, §§ 2, 3 and 4; (11) Fraud (Intentional Misrepresentation, Deceit, Concealment); (12) Injunctive Relief; and (13) Declaratory Relief. The causes of action were inadvertently misnumbered. For purposes of the Demurrer, all references to the numbered causes of action are based on the numbering found on the caption page.

pate having to meet its requirements, the doctrine of "overbreadth" accorded standing to any individual potentially affected by the policy.

Ninth Circuit holdings in other First Amendment and civil rights contexts tend to extend standing to persons similarly situated with the actual victim of the rights deprivation. In *Maldonado v. Morales* (9th Cir. 2009) 556 F.3d 1037, 1044, a billboard owner filed a § 1983 action alleging that California's Outdoor Advertising Act, prohibiting all billboard advertising, except for on-premises advertising, violated his First Amendment and equal protection rights. The Ninth Circuit observed that "[a]lthough plaintiffs are generally limited to enforcing their own rights, standing is broader for facial First Amendment challenges." *Id.* Similarly, a plaintiff alleging that a statute is void for vagueness and overbreadth resulting in a chilling effect on speech has standing even if the law is constitutional as applied to him. *See S.O.C., Inc. v. County of Clark* (9th Cir. 1998) 152 F.3d 1136, 1142-43.

In *Canatella v. State of California* (9th Cir. 2002) 304 F.3d 843, an attorney sued the state of California, the state bar's board of governors, and related entities and individuals under § 1983, challenging the constitutionality of state bar statutes and a state rule of professional conduct on the ground that they violated his First Amendment right of expression and Fourteenth Amendment right of due process. The district court concluded that the attorney lacked standing because he could show no imminent threat of injury and would suffer harm by the threat of bar disciplinary sanctions in the future. The appellate court, however, concluded that he was affected by "continuing, present adverse effects" in his relationship with the bar which potentially would chill his constitutionally protected speech. *Id.*, at p. 853.

An analogous rule appears in the holding of *Allee v. Medrano* (1974) 416 U.S. 802, 820. In *Allee*, a labor union had standing as a named plaintiff to raise claims that a member of the union would have standing to raise. The Supreme Court stated unions may sue under § 1983 "as persons deprived of their rights secured by the Constitution and laws" and observed that "it has been implicitly recognized that protected First Amendment rights flow to unions *as well as to their members and organizers*." (Emphasis added.) The SAC alleges that Davis, as president of the AFA, entered into the contract at issue on behalf of AFA and himself (SAC, ¶ 9, 4:7-8) and thus was intimately involved in arranging the IMAX theater presentation. In fact, Davis would have been present at the event expressing his views, whether via the films he chose, or the communications to the public about the showing, or by comments he would make on site at the time.

AFA is the organization that contracted the IMAX theater, and it has First Amendment speech and expression rights. Davis, an officer and director of the AFA, is a person whose interests in presenting the films were and are identical to AFA's interests. Following the logic of *Allee,* AFA would have standing to assert the constitutional rights of its member and officer, Davis. The same rule would apply symmetrically: Davis can assert the rights of the AFA organization that he actively leads, especially where both he and the organization were intertwined at the same event. Accordingly, Davis is entitled to the same standing to vindicate the First Amendment rights of speech and assembly as the organization that he leads, in an event that he personally organized for the organization, and which he would have moderated.

2. *Davis Has Standing To Assert Contract Claims.*

In addition to claiming that Davis lacks standing in relationship to constitutional and statutory civil rights claims, Defendants assert that he was not a party to the contract and therefore lacks standing to sue for breach of contract and breach of the implied covenant of good faith and fair dealing. However, "[t]he rule is well settled that where a reading of a simple contract, however inartfully it may be drawn, discloses that it is executed for and on behalf of a principal, or discloses an intent to bind such principal, or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is, and this even in cases where the instrument is sufficiently clear to bind the agent." *Eddy v. American Amusement Co.* (1908) 9 Cal.App. 624, 627, 99 P. 1115, 1116. "It is no contradiction of a contract, which is silent as to the fact, to prove by parol that a party is acting therein, not on his own behalf, but for another. It does not release the agent, but *binds the principal in addition to the agent.*" (Emphasis added.) Davis was AFA's agent in executing the contract for its behalf as well as for his. However, on the facts pleaded, Davis has standing to assert contract claims against the Defendants, and any parol evidence is a matter for summary judgment, not demurrer. The function of a demurrer is to test the sufficiency of a pleading by raising questions of law. *Code of Civil Procedure* §589(a); *Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 90; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994. A demurrer is directed to the face of the pleading to which objection is made (*Sanchez v Truck Ins. Exch.* (1994) 21 Cal.App.4th 1778, 1787) and to matters subject to judicial notice (*Code of Civil Procedure* §430.30(a); *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157, 160). The only issue the Court may resolve on a demurrer to a complaint is whether the complaint, standing alone, states a cause of action.

Gervase v Superior Court (1995) 31 Cal.App.4th 1218, 1224. On a demurrer, the Court should rule only on matters disclosed in the challenged pleading. *Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881. The other parties' pleadings cannot dictate the outcome.

3. *Davis Has Standing To Assert A Claim For Violation Of The Unruh Act.*

As argued below, Defendants discriminated against AFA on the basis of their perceived belief that the fundraising event involved a religious message (creationism). For the reasons explained above, Davis' individual rights were therefore violated as well because he was prevented from hosting the event and expressing himself in connection with its topic. In light of the prudential standing rule that the First Amendment must be given breathing space, Davis possesses standing to assert a violation of his individual rights under state discrimination laws regardless of whether he possessed contractual rights. Defendants grossly inflate their argument by asserting that because Davis was not a party to the contract, he is prevented from asserting other claims (Demurrer, 4:8-9). Clearly, Davis. the president of AFA, a non-profit 501(c)(3) organization, was an intended beneficiary of the event's fundraising effort and enjoyed the same right to be free of governmental censorship as AFA.

Defendants' reliance on *Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, is misplaced. *Surrey* involved an individual who sued an online dating service individually and on behalf of the general public alleging that the service's differential pricing practices violated the Unruh Act and the Gender Tax Repeal Act. However, the plaintiff was not a subscriber to the dating service and therefore possessed no personal right upon which to allege discrimination. Unlike the *Surrey* plaintiff, Davis was a specific beneficiary of the contract with the California Science Center. His rights were neither remote nor abstract, but concrete and actual since he and his organization, unlike potential ticket-purchasers, were guaranteed to enjoy the benefit of the contract had it not been frustrated by Defendants' discriminatory actions and policies.

B. Plaintiffs' Second Cause Of Action For Breach Of Implied Covenant Of Good Faith And Fair Dealing States Sufficient Facts.

Plaintiffs' Second Cause of Action alleges Breach of the Implied Covenant of Good Faith and Fair Dealing. Defendants contend that Plaintiffs are required to plead a special relationship between the contracting parties. Defendants cite *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 687, as requiring the pleading of a special relationship to support the independent tort of breach of the implied covenant of good faith and fair dealing. In the contract context as pleaded here, the Supreme Court has nevertheless restated the settled principle that the covenant is im-

plied *in every contract*. "It has long been recognized in California that '[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.'" *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400.

In 2009, the Court of Appeal in *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1033, stated the "prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract." *Id.* at 1032; internal quotation and citation omitted. "The implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." (*Id.*, internal quotation and citation omitted). In 2004, the Court of Appeal followed the same rule and sustained a cause of action of breach of implied covenant of good faith and fair dealing in a case involving a dispute between a production company and a city's theater company. *See Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094. "In essence, the covenant is implied *as a supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." *McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 806.

The implied covenant imposes upon each contracting party both "the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own" and "the duty to do everything that the contract presupposes that he will do to accomplish its purpose." *McClain, supra,* 159 Cal.App.4th at 806 (citing precedent). The covenant protects only the express terms of the agreement and cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement. *McClain, supra,* 159 Cal.App.4th at 806 (citing precedent). "The precise nature and extent of the duties imposed under the implied covenant thus depend upon the purposes of the contract." *Id.*, citing precedent.

A cause of action for breach of the covenant can be and often is pleaded separately but is essentially a species of breach of contract. In *Pasadena Live*, the plaintiff production company alleged breach of the covenant of good faith and fair dealing in its complaint against the city for breach of contract, based on allegations that their written agreement provided the company

would advance $114,550 to the city for improvements to the city's amphitheater, and would have the opportunity to submit proposals for its productions in order to recoup its investment. The city later sent a letter to the company, however, barring the company from submitting any proposals. By sending the letter, the city failed to consider proposals submitted by the company, and therefore the city failed to do everything that the contract presupposed the city would do to accomplish the contract's purpose. The court held the complaint pleading these facts would survive demurrer as adequately pleading breach of the implied covenant of good faith and fair dealing. Here, the contract contemplated that Plaintiffs' fundraising event would take place at the IMAX Theater. Cancellation of the contract by Defendants on the preposterously flimsy pretext that publicity generated by a third party not subject to the contract had harmed Defendants' reputation with the Smithsonian frustrated Plaintiffs' right to the financial benefit it hoped to realize through the IMAX event.

C. Plaintiffs' Third Cause Of Action For Violation Of The First Amendment To The United States Constitution States Sufficient Facts.

1. *Summary of Argument*

Defendants acted under color of state law when they violated Plaintiffs' constitutional rights of free speech and assembly. Under the symbiotic relationship, close nexus, joint participation and entwinement tests for finding state action formulated by the United States Supreme Court, the complaint is sufficiently pled. Neither the Foundation, acting under color of law pursuant to *Food and Agrig. Code* §§ 3857 and 4101, et seq., nor Rudolph, in his private official and individual capacities, is protected by Eleventh Amendment immunity.

2. *Defendants Were Engaged In State Action Under Color Of Law When They Terminated The Contract With Plaintiffs.*

An essential requirement of a 42 U.S.C. § 1983 claim is that the Defendant acted under color of state law. *Flagg Bros. v. Brooks* (1978) 436 U.S. 149, 155. To state a claim under § 1983, a plaintiff must allege: (1) the defendant was acting under color of state law at the time the acts complained of were committed; and (2) the defendant deprived plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Briley v. State of Cal.* (9th Cir. 1977) 564 F.2d 849, 853. Conduct that is actionable under the Fourteenth Amendment as state action is also action under color of state law supporting a suit under § 1983. *Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 935. "[T]he party charged with the deprivation [of a right, privilege, or immunity secured by the Constitution or laws of the United States] must be a person

who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.* at p. 936. Although state action may be found in cases where there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself (*Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n.* (2001) 531 U.S. 288, 295), generally referred to as the close or joint nexus test, the Supreme Court has articulated a number of different factors or tests in different contexts for finding state action by a private party. See *Lugar v. Edmondson Oil Co., supra*, 457 U.S. at p. 939 [listing tests and court precedents]. In addition to the close/joint nexus test, of relevance to this lawsuit are the (1) symbiotic relationship test (*see, e.g., Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715); (2) joint participation test (*see e.g., Lugar v. Edmondson Oil Co., supra*, 457 U.S. 922; and (3) pervasive entanglement test (*see*, e.g. *Brentwood Acad., supra*, 531 U.S. 288. Under any one of these tests, the allegations of the SAC show a combination of activity, collaboration, conformity of purpose and inseparability capable of establishing state action under color of state law.

In this case, Foundation shares such a symbiotic relationship with the state, is so obviously in joint participation with the state and so pervasively entangled with state activity, there is no question but that Foundation and Rudolph acted under color of state law in cancelling Plaintiffs' fundraising event. As Rudolph has admitted:

> "The California Science Center and California Science Center Foundation *have a number of agreements that govern the relationship, including a lease relating to the IMAX Theater and a Joint Operation Agreement.*"

(Request for Judicial Notice ("RJN"), Decl.Rudolph, Exhibit "A." ¶ 6, 18-21, emphasis added.)

> "*Because the Foundation and the California Science Center have spent considerable resources to build a reputation as a highly regarded and respected scientific institution*, we are very attentive to ensure that private groups do not appropriate the reputation of the California Science Center for their own benefit."

(*Id.*, ¶ 8, 3-6, emphasis added.)

Entanglement (*Brentwood Academy*) appears conspicuously by Rudolph's role as president of both the Center and the Foundation exercising powers indistinguishably benefiting the Center of the Foundation jointly. Additionally, the Center and Foundation operate jointly in the

form of a public-private partnership. (RJN, Exhibit "A," ¶ 6, 2:9-10, submitted in support of the Defendant California Science Center Foundation's Opposition to the Emergency Relief Request by American Freedom Alliance ["The California Science Center and the Foundation is one of the oldest and most successful public-private partnerships in the State of California."]).

In the context of free speech violations, a New York district court decision is instructive. In *People for the Ethical Treatment of Animals v. Guiliani* (S.D.N.Y. 2000) 105 F.Supp.2d 294 ("PETA decision"), the City of New York formed a public-private partnership with organizers of a public art exhibit called the CowParade New York City 2000 ("CowParade") in which approximately 500 life-size fiberglass sculptures of cows painted, decorated or otherwise altered artistically, were placed throughout the city. Individuals and businesses were solicited to become sponsors of CowParade by "adopting" a cow. Plaintiff, the animal advocacy organization People for the Ethical Treatment of Animals ("PETA"), submitted two cow designs, one of which was rejected by a committee set up to screen inappropriate designs submitted for the event. The cow design submitted by PETA that was rejected by the committee divided the cow into sections in a manner intended to resemble a butcher shop chart showing the cuts of meat derived from a cow. Within each section was a statement or quotation concerning the health and ethical problems associated with the killing of cows for food. In its suit for a preliminary injunction, PETA alleged, as Plaintiffs herein have, that defendants violated 42 U.S.C. § 1983 and PETA's free speech rights under the First and Fourteenth Amendments of the United States Constitution as well as the state constitution, claiming that CowParade breached its agreement with PETA by not allowing it to display both cows and that the breach should be remedied by specific performance and damages.

The district court found the "contractual agreement between the City and the CowParade Organizers, coupled with the significant regulation and control over the event that was exercised by the City, created a sufficient link between the public and private entities, placing the CowParade activities under the umbrella of state action sufficient to satisfy the requirements of 42 U.S.C. § 1983." *Id.* The PETA decision relied on *Burton v. Wilmington Parking Auth.* (1961) 365 U.S. 715, and applied the symbiotic test to determine whether the relationship between the city and the event partner in its public-private partnership was sufficient to attribute state action to the event's organizers. Under the *Burton* test, where "[t]he State has so far insinuated itself into a position of interdependence with [a private entity] ... it must be recognized as a joint par-

ticipant in the challenged activity, which, on that account, cannot be considered to have been ... purely private...." In the PETA case, the city and the event organizers conceded they formed a public-private partnership giving rise to a symbiotic relationship. Once the symbiotic test was satisfied, the court moved on to analyze whether PETA's First Amendment rights were violated.[3]

The gravamen of Defendants' argument is that Plaintiffs have failed to sufficiently allege a close enough relationship between the Center and Foundation to establish under any facts that Foundation/Rudolph acted under color of state law. Their argument crumbles under the weight of tortured reasoning and Rudolph's own contradicting admissions: "The Science Center includes an IMAX theater, *which is leased by and operated by the Foundation.*" (RJN, Exhibit "A." ¶ 4, 1:26-27, emphasis added.) "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.*, ¶ 6, 10-13, emphasis added.) "The California Science Center and California Science Center Foundation *have a number of agreements that govern the relationship, including a lease relating to the IMAX Theater and a Joint Operation Agreement.*" (*Id.*, ¶ 6, 18-21, emphasis added.) "*Because the Foundation and the California Science Center have spent considerable resources to build a reputation as a highly regarded and respected scientific institution*, we are very attentive to ensure that private groups do not appropriate the reputation of the California Science Center for their own benefit." (*Id.*,¶ 8, 3-6, emphasis added.)

Plaintiffs have alleged substantial facts supporting the presence of a symbiotic relationship (e.g., the Foundation's concern for the Center's reputation with the Smithsonian). SAC, ¶¶ 18-25. Defendants stretch mightily to claim first that Rudolph, wearing the hats of president/CEO of the Center and president of the Foundation, did *not* act for the benefit of the Center in executing the decision to cancel the event as alleged in the complaint and as acknowledged by Rudolph himself ("I decided to cancel the event scheduled for October 25, 2009 and Chris Sion

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[3] Defendants here have not challenged the sufficiency of the First Amendment allegations. Indeed, they have neither argued that the Center and/or its IMAX Theater are not public fora for purposes of establishing a requirement of viewpoint neutrality enforcement, nor that they are exempt from the requirement of providing public access to expressive activity at the Center or the IMAX Theater here at issue. Accordingly, it must be conceded here that Plaintiff's First Amendment claims have been sufficiently alleged, and that the Court is not required to perform a First Amendment forum analysis.

sent an email to the AFA with that direction."; RJN, Exhibit "A." ¶ 13, 4:14-15)), but then to claim the Foundation did not act under color of law.

Lebron v. National Railroad Passenger Corp. (1995) 513 U.S. 374 analogizes here. In *Lebron*, the Supreme Court held Amtrak, which was created to achieve government objectives, could be deemed a federal entity for purposes of the First Amendment regardless of its statutory designation as a "private" corporation. Amtrak was held to be a government agency or instrumentality for the purpose of individual rights guaranteed against the Government by the Constitution. *Id.* at 400. In *Brentwood Academy*, *supra*, the Supreme Court held that a nominally private interscholastic athletic association comprised primarily of public schools was a state actor for purposes of claims under § 1983 due to a "substantial entwinement" with state regulatory functions. 531 U.S. 288, 302-03.

In *Clark v. Placer County* (1996) 923 F.Supp. 1278, a private, non-profit corporation organized under California laws and operating a county fair was treated as the county government for § 1983 purposes. *Id.*, at 1283. Recognizing that a statutory scheme (*Government Code* §§ 2900, *et seq.*) ensured the "creation, maintenance and promotion of county fairs," the court found that "nonprofit corporations running county fairs are agents of the county." The court noted that while county fairs do not constitute a central governmental function, "all that is required for the purpose of § 1983 liability under *Lebron* is that the corporation have a 'public statutory mission.'" *Id.* at p. 1284. The court found sufficient similarities with *Burton v. Wilmington Parking Authority*, *supra*, to conclude the private fair operator to be a state entity for purposes of § 1983 liability. The parallels it recited apply equally here:

> Here, as there, the underlying relationship involved the leasing of public property. Here, as there, the relationship was specifically authorized by state statute. Here, as there, the income received from the private party was to be used exclusively for the maintenance of public land. Here, as there, the success of the public function ... depended on the financial contributions of the private party.

Id. at p. 1286. Notwithstanding Foundation's contrary assertion, under a host of cases, the Foundation is without any doubt a state actor subject to liability under § 1983 for violating Plaintiffs' rights.

This action is distinguishable from cases cited by Defendants. Both *Stark v. Seattle Seahawks* (W.D. Wash. 2007) WL 182017 and *Gallagher v. Neil Young Freedom Concert* (1995) 49 F.3d 1442 involved security companies engaged in pat-down searches of patrons at public stadi-

ums. The courts analyzed the relationship under the "joint activity" and "public function" tests, neither of which pertains here, holding that pat-down searches conducted by private actors do not constitute state action because the state's involvement in security at public events was not sufficiently tied to the practice of conducting pat-down searches so as to show sufficient state action directly benefiting the state. These decisions would be analogous to this situation if AFA had subcontracted services out and was swept into a constitutional challenge by aggrieved patrons caused by AFA's subcontractor. Center and Foundation have a continuing, ongoing, permanent and inseparable connection; the Foundation's very existence depends on the Center, and the Center relies on the Foundation specifically because it "may require individual skills not generally available in state civil service to support specialized functions, such as exhibit maintenance, and educational and guest services programs, including animal care and horticulture." *Food and Arig. Code* § 4101.4, subd. (a). This case can further be distinguished from *Stark* and *Gallagher* in that the pat-down search policy was neither motivated nor compelled by any state law or state actor but derived solely from the activity of the private entities contracting with the security firm (the NFL and the Seattle Seahawks). Moreover, the city did not seek the policy or benefit from it. In this case, the Foundation acted on behalf of and as the agent for the Center (e.g., Joint Operation Agreement for IMAX theater). As Rudolph explains, the Foundation and the Center have spent considerable resources to build a reputation as a highly regarded and respected scientific institution and are very attentive to ensure that private groups do not appropriate the reputation of the Center for their own benefit. (RJN, Exhibit "A," *supra*, ¶ 8, 3-6.)

Another decision cited by Defendants, *Lansing v. City of Memphis* (2000) 202 F.3d 821, involving time, place and manner restrictions on a public street, is even more distinguishable. There, "Memphis in May" festival organizers leased city property to conduct its annual festival. A street preacher challenged restrictions on his ability to proselytize on a public street near the city park, where the festival was situated. Applying the "public function" and "state compulsion" tests, the court found there to be no evidence that the private festival had exclusive control of the streets

The evidence in this case shows that the contract was entered into by the Foundation as a partner and agent of the Center. *Food & Agric. Code* § 4101.4, subd.(b), provides that the Foundation's relationship with the Center is exclusive and subject to state control:

> "Notwithstanding any other provision of law, the California Science Center may enter into a personal services contract or contracts with the California Science Center Foundation without a competitive bidding process. These contracts shall be subject to approval by the State and Consumer Services Agency and the Department of General Services and be subject to all state audit requirements."

Thus, the Foundation acts as the exclusive agent of the Center. Even more compelling to show that the Foundation is an agent for the Center is the nature of its partnership arrangement. "The California Science Center and the Foundation is one of the oldest and most successful public-private partnerships in the State of California." (RJN, Exhibit "A," Decl.Rudolph ¶ 6, 2:9-10.) "The California Science Center and California Science Center Foundation have a number of agreements that govern the relationship, including a lease relating to the IMAX Theater and a Joint Operation Agreement." (RJN, Exhibit "A," Decl. Rudolph ¶ 6, 2:18-21.) Far from being a completely separate and autonomous contractor, such as a security firm contracting with the Center's IMAX theater, or an individual unaffiliated with a municipal event and outside the scope of the private event sponsor's regulatory control, the Foundation is, for all intent and purpose, the *de facto* Center, lacking only the responsibility to maintain the physical facilities. This is particularly evident through Rudolph's dual role as president of both the Center and the Foundation. Accordingly, under the symbiotic relationship, joint participation and pervasive entanglement tests, there can be no doubt that the Foundation is a state actor that engaged in state action under color of state law in restricting Plaintiffs' freedom to put on its fundraising event, thereby engaging in a constitutionally protected right of expression and assembly.

3. *Defendants Are Not Entitled To Invoke Eleventh Amendment Immunity Protection.*

The Ninth Circuit recently made clear that private entities and their officers enjoy no Eleventh Amendment immunity. In *Del Campo v. Kennedy* (2008) 517 F.3d 1070, a district attorney's office[4] contracted with a private entity to enforce collections on bad checks. The court held that "[u]nder the law of this circuit, an entity invoking Eleventh Amendment immunity bears the burden of asserting and proving those matters necessary to establish its defense." *Id.* at 1075. "[O]ur cases confirm that private entities have no place within the sovereign immunity legal framework." *Id.* at 1076. "[W]e should be extremely hesitant to extend this fundamental

[4] "DAs serve both state and county functions: They act as state officials, and so possess Eleventh Amendment immunity, when "acting in [their] prosecutorial capacity." *Del Campo v. Kennedy*, 517 F.3d 1070 at 1073.

and carefully limited immunity to private parties whose only relationship to the sovereign is by contract." *Id.* "Although we hold that private entities cannot be arms of the state, we emphatically do not hold that they cannot act under color of state law for the purposes of 42 U.S.C. § 1983 and similar statutes." *Id.* at 1081, fn. 16. "The usual issue in our cases has been whether a governmental entity is an arm of the state or is better characterized as part of another level of government. Our inquiry has been careful, and we have often declined to extend immunity even to governmental entities." *Id.* at 1076-1077.

The *Del Campo* court referred to a 7th Circuit decision, *Takle v. Univ. of Wisconsin Hosp. and Clinics Auth.* (7th Cir. 2005) 402 F.3d 768 concerning a privatized state hospital originally created by statute. *Id.* at 1079. "The hospital still had many ties to the state, which, as is significantly similar in this case, owned its buildings and provided funds for its medical school, *among other things*. *Id.*, citing *Takle*, 402 F.3d 768 at pp. 770-71 (emphasis added). The court stated, "*Even such public/private 'hybrid entities' ... [are] not entitled to sovereign immunity.*" *Id.* (Emphasis added.)

This language from *Del Campo* reflecting on the *Takle* case could not be more hostile to the arguments Defendants have similarly raised here, that a private entity is entitled to sovereign immunity from constitutional liability though not a government agency. As that court articulated, spotting the double-standard:

> Connections to the state *even as substantial as those* of the University of Wisconsin Hospital's did not require that privatization be treated as a farce in which the privatized entity enjoys the benefits both of not being the state and so being freed from the regulations that constrain state agencies, and of being the state and so being immune from suit in federal court.

Id. (Internal quote marks omitted; emphasis added.) As stated in *Del Campo*, the public-private partnership form does not allow Defendants to have it both ways.

D. Plaintiffs Fifth And Sixth Causes Of Action For Conspiracy And Failure To Prevent Violations And A Conspiracy Are Sufficiently Pled.

Plaintiffs have alleged a civil conspiracy between and among the Defendants to violate Plaintiffs' constitutional rights by engaging in the prior restraint of Plaintiffs' speech relating to intelligent design. Defendants disingenuously assert that Plaintiffs have merely alleged that Defendants entered into an agreement. In fact, the SAC details factual allegations showing Defendants breached their contract to surreptitiously accomplish a violation of Plaintiffs' First Amendment rights. As detailed in this brief, the SAC's alleged facts show the gravamen of this case: a

behind-the-scenes effort, consistent with pressure placed on the Defendants by the Smithsonian and other anti-intelligent design activists, to prevent discussions of intelligent design at a science museum. The Center's vice-president of communications expressly stated her belief that these discussions were religious in nature and that speech about them should be excluded. The facts alleged amply show that invidiously discriminatory animus animated Defendants' action and that the conspiracy was aimed at interfering with Plaintiffs' First Amendment rights of speech and assembly.

E. Plaintiffs' Ninth Cause of Action For Violation Of The Unruh Civil Rights Act States Sufficient Facts.

Civil Code § 51, subd. (b), provides:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

Civil Code § 51.5, subd. (a), provides in relevant part:

> "No business establishment of any kind whatsoever shall discriminate against, ***boycott or blacklist***, or refuse to buy from, ***contract with*** ... any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics."[5]

Defendants dubiously assert that Plaintiffs have not alleged intentional discrimination as a requirement of a cause of action for violation of *Civil Code* §§ 51 and 51.5, advancing their own subjective interpretation of evidence in a manner suited for summary judgment, not demurrer. Plaintiffs are not required to prove intent, only to allege it, to defeat a demurrer. A demurrer does not test the sufficiency of the evidence or other matters outside the pleading to which it is directed. *Four Star Elect. V. F & H Constr* (1992) 7 Cal.App.4th 13751379. It challenges only the legal sufficiency of the affected pleading, not the truth of the factual allegations in the pleading or the pleader's ability to prove those allegations. *Cundiff v. GTE Cal., Inc.* (2002) 101

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[5] *Civil Code* § § 51.5, subd. (c) provides: "(b) As used in this section, "person" includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company."

Cal.App.4th 1395, 1404-1405. A demurrer is not the proper procedure for determining the truth of disputed facts, such as the correct interpretation of the parties' agreement or its enforceability. *Fremont Indem. Co. v. Frement Gen. Corp.*(2007) 148 Cal.App.4th 97, 114-115. The Court may not make factual findings on a demurrer, including "implicit" findings. *Mink v. Maccabee*(2004) 121 Cal.App.4th 835, 839. Plaintiffs have sufficiently alleged facts giving rise to a cause of action for violation of the Unruh Civil Rights Act.

The SAC specifically alleges: "Defendants' actions constitute intentional discrimination against Defendants on the basis of Defendants' perceived religious speech." (SAC ¶ 93, 26:1-2.) The facts supporting the allegations of intentional discrimination based on a belief that intelligent design is a religious-based doctrine are adequately pled. (SAC, ¶ 18, 6:18-27; 7:1-9). The SAC alleges, for instance, that the Center's vice-president for communication contacted Defendant Rudolph prior to the cancellation of the event to advise him that the Smithsonian Institution, with which it is a west coast affiliate museum, "was alarmed" that a "creationist" organization had publicized Plaintiffs' fundraising event, implying that the Center "officially supports the creationist film," and that it wanted action taken to disassociate it from the event (SAC, ¶ 18, 6:24-26).[6] The SAC additionally alleges that the Smithsonian had "pulled the plug" on a similar event. (SAC, ¶ 18; 6:27, 7:1-2). The vice-president then proceeds to advise Rudolph that it isn't a science center's "place" to "debate Darwinism." (SAC, ¶ 18; 7:7-8). As alleged, the very next day the event was cancelled. A rational inference is easily drawn from these facts that the Defendants were animated by a belief that the theory of intelligent design is religious "creationism" by another name and inappropriately debated at a science center resulting in discrimination.

F. Plaintiffs' Tenth Cause Of Action For Fraud States Sufficient Facts.

1. *Plaintiffs Have Sufficiently Alleged Facts Showing Reasonable Reliance Related To Defendants Deceit And Concealment.*

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns* (1976) 427 U.S. 347, 373. The issue presented under Plaintiffs' Fourth Cause of Action for Fraud is whether the loss of AFA's First Amend-

[6] "Creationism has been defined as: (1) the doctrine that matter and all things were created, substantially as they now exist, by an omnipotent Creator, and not gradually evolved or developed: (2) (sometimes initial capital letter) the doctrine that the true story of the creation of the universe is as it is recounted in the Bible, esp. in the first chapter of Genesis; and (3) the doctrine that God immediately creates out of nothing a new human soul for each individual born. Dictionary.com, http://dictionary.reference.com/browse/creationism, accessed July 3, 2010.

ment freedom by entities and individuals acting under color of law is attributable to Defendants' scheme to deceive Plaintiffs into believing that they had committed a contractual breach when they had not (and thus conceal its civil rights violation) and to conceal their true reason for cancelling the event. Plaintiffs were deceived when they were told that they had breached the contract by failing to obtain Defendants' approval prior to issuing a press release that appeared on a third party's web site. In essence, Defendants cancelled the contract on the basis of facts they knew to be false.

Fraud is either actual or constructive. *Civil Code* § 1571. One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for *any damage* which he thereby suffers. *Civil Code* § 1709. A deceit is either: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; (3) The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact (concealment); or, (4) A promise, made without any intention of performing it. *Civil Code* § 1710.

By its terms, deceit may be characterized by any one these definitions, not by a combination of them. The plain language of §§ 1709 and 1710 shows reliance where Plaintiffs were induced to alter their position to their injury or risk. Here, Plaintiffs have alleged facts sufficient to show that Defendants willfully deceived Plaintiffs with the intent of inducing it to *alter their position to their injury* (loss of First Amendment freedom to present their message concerning intelligent design in a public forum) *and risk* (loss of money they expected to generate through donations from major donors at the fundraising event and requirement that it they locate on short notice an alternative venue suitable to show the 3-D IMAX film). *Civil Code* § 1709. In fact, Defendants succeeded in inducing Plaintiffs to alter their position to their injury by the loss of their First Amendment freedom to present their message concerning intelligent design in a public forum. Defendants also succeeded in inducing Plaintiffs to alter their position to the risk of losing donations from those expected to attend the event. By any definition of deceit, Plaintiffs were forced to alter their position.

Courts give the words of the statute "a plain and commonsense meaning" unless the statute specifically defines the words to give them a special meaning. *MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082. "If the statutory lan-

guage is clear and unambiguous, *our task is at an end*, for there is no need for judicial construction." *Id.* at p. 1083. "In such a case, there is nothing for the court to interpret or construe." *Id.* Section 1710 specifically defines "deceit." One definition of deceit is "[t]he suggestion, as a fact, of that which is not true, by one who does not believe it to be true." § 1710 (1). Here, the Complaint alleges that Defendants represented as fact that Plaintiffs had breached the contract, knowing that to be false, when the truth was that Defendants did not wish to be associated with an intelligent design event once informed of the nature of the event and Defendants had been admonished by Smithsonian officials for entering into the agreement. (*See, e.g.*, SAC, ¶ ¶ 18-20, 31, 107-108.) Another definition of deceit is "[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." § 1710(2). The Complaint alleges that Defendants cancelled the event based on a provision of the contract requiring Plaintiffs to obtain prior approval of publicity while objecting to the content of publicity Plaintiffs did not prepare or publish. Defendants had no reasonable ground for believing that Plaintiffs were responsible for generating false or misleading publicity because Plaintiffs had publicized the event accurately on their own web site and did not control the Discovery Institute's publicity. Moreover ***Defendants would have been unaware of any collaboration between Plaintiffs and the Discovery Institute at the time they cancelled the contract.*** A third definition of deceit, which describes concealment, is "[the] suppression of a fact, by one who ... gives information of other facts which are likely to mislead for want of communication of that fact." *Civil Code* § 1710(3). The Complaint alleges that Defendants suppressed the fact that they had received complaints from numerous parties, including the Smithsonian, about the event's intelligent design theme, which they were acting on. (e.g., SAC, ¶ ¶ 23-25).

The SAC's allegations clearly demonstrate actionable deceit in this case under the plain meaning of deceit derived from § 1710.

2. *Plaintiffs Have Sufficiently Alleged Facts Showing Forbearance Related To Defendants Deceit And Concealment.*

"California law has long recognized the principle that induced forbearance can be the basis for tort liability." *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 174. Notably, "[f]orbearance -- the decision not to exercise a right or power ... [is sufficient] to fulfill the element of reliance necessary to sustain a cause of action for fraud or negligent misrepresentation." *Id.* at 174 (citations omitted). This concept derives from the principle, declared by the Restate-

ment of Torts (Second) § 525, that "[o]ne who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." Defendants made representations containing false reasons for cancelling the event and terminating the contract, hoping Plaintiffs would believe were being seriously proposed. The false representations induced Plaintiffs to forbear from taking further action, such as appealing to the president, Rudolph, directly or the board to secure the venue. Defendants made the false statements to cause Plaintiffs to *not* attempt to exhibit the film and to *not* take other steps to persuade Defendants to fulfill their promise.

Plaintiffs are unable to mitigate the loss of their First Amendment right of free speech constituting irreparable injury. Plaintiffs suffered an immediate loss of this right and irreparable injury as a direct result of Defendants' deception and the concealment of their ulterior basis for backing out of the contract. The SAC alleges Defendants sought to cancel the contract only after they had been contacted by the Smithsonian Institution about concerns that the event was being promoted as one sponsored by Defendants. The Smithsonian sought to distance itself from an event mentioning the subject of intelligent design, as it had previously done at a similar event, and thus pressured its affiliated museum to do the same. Once it learned of the Smithsonian's objection to an intelligent design film being shown at its affiliate science center, Defendants refused to perform under the contract.

G. Plaintiffs' Eleventh Cause Of Action For Injunctive Relief States Sufficient Facts.

"The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty-and thus a good unto itself-but also is essential to the common quest for truth and the vitality of society as a whole." *Balboa Island Village Inn, Inc. v. Lemen, supra,* 40 Cal.4th at 1147. "Under our Constitution, 'there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas.' " *Id.* (Citation omitted.) "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns, supra,* 427 U.S. 347 at 373. Plaintiffs have alleged facts showing that unless Defendants are permanently enjoined from engaging in conduct intended or having the effect of suppressing discussion concerning intelligent design, they will persist in restricting the right of Plaintiffs to engage in protected expressive activity at the Center in the future.

To obtain a permanent injunction, a party must show: (1) that he has prevailed in establishing the violation of the right asserted in his complaint; (2) there is no adequate remedy for the violation of this right; and (3) irreparable harm will result if the court does not order injunctive relief. *Alabama v. U.S. Army Corps of Engineers* (11th Cir. 2005) 424 F.3d 1117, 1128. The standard for a permanent injunction is essentially the same as for a preliminary injunction, except that the plaintiff must show actual success on the merits instead of a likelihood of success. *Amoco Production Co. v. Village of Gambell* (1987) 480 U.S. 531, 546, fn.12.

In this case, Plaintiffs have alleged a violation of their First Amendment rights due to efforts by Defendants to censor their program relating to intelligent design. E-mails exchanged between Defendants' employees suggest that they believed Plaintiffs' event should be cancelled due to the perception that it was a "creationist" event: "A science center should not even be asked to partner with any group associated with debating Darwinism - it's not our place." (SAC, ¶ 18, 7:7-8). In *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 61, 66-67, the United States Supreme Court concluded that letters from a state commission on morality advising book distributors that the commission's members considered certain books objectionable for sale to youths constituted "informal censorship" in violation the First Amendment even though the books were not banned and the commission lacked authority to apply legal sanctions. The court concluded that the practice amounted to a "system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned." *Bantam* at 70, quoted in *Smith v. Novato Unified School District* (2007) 150 Cal.App.4th 1439, 1463. Here, Plaintiffs believe they have sufficiently alleged entitlement to relief under § 1983 for violation of its First Amendment rights.

While it is true that injunctive relief is, by its very terms, a form of relief sought, it is common in a case alleging violation of the First Amendment to assert it as a cause of action in order to focus the Court's attention on the prospective relief being sought. Where the form of a pleading does not prejudice the opposing party, courts will view it as harmless "form over substance." *See, e.g., Weiss v. Chevron, U.S.A., Inc.* (2d Dist.1988) 204 Cal.App.3d 1094, 251 (trial court could consider evidence not initially included in defendant's motion for summary judgment, but submitted together with its reply to plaintiff's opposition); *Motor City Sales v. Superior Court* (1973) 31 Cal.App.3d 342, 346 (relating to fictitious party pleading). It is only neces-

sary that Plaintiffs assert a cause of action that gives rise to injunctive relief and to pray for such relief, yet as a matter of form, no harm and no prejudice to the moving party results from separating it into a section labeled "Cause of Action." Holding Plaintiffs to a requirement that equitable relief sought may not be expressed in the form of a cause of action would "exalt form over substance." *Id.*

If not permanently enjoined, Defendants will continue to engage in the practice of prior restraint relating to intelligent design and other topics of which it is ignorant or to which it otherwise objects. Plaintiff has adequately alleged the injunctive relief sought, and presenting it in the form of a Cause of Action does not prejudice Defendants.

III. CONCLUSION

The Court should overrule the demurrer in its entirety. Plaintiffs are entitled to amend the Complaint should the Court sustain any portion of the demurrer.

DATED: July 4, 2010

THE BECKER LAW FIRM

By: _____
WILLIAM L. BECKER, JR., ESQ.
Attorneys for Plaintiffs, AMERICAN FREEDOM ALLIANCE and ADRIAN (AVI) DAVIS

PROOF OF SERVICE

I, William J. Becker, Jr., declare that:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 11500 Olympic Blvd., Suite 400, Los Angeles, California 90064.

On February 14, 2011, I served the foregoing documents:

REQUEST FOR JUDICIAL NOTICE [REPLY RE: DEMURRER TO CROSS-COMPLAINT]

The above-referenced document was served on:

Allan S. Ono, Esq. Erik Katz, Esq. Deputy Attorney General Natural Resources Law Section OFFICE OF THE ATTORNEY GENERAL 300 S. Spring Street, 11th Floor North Tower Los Angeles, CA 90013 E-mails: allan.ono@doj.ca.gov; Eric.Katz@doj.ca.gov	Attorneys for Defendants, **California Science Center** and **Jeffrey Rudolph in his official capacity as president and CEO of the California Science Center**
Patrick W. Dennis, Esq. James Zelaney, Esq. GIBSON, DUNN & CRUTCHER Los Angeles Office 333 South Grand Avenue Los Angeles, CA 90071-3197 E-mails: PDennis@gibsondunn.com; JZelenay@gibsondunn.com	Attorneys for Defendants, **California Science Center Foundation** and **Jeffrey Rudolph in his official capacity as President of the California Science Center Foundation**

☒ **BY E-MAIL:** I caused such document to be e-mailed as pdf attachments pursuant to agreement of counsel to the addressees shown above.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 14, 2011, at Los Angeles, California.

/s/
William J. Becker, Jr.