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[EXEMPT FROM FILING FEES – GOV. CODE § 6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

BC 423687

AMERICAN FREEDOM ALLIANCE, a nonprofit corporation,

Plaintiff,

v.

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.

DEFENDANTS CALIFORNIA SCIENCE CENTER AND JEFFREY RUDOLPH IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS PRESIDENT AND CEO OF THE CALIFORNIA SCIENCE CENTER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION ON PLAINTIFF'S THIRD AMENDED COMPLAINT

[Notice of Motion and Motion; Separate Statement of Undisputed Material Facts; Appendix of Non-California Authorities; Declaration of C. Tateishi; Declaration of Allan S. Ono; Declaration of Jeffrey Rudolph; and [Proposed] Order filed concurrently herewith]

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff, American Freedom Alliance ("AFA"), contends that it contracted for the use of the IMAX facility located on the grounds of the California Science Center for a private event featuring two films intended to stimulate scientific debate between opposing views on evolution and intelligent design ("Event"). AFA now alleges that defendants breached their contractual commitment for use of the venue in willful violation of its civil rights. But AFA's reflexive distrust stemming from what it views as a pervasive bias against intelligent design cannot, by itself, support its claims for Constitutional violations. Plaintiff has no factual support for any of these claims and as set forth below, defendants California Science Center ("Center") and Jeffrey Rudolph, in his individual and official capacity as President and CEO of the Center ("Rudolph", and collectively with the Center, "Center Defendants"), are entitled to judgment as a matter of law for at least the following reasons:

1. The Center Defendants cannot have breached the alleged Event contract because they were not parties to an Event contract with AFA, did not engage AFA in any contract negotiations, or even have the ability to contract with AFA (or any other private party) for the rental of the IMAX facility;

2. AFA has not filed a statutorily required claim for damages against the Center with the California Victim's Compensation and Government Claims Board and the time for doing so has long passed;

3. Even were the Center Defendants somehow in breach of an Event contract with AFA, they nevertheless possess Eleventh Amendment immunity from lawsuits which assert alleged federal civil rights violations;

4. Even were the Center Defendants somehow in breach of an Event contract with AFA, there is no evidence that the Center Defendants intended to discriminate against AFA; and,

5. Even if the Center Defendants somehow intended to discriminate against AFA, there is no possible threat of future injury to AFA by the Center necessary to support injunctive

relief because the Center Defendants lack the ability to contract with private parties for the use of the IMAX facilities (i.e., the Center Defendants will never have the future opportunity to contract with AFA).

STATEMENT OF FACTS

I. THE CENTER

The Center, also known as the is the Sixth District Agricultural Association, was created by the California Legislature pursuant to the Food and Agriculture Code, Division 3, Part 3. (Sep. Stmt. 1; Food & Agr. Code, §§ 3801 et seq.) The Center is "a state institution" organized within "the State and Consumer Services Agency and is deemed a tax-exempt organization as an instrumentality of this state in accordance with Section 23706 of the Revenue and Taxation Code." (Sep. Stmt. 2; see also Food & Agr. Code, § 3953.) In its recognized capacity as a State institution, the Legislature has, among other things, specifically authorized the Center to establish a space-age museum, and to create an independent California African-American History Museum. (Food & Agr. Code, §§ 4102, 4103, 4104.) Today, the Center is the West Coast's largest interactive science center and museum.

II. THE RELATIONSHIP BETWEEN THE CENTER AND THE FOUNDATION

Defendant California Science Center Foundation ("Foundation") is a non-profit section 501(c)(3) organization that raises funds to support exhibits and educational programs featured at the Center. (Sep. Stmt. 4.) The Foundation also leases the Exposition Park IMAX theater from the Center pursuant to a 25 year lease agreement. (Sep. Stmt. 5.) The Foundation and its employees are solely responsible for operations at the IMAX and have the exclusive authority to contract with third parties for private events held at the venue. (Sep. Stmts. 7, 8, 9.)

III. THE AFA CONTRACT AND ITS CANCELLATION

On or about September 24, 2009, AFA approached Foundation employees to ascertain the availability of the IMAX facility for a proposed October 25, 2009 private fund raising event entitled "We Are Born of Stars IMAX Screening" ("Event"). (Sep. Stmt. 11.)

The Event was to consist of the screening of two films. The first film entitled "We Are Born of Stars (3D)" purported to express a positive view of evolutionary theory. (Third Amended

Complaint ("TAC") ¶ 10.) By contrast, the second film, "Darwin's Dilemma: The Mystery of the Cambrian Fossil Record," purported to challenge the theory of Darwinian evolution. (TAC ¶ 11.) Because it was a private event, the Foundation was not particularly concerned about the Event's content and, over the next few days, the Foundation and AFA came to agree upon terms for the Event. (Sep. Stmt. 44.) Neither the Center nor its employees were ever involved in any Event contract negotiations on behalf of the Center or Foundation with AFA. (Sep. Stmt. 12.)

The contract included standard terms and conditions governing the use of promotional materials. (Sep. Stmt. 40.) That provision, which AFA admits it understood, provided as follows:

> **PROMOTIONAL MATERIALS:** It is required that the Event Services Office approve, for technical and factual accuracy, all promotional materials mentioning the California Science Center produced for your event (including invitations, programs, press releases, etc.) prior to printing or broadcast. Please allow sufficient time for this approval. (Sep. Stmts. 40, 43.)

On October 5, 2009, the Foundation learned of press releases that had been issued relating to the Event. (Sep. Stmt. 45.) The Foundation believed these press releases misappropriated the Center's name and reputation by implying that the Center, as a Smithsonian-affiliated Institution, was the entity premiering the Event's films. One press releases stated, "The debate over Darwin will come to California on October 25, when the Smithsonian Institution's west coast affiliate premieres 'Darwin's Dilemma: The Mystery of the Cambrian Fossil Record,' a new intelligent design film which challenges Darwinian evolution." (Sep. Stmt. 46.) Because none of the press releases were ever submitted to the Foundation's Event Services Office for approval, the Foundation believed that the press releases violated the Promotional Materials provisions of the Event contract. (Sep. Stmts. 47, 50.) In order to stem what he believed were misleading publicity pieces, on October 6, 2009, Rudolph, acting in his capacity as President of the Foundation, decided to cancel the AFA Event contract. (Sep. Stmts. 48, 49.) This was solely his decision in his Foundation capacity; Rudolph did not consult with any Center employees. (Sep. Stmt. 18.) The cancellation was communicated to AFA on October 6, 2009, and Plaintiff filed suit eight (8) days later claiming that defendants had somehow schemed to violate its civil rights. What may at most have then been a straight forward contract dispute was quickly transformed into a civil rights-styled lawsuit with, as set forth below, no facts to support it.

LEGAL STANDARD

"A motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Summary judgment should be granted to a defendant if it shows "that the plaintiff cannot establish at least one element of the cause of action" because he does not possess, and cannot reasonably obtain needed evidence." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.) Alternatively, a defendant "may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action." (*Id.*, p. 855.) Finally, a defendant may obtain summary judgment if it establishes an affirmative defense to that cause of action. (*Id.*, § 437c, subd. (o).) Upon a defendant meeting its burden, the burden shifts to the plaintiff to show a triable issue of material fact exists as to that cause of action or a defense thereto. (*Id.*, § 437c, subd. (p).)

A motion for summary adjudication shall be granted if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty, and may be made in the alternative to a motion for summary judgment. (*Id.*, § 437c, subd. (f).)

ARGUMENT

I. AFA'S CLAIM FOR BREACH OF CONTRACT AGAINST THE CENTER FAILS

A. AFA's Failure to Present its Claim for Money Damages Pursuant to the Government Claims Act Bars its Claim

As a preliminary matter, AFA's breach of contract cause of action fails because AFA has neglected to submit a claim for money damages with the Victim's Compensation and Government Claims Board within the strict deadlines required by statute. (Sep. Stmt. 24.) As such, its claims for money damages, including its breach of contract claim, fail as a matter of law.

AFA seeks money damages from the Center for an alleged breach of contract. (Sep. Stmt. 22.) All claims against government entities which seek money damages, including claims for contract damages, are subject to the Government Claims Act. (Gov. Code, § 905; *City of Stockton v. Superior Court (Civic Partners Stockton, LLC)* (2007) 42 Cal.4th 730, 737-738.) A statutory prerequisite to filing a complaint seeking money or damages is the timely presentment

of a claim. (Gov. Code, § 945.4.) "[F]ailure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity." (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239.) Filing a civil complaint in superior court does not satisfy a claimant's claim presentment obligation. (*City of Stockton v. Superior Court, supra,* 42 Cal.4th at 746 ["The legislature's intent to require the presentation of claims before suit is filed could not be clearer. (§ 945.4.)"].) The claim filing procedures and limitations specifically apply to district agricultural associations, such as the Center. (Food & Agr. Code, § 3955.)

AFA's Complaint does not contain an allegation that it presented a claim pursuant to the Government Claims Act. (Sep. Stmt. 23.) Indeed, as of February 17, 2011, AFA has not presented a claim against the Center to the California Victim's Compensation and Government Claims Board. (Sep. Stmt. 24.) "The period for asserting contract claims is one year." (*City of Stockton v. Superior Court, supra,* 42 Cal.4th at p. 746, n. 13 [citing Gov. Code, § 911.2].) Therefore, the last day on which AFA could have submitted a claim for the alleged breach of contract – which allegedly occurred on October 6, 2009 – was October 5, 2010. Because AFA has not complied with the Government Claims Act, and time for doing so has long passed, its First Cause of Action seeking contract damages is barred.

B. The Center Cannot be Liable for Breach of Contract Because it is Not a Party to the Event Contract

Even if AFA's breach of contract claim were not barred for failure to comply with the Government Claims Act, it is also barred for the independent reason that the Center cannot be liable for the alleged breach of a contract to which it is a stranger: the Center is not a party to the Event contract, was not involved in negotiating the Event contract, and was not involved in the cancelation of the Event contract.

AFA claims that the Center is a party to the Event contract. (TAC ¶ 8.) That contention is demonstrably false. The Event contract does not identify the Center as a contracting party. (Sep. Stmt. 12.) The Event contract was not executed by the Center, but instead was the product of negotiations exclusively between the Foundation and AFA. (Sep. Stmt. 12.) "It is essential to the

validity of a contract, not only that the parties should exist, but that is should be possible to identify them." (Civ. Code, § 1558.) Because the Event contract neither identifies the Center as a contracting party, nor was it executed by the Center, the Center is not a direct party to the contract.

C. The Foundation is Not the Center's Agent

AFA may attempt to argue that the Foundation executed the Event contract as an agent on behalf of the Center. (See, e.g., TAC ¶ 7 ["each of the Defendants . . . are the agents . . . of each other . . . ."].) But the Foundation is not the Center's agent and such boilerplate contentions are baseless.

In February 1995, the Center and the Foundation entered into a 25-year lease for the IMAX facility. (Sep. Stmt. 5.) The lease specifically disclaims the creation of an agency or partnership relationship. (Sep. Stmt. 6; IMAX Lease ¶ 13A ["This Amended and Restated Lease shall not be construed as constituting Foundation as agent or partner of Museum . . . ."].)[1] Thus, while the IMAX Lease requires the Foundation to conduct its operations in accordance with both State and Federal laws, the Center neither has the ability to contract with third parties for rental of the IMAX nor has authority over the Foundation's contractual dealings with third parties seeking to rent the IMAX for private events. (Sep. Stmts. 16, 7, 8, 9; Tateishi Decl. ¶ 5.) Consistent therewith, the IMAX Lease even expressly prohibits the Center from dictating what films will be shown (such as the films AFA intended to show). (Sep. Stmt. 5.)

Nor can AFA present evidence that an implied ostensible agency relationship exists. (Civ. Code, § 2300.) "Liability of the principal for the acts of an ostensible agent rests on the [equitable] doctrine of 'estoppel,' the essential elements of which are [1] representations made by the principal, [2] justifiable reliance by a third party, and [3] a change of position from such reliance resulting in injury." (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 404.) It is AFA's burden to establish the existence of an ostensible agency relationship between the Center and the Foundation. Even assuming AFA could satisfy the first two of these elements (which it cannot), AFA would still be unable to establish that it suffered injury due to some

[1] The Center is referred to in the IMAX Lease as the "Museum".

misplaced reliance on the Foundation's contracting authority. Not only did the Foundation have authority to contract with AFA for its after-hours private Event at the IMAX, it had the *exclusive* authority to do so. (Sep. Stmt. 8.) AFA wanted to negotiate with the party that could put them into the IMAX and that is precisely what occurred. (Sep. Stmt. 13.)

Nor does an ostensible agency relationship even make sense. If Plaintiff contends that the Center was the principal and the Foundation was the Center's agent, at a minimum, the Center would need to possess the ability to enter into a contract directly with AFA. But the undisputed evidence is that only the Foundation had that ability (pursuant to its 25-year lease of the IMAX facility). If the Center did not have the ability to itself rent the IMAX facility to AFA, no one, including the Foundation, could have been the Center's agent for that purpose.

The undisputed facts preclude a finding of agency, implied or otherwise, as a matter of law.

II. AFA'S CONSTITUTIONAL CLAIMS AGAINST THE CENTER DEFENDANTS LACK MERIT

AFA's Second, Third, Fourth, and Eighth Causes of Action are each based on alleged violations of the United States and California Constitutions. All these causes of action fail.

A. The Center Defendants Did Not Engage in the Actions AFA Claims Were Unconstitutional

AFA's lawsuit is based on an erroneous contention that the cancellation of the AFA contract violated its constitutional rights. The case fails as to the Center for, among other reasons, the simple fact that neither the Center nor any of its employees were involved in the contracting or cancellation of the AFA Event. Only the Foundation, and not the Center, had the legal right and authority to book private events at the IMAX Theater. (Sep. Stmts. 8, 9.) Only Foundation employees, and not Center employees, were involved in the negotiation of the AFA Event contract. (Sep. Stmt. 38.) Only Rudolph, as President of the Foundation, made the decision to cancel the AFA Event contract. (Sep. Stmt. 48, 49.) No Center employees were involved in the decision to cancel the AFA Event contract. (Sep. Stmt. 18.) In simple terms, whatever AFA contends was done unlawfully or unconstitutionally, it was not done by the Center. AFA's bare speculation flies in the face of the facts, is not evidence and is legally insufficient to support its supposed civil rights claims. (*Keniston v. Roberts* (9th Cir. 1983) 717 F.2d 1295, 1300 [vague

and conclusory allegations are insufficient to support civil rights claims or to withstand summary judgment].)

1. AFA has not and cannot produce evidence that the Center Defendants intentionally discriminated against AFA

Even assuming that the Foundation's decision to cancel the Event were somehow attributable to the Center Defendants, AFA still cannot prove that the Foundation's decision to cancel the Event contract was the result of a discriminatory motive. Rudolph's deposition testimony is clear—he alone, as President of the Foundation, made the decision to cancel the Event after determining that "the press statements put out were in violation of [the Foundation's] policies and procedures." (Sep. Stmts. 46, 50.) AFA has no evidence to refute Rudolph's testimony. Rather, its unequivocal refusal to accept any other explanation for the cancellation is based solely upon unsupported speculation and conjecture. (Sep. Stmt. 60.) But AFA's subjective belief and bald assertion of discriminatory intent are inadequate. (*Foster v. Arcata Assoc. Inc.* (9th Cir. 1985) 772 F.2d 1453, 1459, cert denied, (1986) 475 U.S. 1048, overruled on other grounds by *Kennedy v. Allied Mutual Ins. Co.* (9th Cir. 1991) 952 F.2d 262.) This is because vague and conclusory allegations are legally insufficient to support civil rights claims or to withstand summary judgment. (*Keniston v. Roberts, supra,* 717 F.2d at 1300.). As such, AFA must support its First Amendment claims with actual evidence demonstrating that deterrence of its First Amendment rights "was a substantial or motivating factor in [the Foundation's] conduct." (*Sloman v. Tadlock* (9th Cir. 1994) 21 F.3d 1462 [applying intent-based, retaliatory discharge framework to claim that police officers' actions were intended "to prevent [plaintiff] from expressing his political views"].) In other words, AFA must show that defendants "intended to interfere with [its] First Amendment rights." (*Mendocino Environmental Center v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300.)

The same standard applies to AFA's claims under the California Constitution. When interpreting similar provisions of the California Constitution, "[d]ecisions of the United States Supreme Court . . . ought to be followed unless persuasive reasons are presented for taking a different course." (*People v. Teresinski* (1982) 30 Cal.3d 822, 836.) Thus, "California courts

have routinely followed Supreme Court precedents in addressing public employee free speech matters." (*Kaye v. Board of Trustees of the San Diego Country Public Law Library* (2009) 179 Cal.App.4th 48, 57 [citing examples].) Because Article 1, §§ 2, 3, and 4 of the California Constitution are similar to the federal Constitution, the same federal standard applies to those claims absent a persuasive reason otherwise. (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 179 ["Generally, when we interpret a provision of the California Constitution that is similar to a provision of the federal Constitution, we will not depart from the United States Supreme Court's construction of the similar federal provision unless we are given cogent reasons to do so"].)

Similarly, AFA cannot establish its equal protection claim. AFA baldly alleges that the Defendants "intentionally treat[] Plaintiff differently than other similarly-situated organizations based on the viewpoint of its expression." (TAC ¶ 67.) But, a number of federal courts have held that an equal protection claim cannot be brought where, as here, it is premised on the same facts as a First Amendment claim. (See, e.g., *Kirby v. City of Elizabeth City* (4th Cir. 2004) 388 F.3d 440, 447; *Watkins v. Bowden* (11th Cir. 1997) 105 F.3d 1344, 1354; *Bernheim v. Litt* (2d Cir. 1996) 79 F.3d 318, 323; *Thompson v. City of Starkville* (5th Cir. 1990) 901 F.2d 456, 468; *Vukadinovich v. Bartels* (7th Cir. 1988) 853 F.2d 1387, 1391–92.) For those courts willing to consider equal protection claims based on First Amendment violations, those claims are generally evaluated under the "class-of-one" methodology. (See, e.g., *Neveu v. City of Fresno* (E.D. Cal. 2005) 392 F.Supp.2d 1159 [applying "class-of-one" methodology to equal protection claim that plaintiff was treated differently "for having exercised his rights to free speech"]; *Cain v. Tigard-Tualatin School Dist.* (D. Or. 2003) 262 F.Supp.2d 1120, 1130–31 [dismissing claim based on First Amendment retaliation].) Thus, AFA's claim fails if, as here, there is a rational basis for the cancellation (e.g. the dissemination of unapproved press releases suggesting Smithsonian and Science Center sponsorship of the Event). But even if the decision to cancel was irrational, AFA still cannot prove intentional discrimination. (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564 [establishing the "class-of-one" analysis and noting the requirement that plaintiff be "intentionally treated differently"]; *Village of Arlington Heights v. Metropolitan Housing*

Development Corp. (1977) 429 U.S. 252, 265 [conclusory allegations by themselves do not establish an equal protection violation without proof of invidious discriminatory intent].)

Thus, each of AFA's civil rights claims requires proof that the cancellation of the Event was the result of a discriminatory motive. Proof of improper motive cannot be the result of mere speculation. (See *Karam v. City of Burbank* (2003) 352 F.3d 1188, 1194.) But, in their depositions, AFA's own witnesses failed to identify any evidence of improper motive, except for the singular act of the cancellation itself. (Sep. Stmt. 60.) Nevertheless, AFA in its various complaints has alleged that defendants "have instituted a policy whereby the advancement, promotion or discussion of intelligent design is prohibited." (TAC ¶ 41.) However, AFA has developed no evidence to support this claim. In its interrogatory responses, AFA suggests that documents and testimony from Chris Sion (Foundation Vice President of Food and Event Services) and documents obtained from the Natural History Museum of Los Angeles County demonstrate the existence of such a policy, noting that the "unanimity of position suggests a policy." (Sep. Stmt. 47.1)

A closer examination of this "evidence" demonstrates it is either misconstrued or mere speculation. AFA has previously relied on e-mails from Sion as purported evidence of discriminatory intent. But this Court has previously found that those e-mails "don't show discriminatory intent." (Ono Decl. Ex. 1 [July 19, 2010 Hearing Transcript] at 6:20-23.) Moreover, Sion, and other Foundation witness, testified that Rudolph ultimately made the decision to cancel the Event. (Sep. Stmt. 48.) Further, Sion—and every other Foundation witness—denied the existence of any policy addressing the content of private events. (Sep. Stmt. 51.) Even the e mail from the Natural History Museum AFA relies on was not received by anyone at the Foundation until after the Event was cancelled. (Sep. Stmt. 52.) In fact, the actual evidence demonstrates that AFA's speculation regarding a discriminatory policy is incorrect. AFA's own witnesses testified that the Foundation Defendants were aware of the Event's subject matter before any agreement was reached and before they became aware of the unapproved press releases. (Sep. Stmt. 11.) Rudolph testified that he "had a general understanding" as to the nature of the Event based on an October 1, 2009 e-mail from Sion. (Sep. Stmt. 53.) Indeed, AFA

witness Joe Peterson testified that Sion was supportive of having a "conservative" event. (Sep. Stmt. 54.) AFA's witnesses also testified that the Foundation employees, particularly Sion, were aggressively trying to get the contract finalized. (Sep. Stmt. 55.) The Foundation even agreed to modify its standard payment terms in an effort to assist AFA. (Sep. Stmt. 56.) Tellingly, Foundation employee recommendations to not cancel the Event in response to the inaccurate press releases (which were ultimately rejected by Rudolph in his official capacity as Foundation President) supports the conclusion that the Foundation has no policy to prohibit discussions of intelligent design at private events. (Sep. Stmt. 57.)

Finally, the testimony of the Foundation's witnesses demonstrate that—consistent with the reasons given at the time—the Event was cancelled because AFA had violated the Promotional Materials provision of the Event Policies & Procedures. All of the Foundation witnesses testified that the inaccurate press releases were the reason for the cancellation. (Sep. Stmt. 58.) Rudolph did not consider the subject matter of the Event when making the decision to cancel (Sep. Stmt. 50), a statement that is confirmed by the fact that Foundation CFO Cynthia Pygin testified that the subject matter of the Event never was discussed in her conversations with Rudolph prior to the cancellation. (Sep. Stmt. 59.) Indeed, Rudolph's concerns that the press releases violated the agreement and were misleading—implying sponsorship by the Center and the Smithsonian when it was only a private event —were the motivating factor for his decision to cancel. (Sep. Stmts. 46, 47,49, 50.)

Because there is no evidence of intentional discrimination, AFA cannot prevail on its alleged state and federal constitutional claims as a matter of law.

B. AFA's Federal Claims Against the Center Defendants Fail

Even assuming that AFA could somehow establish that the Foundation discriminated against AFA and that the Center was responsible for it, the Center, as an arm of the state, is immune from lawsuits based on alleged violations of federal law.

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1. The Center enjoys Eleventh Amendment immunity as an "arm of the state"

The Eleventh Amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (U.S. Const., XI Amendment.) The "preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." (*Federal Maritime Com'n v. South Carolina State Ports Authority* (2002) 535 U.S. 743, 760.) The Eleventh Amendment immunity applies not only when the State itself is named in an action, but also to "actions against state agents and state instrumentalities." (*Regents of the University of California v. Doe* (1997) 519 U.S. 425, 429.) It has been interpreted to preclude lawsuits filed in *federal court* by citizens of their own state (*Welch v. Texas Dept. of Highways and Public Transp.* (1987) 483 U.S. 468, 472-473), as well as to preclude lawsuits filed in *state court* based on a federal statute. (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1103 ["if an entity enjoys Eleventh Amendment immunity, it is also immune from suit under section 1983, even in state court"].) While state entities are protected by the Eleventh Amendment, local cities and counties are not. (*Monell v. Department of Social Services of City of New York* (1978) 436 U.S. 658.)

Whether a governmental entity like the Center is protected by the Eleventh Amendment depends on whether it "is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." (*Mt. Healthy City School Dist. Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 280.) Courts have looked to the following factors to make that determination:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity. To determine these factors, the court looks to the way state law treats the entity.

(*Mitchell v. Los Angeles Community College Dist.* (9th Cir. 1988) 861 F.2d 198, 201.)

"[V]ulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations." (*Hess v. Port Authority Trans-Hudson Corp.* (1994) 513 U.S. 30, 48; *Durning v. Citibank, N.A.* (9th Cir. 1991) 950 F.2d 1419, 1423-1424 [whether a money judgment would be satisfied out of state funds is "the most important factor"].) In this case, if the Center were subject to a money judgment, that judgment would be satisfied by money drawn from the State's General Fund. (Sep. Stmt. 30.)[2] Indeed, almost 90% of the Center's spending is drawn from the State's General Fund. (Sep. Stmt. 28.) The remainder of the Center's spending is based on work for which it will be reimbursed by a third-party,[3] or spending authorized by the Legislature from a state special fund known as the Exposition Park Improvement Fund. (Sep. Stmt. 29.) The Exposition Park Improvement Fund would not be available to fund a judgment in this case, as expenditures from that fund "may only be used, upon appropriation from the Legislature, for improvements to Exposition Park, ..." (Food & Agr. Code, § 4106, subd. (e).)

A finding that the state's purse is at risk should end the "arm-of-the-state" inquiry. But even a review of the remaining, less significant factors support the conclusion that the Center is an arm of the State for Eleventh Amendment purposes. Tellingly, the State has control over the Center's litigation. While the Center may be sued, it cannot sue without obtaining the approval of the Department of Food and Agriculture. (Food & Agr. Code, § 3954.) Likewise, the Center takes money in the name of the State. Money donations to the Center are not held directly by the Center, but are sent to the Legislature controlled Exposition Park Improvement Fund, and can only be appropriated back to the Center by the Legislature. (Sep. Stmt. 31; Tateishi Decl. ¶ 7.)

Finally, corporate status seals the analysis. The Legislature created the Center, housed it within the State's State and Consumer Services Agency, determined that it is "an instrumentality this state", decreed that it is a "state institution", proclaimed that its directors are "state officers",

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[2] The fact that the Center may have contractual indemnity rights from a third party is irrelevant to an arm of state analysis. (*Regents of the University of California v. Doe* (1997) 519 U.S. 425, 431 ["The Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party"].)

[3] For example, the Center is authorized to incur postage expenses for the Foundation up to a certain limit, so long as the Foundation reimburses the Center for the actual cost.

and provide state control by requiring that its directors be appointed by the Governor. (Food & Agr. Code, §§ 3953, 3959, 3962, 4101.)

AFA has previously cited *ITSI TV Productions v. Agricultural Assns.*, for the proposition that at least one obscure district agricultural association could not establish that it was an arm of the state based upon the particular facts of that case. (*ITSI TV Productions, Inc. v. Agricultural Assns.* (9th Cir. 1993) 3 F.3d 1289.) The *ITSI TV* court recognized that the "most important factor" in determining whether a different agricultural association was protected by the Eleventh Amendment was "whether a money judgment would be satisfied out of state funds." (*Id.*, at p. 1292.) After determining that all of that particular agricultural association's funds were received from sources other than the State's General Fund, the Court concluded that it was not protected by the Eleventh Amendment. (*Id.*, at pp. 1292-1293.) That is clearly not the case here as almost 90% of the Center's budget comes out of the State's General Fund. (Sep. Stmt. 28.) As such, the Center is an arm of the state for purposes of the Eleventh Amendment, and immune from AFA's Second, Third and Fourth Causes of Action premised on violations of federal law.

2. The Center is not a "person" under 42 U.S.C. § 1983

While the Fourteenth Amendment allows Congress to enact certain statutes that abrogate a state's sovereign immunity, the United States Supreme Court has unambiguously held that Congress did not abrogate the states' sovereign immunity when it enacted 42 U.S.C. § 1983. (*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 64 ["a state is not a person within the meaning of § 1983"].) The court's ruling was based on the fact that only "persons" are subject to § 1983, and Congress did not intend for states to be included within the definition of persons. (*Id.*, p. 65.) Because the Center is an arm of the state and therefore not a person for purposes of § 1983, AFA's Second and Third Causes of Action, expressly based on 42 U.S.C. § 1983, are therefore prohibited as a matter of law. (*Id.*) AFA's Fourth Cause of Action, premised on an alleged violation of the equal protection clause found in the federal Constitution's Fourteenth Amendment, is similarly barred for the same reasons, as courts have held that a violation of the equal protection clause can only be prosecuted through a 42 U.S.C. § 1983 action. (*Bank of Lake Tahoe v. Bank of America* (9th Cir. 2003) 318 F.3d 914, 917 [claim for equal protection violation

"must utilize 42 U.S.C. § 1983"], citing *Azul-Pacifico, Inc. v. City of Los Angeles* (9th Cir. 1992) 973 F.2d 704, 705.)

C. AFA's Federal Claims Against Rudolph Fail

"Plaintiff is limited to injunctive and declaratory relief against the individual defendants in their official capacities, and damages against the individual defendants in their personal capacities." (*Carmen v. San Francisco Unified School Dist.* (N.D. Cal 1997) 982 F.Supp. 1396, 1407.)

1. No relief is available against Rudolph in his official capacity

a. Damages are not available against Rudolph in his official capacity

The Supreme Court has held that "[s]tate officers sued for damages in their official capacity are not 'persons' for purposes of [a § 1983] suit because they assume the identity of the government that employs them." (*Hafer v. Melo* (1991) 502 U.S. 21, 27.) Inasmuch as the Center is a State entity, Rudolph, in his official capacity as President and CEO of the Center, also enjoys the same immunity. (*Will v. Michigan, supra*, 491 U.S. at 71.) Therefore, AFA's claim for damages against Rudolph in his official capacity is barred just as AFA's claims are barred against the Center.

b. Injunctive relief is not available against Rudolph in his official capacity

While the State's Eleventh Amendment immunity bars all manner of claims against the Center, it does not prevent a plaintiff from seeking prospective injunctive relief against a state officer acting in his official capacity. (*Ex Parte Young* (1908) 209 U.S. 123; *Pennhurst State Sch. & Hosp. v. Halderman* (1984) 465 U.S. 89.) To obtain an injunction, however, the plaintiff must prove that it faces a significant threat of a future injury. (*Haley v. Casa Del Rey Homeowners Ass'n* (2007) 153 Cal.App.4th 863, 873 ["Injunctive relief is available to prevent future harm, not to address past harm"]; *Bank of Lake Tahoe v. Bank of America* (9th Cir. 2003) 318 F.3d 914, 918.)

AFA ostensibly seeks an injunction prohibiting Rudolph, in his official Center capacity, from refusing to allow AFA access to hold private events, including events concerning intelligent

design. (Sep. Stmt. 67.) But Rudolph, in his Center capacity, has no control over private event bookings at the IMAX. (Sep. Stmts. 62, 63, 68.) He has no ability to rent the IMAX to AFA or any other third party for a private event now or in the future. (Sep. Stmt. 63, 68.) The IMAX Lease even expressly prohibits the Center from requiring the Foundation to show any particular film. (Sep. Stmt. 61.)

Because Rudolph, in his official Center capacity, has no control over which private events the Foundation may prospectively book with private entities like AFA, AFA does not face a threat of future harm from him in his Center capacity. In other words, AFA cannot obtain an injunction against Rudolph in his official Center capacity because Rudolph, in that capacity, is incapable of having future private event-related dealings with AFA.

2. No relief is available against Rudolph in his individual capacity

a. AFA is not entitled to damages against Rudolph in his individual capacity as he possesses qualified immunity

The doctrine of qualified immunity protects public officials from personal liability when performing discretionary functions. (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.) In order to overcome a public official's qualified immunity, a plaintiff is required to show that the official (i) violated clearly established statutory or constitutional rights, (ii) of which a reasonable person would have known. (*Conn v. Gabbert* (1999) 526 U.S. 286, 290; *Pearson v. Callahan* (2009) 555 U.S. 223; 109 S.Ct 818 [Doctrine of qualified immunity protects a government official from personal liability when such official reasonably believes his conduct complies with the law.]; *Davis v. Scherer* (1984) 468 U.S. 183, 197 [The plaintiff shoulders the burden of proving that the rights he claims are "clearly established"].) "The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." (*Pearson, supra,* 109 S.Ct. at p. 815.) Thus, the qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. (*Brian v. Hunter* (1991) 502 U.S. 224, 229; *Davis, supra.* 468 U.S.at p. 197 ["[Qualified immunity] safeguards all but the plainly incompetent or those who knowingly violate the law....[I]f officers of reasonable

competence could disagree on [whether a chosen course of action is constitutional], immunity should be recognized."]; *Harlow, supra*, 457 U.S. at pp. 816-17 [Bare allegations of malice should not suffice to subject government officials" to the burdens of trial or extended discovery].) Indeed, this accommodation for reasonable error exists "because officials should not err always on the side of caution because they fear being sued." (*Hunter, supra,* 502 U.S. at p. 229.)

For the reasons discussed above, Rudolph, in his individual (or any other) capacity, did not violate AFA's constitutional rights.[4] But assuming arguendo that AFA somehow established a constitutional violation by Rudolph, a reasonable official in Rudolph's position could nevertheless have believed that it was within his discretion to cancel the Event contract under the circumstances presented.

Whether a reasonable official *under these facts* could have believed that it was not unconstitutional to cancel the Event contract is a question of law the court can determine on summary judgment. (*Knox v. Southwest Airlines* (9th Cir. 1997) 124 F.3d 1103, 1107 [For qualified immunity inquiry, reasonableness of defendant's actions are not a question of fact, they are a question of law].) Here, Rudolph's uncontroverted testimony was that he canceled the Event contract without regard to the content of AFA's Event. (Sep. Stmts. 69, 70.) Rudolph further testified that he believed that AFA violated the terms of the Event contract, and that violation of the contract gave the Foundation the right to cancel. (Sep. Stmts. 70, 73.) Upon these facts, even were Rudolph's decision to cancel ultimately wrong and in breach of the Event contract, a reasonable official in Rudolph's position could easily have believed that cancelation of the Event contract under the circumstances was constitutional. As such, Rudolph is afforded qualified immunity for that decision and plaintiff's claims asserted against him in his individual capacity and barred as a matter of law.

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[4] Rudolph canceled the Event contract in his official capacity as Foundation President. (Sep. Stmt. 49.) The qualified immunity argument is made arguendo to address the Third Amended Complaint's unfounded, scatter-gun, allegation of wrongdoing in Rudolph's individual capacity.

b. AFA can seek an injunction governing the Center's actions only against Rudolph in his official capacity

AFA cannot obtain an injunction against Rudolph in his personal capacity, as the injunction seeks to regulate his activities as it relates to duties in his official capacity. (*Carmen v. San Francisco Unified School Dist.* (N.D. Cal 1997) 982 F.Supp. 1396, 1407 ["Plaintiff is limited to injunctive and declaratory relief against the individual defendants in their official capacities..."].)

3. Even if AFA prevails on its Constitutional claims, it is not entitled to money damages as claimed

AFA's operative Third Amended Complaint seeks money damages for the alleged violation of the California Constitution. However, AFA cannot satisfy the necessary damages element of its cause of action, as no money damages are available even if there was a violation of the California Constitution. The Supreme Court expressly held that a plaintiff cannot obtain money damages even if it proves a violation of Article I, section 2 (speech). (*Degrassi v. Cook* (2002) 29 Cal.4th 333, 342.) A court of appeal recently expressly held that a plaintiff cannot obtain money damages even if it proves a violation of Article I, section 3 (association). (*MHC Financing Ltd. Partnership Two v. City of Santee* (2010) 182 Cal.App.4th 1169, 1184.) While the Center is aware of no case law directly discussing the availability of money damages for a violation of Article I, section 4 (religion), the same result should follow the courts' holdings that no money damages are available for violations of Article I, § 2 (speech) and § 3 (association.) (See *Katzberg v. Regents of the University of California* (2002) 29 Cal.4th 300.)

III. BECAUSE THERE IS NO EVIDENCE OF A CONSTITUTIONAL VIOLATION, AFA'S CAUSE OF ACTION FOR DECLARATORY RELIEF IS MOOT

AFA requests judicial declarations that "the cancellation of the EVENT and breach of the contract violated the United States Constitution and the California Constitution" and that "the Defendants engaged in content and viewpoint discrimination by preventing Plaintiff from addressing the topic of intelligent design in a public forum." (TAC ¶¶ 111, 112.) As discussed above, AFA cannot prove violations of the United States Constitution or the California

Constitution. Thus, the request for declaratory relief is moot, and summary adjudication should be granted.

IV. AFA CANNOT SEEK PUNITIVE DAMAGES AGAINST THE CENTER

Paragraph 4 of AFA's prayer for relief seeks "punitive and exemplary damages on the Fourth Cause of Action for Fraud." (Sep. Stmt. 82.) This prayer for punitive damages should be deemed moot as the court has already sustained the Center's demurrer to AFA's fraud cause of action.

To the extent that any claim for punitive damages against the Center as to any remaining cause of action can be deemed adequately pled, which it is not, such a prayer is barred as a matter of law. Government Code section 818 expressly states, "[n]otwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant." (Gov. Code, § 818.) Therefore, AFA may not seek punitive damages against the Center for any reason.

CONCLUSION

For all the foregoing reasons, the California Science Center and Jeffrey Rudolph, in his individual and official capacity as President and CEO of the California Science Center, respectfully request that the court enter summary judgment or, in the alternative, summary adjudication, in their favor and against AFA.

Dated: March 23, 2011

Respectfully Submitted,

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Attorneys for Defendants California Science Center and Jeffrey Rudolph in his individual and official capacity as President and CEO of the California Science Center

DECLARATION OF SERVICE BY MESSENGER

Case Name: **American Freedom Alliance v. California Science Center, et al.**

No.: **BC 423687**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On March 25, 2011, I caused the attached DEFENDANTS CALIFORNIA SCIENCE CENTER AND JEFFREY RUDOLPH IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS PRESIDENT AND CEO OF THE CALIFORNIA SCIENCE CENTER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION ON PLAINTIFF'S THIRD AMENDED COMPLAINT to be personally served by Ace Messenger Service by placing a true copy thereof for delivery to the following person(s) at the address(es) as follows:

William J. Becker, Jr., Esq.
The Becker Law Firm
11500 Olympic Boulevard, Suite 400
Los Angeles, CA 90064

James L. Zelenay Jr., Esq.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 25, 2011, at Los Angeles, California.

Olivia Padilla
Declarant

Signature

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