ORIGINAL

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SUPERIOR COURT, STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DIVISION

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.

CASE NO. BC 423687

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

DEFENDANTS CALIFORNIA SCIENCE CENTER FOUNDATION'S AND JEFFREY RUDOLPH'S (AS PRESIDENT OF THE FOUNDATION AND IN HIS INDIVIDUAL CAPACITY) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION ON AMERICAN FREEDOM ALLIANCE'S CLAIMS ASSERTED UNDER THE UNITED STATES CONSTITUTION AND CALIFORNIA CONSTITUTION

[Separate Statement, Notice of Motion and Motion; Appendix of Non-California Authorities; Declaration of Jeremy S. Ochsenbein; Declaration of Jeffrey N. Rudolph, Declaration of Cynthia Pygin; and [Proposed] Order filed concurrently herewith]

DATE OF FILING OF ORIGINAL COMPLAINT:	October 14, 2009
DATE OF FILING OF THIRD AMENDED COMPLAINT:	August 18, 2010
TRIAL DATE:	July 25, 2011
HEARING DATE:	June 1, 2011
HEARING TIME:	8:45 a.m.
HEARING PLACE:	Dept. 14

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I. INTRODUCTION

Plaintiff American Freedom Alliance ("AFA") has taken a modest, run-of-the mill contract dispute and—without any factual basis—attempted to transform it into a constitutional civil rights case.[1] This litigation stems from a decision by Defendant Jeffrey Rudolph ("Rudolph"), made as President of the Defendant California Science Center Foundation (the "Foundation") (collectively with Rudolph, the "Foundation Defendants"), to cancel a private AFA event (the "Event") that was to be held at the IMAX theater of the California Science Center (the "Science Center") after regular public hours had ended. The Event was to involve the presentation of two films and a debate about evolutionary theory, including a discussion of intelligent design. The Foundation Defendants cancelled the Event after becoming aware of misleading press releases that had been distributed to news wires without prior approval of the Foundation, and in violation of the terms of the Foundation's Event Polices and Procedures, which AFA had agreed to follow.

Because the United States Constitution "preserves an area of individual freedom," mere contractual disputes between private parties are not subject to Constitutional scrutiny. (*See Lugar v. Edmondson Oil Co., Inc.* (1982) 457 U.S. 922, 936.) Nevertheless, AFA attempts to "nickel and dime" its way into a determination that the Foundation is a state actor—a result that cannot be supported by the facts and that would lead to an unprecedented incursion into the "area of individual freedom" carefully preserved by the Supreme Court.

Disregarding the Foundation Defendants' legitimate reasons for cancellation, the AFA—without any factual basis—immediately sought judicial relief, claiming the cancellation was an act of discrimination. When asked in his deposition the reason why he believed "the basis for the cancellation was the content of the program," Avi Davis, the AFA's President, stated:

> The fact is that we know that nothing we did regarding our performance of the contract could have led to an accusation of violation. Nothing. We performed our part of the contract. We signed it. We prepared our materials. We were going to submit it. Nothing we did was possibly -- could possibly have done it. The only

[1] The AFA has asserted causes of action against the Foundation Defendants for violation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution as well as claims under Article 1, §§ 2, 3, and 4 of the California Constitution. For purposes of this Motion, these causes of action are referred to collectively as the "civil rights claims."

> reason for that film to be canceled was because the people who owned that cinema didn't want it shown and were not happy about the content.

(Sep. Stmt. 32.) Thus, AFA's civil rights claims are premised on incorrectly applying the *res ipsa loquitur* theory of negligence to constitutional law—operating under the belief that there could be no other reason for the cancellation despite having been given the ***actual*** reason by the Foundation Defendants. AFA had no evidence of discrimination when it filed suit and—after extensive discovery—it still has no factual basis to support these claims. Indeed, the uncontroverted evidence confirms that the unapproved publicity for the Event was the Foundation's reason for cancelling.

As discussed below, the AFA "does not possess, and cannot reasonably obtain," the evidence needed to prove the Second, Third, Fourth, Eighth, and Ninth Causes of Action in its Third Amended Complaint. (*See Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.) The Foundation Defendants are not state actors. Further, even if they were, AFA cannot prove intentional discrimination. Thus, the Foundation Defendants respectfully request that the Court grant their Motion for Summary Adjudication denying each of those claims.

II. STATEMENT OF FACTS

A. The Private Foundation Defendants Cancelled The Event Because AFA Violated Its Agreement.

> [T]he press statements put out were in violation of our policies and procedures that were potentially harmful to the reputation of the Science Center and to our relationship with the Smithsonian. I believe that violated our agreement, and . . . I felt that the best course of action was to cancel the event.

(Sep. Stmt. 23.) On this basis, "[a]s President of the California Science Center Foundation, [Jeffrey Rudolph] chose to cancel the [AFA] event." (Sep. Stmt. 1.)

The California Science Center Foundation is a non-profit, section 501(c)(3) organization that raises funds to support exhibits and educational programs featured at the California Science Center, the West Coast's largest interactive science center and museum. (Sep. Stmt. 2.) The Foundation designs and administers the exhibits and educational programs at the Science Center. (Sep. Stmt. 3.) The Foundation also is responsible for contracting with private parties to use areas within the Science Center for private events. (*Ibid.*) Further, the Foundation is solely responsible for the operations of the IMAX theater. (Sep. Stmt. 4.)

The relationship between the Foundation and Science Center is memorialized in several agreements. First, the Foundation and Science Center have entered into a joint operation agreement. (Sep. Stmt. 5.) A separate lease agreement governs their relationship regarding the IMAX theater. (Sep. Stmt. 6.) The Foundation also provides services to the Science Center pursuant to various services contracts. (Sep. Stmt. 7.) There are also a number of agreements pertaining to the lease of the Phase II building to the Science Center by the Foundation. (*Ibid.*)

Foundation employees, who are paid directly by the Foundation, do not receive public employee benefits and are not classified as civil servants as a result of their employment by the Foundation. (Sep. Stmt. 8.) And while the Foundation's Board of Trustees includes members of the Science Center's Board of Directors, only 9 of the 83 total current members are also Science Center Directors. (Sep. Stmt. 9.)

In late September 2009, Foundation employees were contacted by AFA regarding scheduling a private fundraising event at the California Science Center. (Sep. Stmt. 24.) Over the next few days, the Foundation and AFA arranged to book a private event at the IMAX theater on October 25, 2009. (*Ibid.*) During this time, the Foundation Defendants were aware that AFA planned to show the movie "Darwin's Dilemma" and include a discussion about Darwinism. (Sep. Stmt. 25.) Joe Peterson, who contacted the Foundation on behalf of AFA, testified that the Foundation was aware of the nature of the Event from the first meeting. (*Ibid.*) Because it was a private event, the Foundation Defendants had no concerns about the content or nature of the Event. (Sep. Stmt. 26.)

On October 5, 2009, the same day that the Foundation received the executed Event Price Estimate from AFA, it first became aware of press releases that had been issued relating to the Event. (Sep. Stmt. 27.) These press releases improperly implied that the California Science Center and the Smithsonian Institution were the parties premiering the film at the AFA's private event. (Sep. Stmt. 28.) Because none of the press releases was submitted to the Foundation's Event Services Office prior to their issuance, Foundation employees concluded that the press releases violated the Event Services' Policies and Procedures. (Sep. Stmt. 29.) As a result, the Foundation cancelled the AFA's private Event on October 6, 2009. (*Ibid.*)

B. Procedural History

On October 14, 2009, AFA filed an emergency motion for a temporary restraining order, along with a complaint. (Declaration of Jeremy S. Ochsenbein ("Ochsenbein Decl."), ¶ 2.) That same day, the Court denied the request for the temporary restraining order. (*Ibid.*) After several amended complaints and demurrers, the Foundation Defendants' filed an Answer to the Third Amended Complaint ("TAC")[2] on November 8, 2010, simultaneously filing a cross-complaint.[3] (*Id.*, ¶ 5.) The parties have engaged in extensive document discovery, exchanged multiple sets of written discovery requests, and completed a total of sixteen depositions. (*Id.*, ¶ 7.)

III. STANDARD OF REVIEW

Summary adjudication is appropriate because AFA lacks the evidence necessary to prove certain claims alleged in its complaint. "A summary adjudication motion is subject to the same rules and procedures as a summary judgment motion." (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.) A defendant will prevail on summary judgment if it can show that one or more elements of a plaintiff's cause of action, even if not separately pleaded, cannot be established. (Cal. Code Civ. Proc. § 437c, subd. (p)(2).) A defendant does not have to conclusively negate an element of the plaintiff's cause of action in order to be entitled to summary judgment, but must only "show that the plaintiff *does not possess* needed evidence . . . [and] that the plaintiff *cannot reasonably obtain* needed evidence." (*Aguilar, supra*, 25 Cal.4th at pp. 853–54, emphasis in original.)

The absence of evidence can be shown by deposition testimony from plaintiff's witnesses indicating lack of knowledge regarding certain elements (*Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 481–483); or a plaintiff's factually-devoid discovery responses (*Union Bank v. Super. Ct.* (1995) 31 Cal.App.4th 573, 590). In ruling on a summary judgment motion, this Court is also entitled to assess the sufficiency of evidence to determine what inferences a jury could draw

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[2] The remaining causes of action are: 1) Breach of Contract; 2) Violation of the First Amendment of the United States Constitution (Speech); 3) Violation of the First Amendment of the United States Constitution (Association); 4) Violation of the Fourteenth Amendment's Equal Protection Clause; 5) Violation of the California Constitution, Art. 1, §§ 2, 3 and 4; and 6) Declaratory Relief. (*Id.*, ¶ 4.)

[3] The remaining causes of action in the cross-complaint are: 1) Breach of Contract and 2) Fraud. (*Id.*, ¶ 5.)

from the evidence. (*See Aguilar, supra*, 25 Cal.4th at p. 856 [finding that the court must determine "what any evidence or inference *could show or imply to a reasonable trier of fact*" (emphasis in original)].) After the defendant establishes an absence of evidence for an element of a claim, the burden shifts to the plaintiff to prove the existence of a triable issue of fact. If the plaintiff is unable to do so, defendants are entitled to judgment as a matter of law. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780–81.)

IV. ARGUMENT

AFA has incorrectly attempted to magnify this action, which at most is an ordinary contract dispute, into a civil rights action—piggybacking claims under both the United States and the California Constitutions. However, these constitutional claims fail as a matter of law for either of two independent reasons. First, the cancellation of the Event by the Foundation Defendants did not occur "under color of law" as required by 42 U.S.C. § 1983. (*See Gallagher v. "Neil Young Freedom Concert"* (10th Cir. 1995) 49 F.3d 1442, 1447 ["Under Section 1983, liability attaches only to conduct occurring 'under color of law.'"].) Likewise, there must be state action for liability under the free speech, free assembly, and free exercise clauses of the California Constitution. (*Golden Gateway Ctr. v. Golden Gateway Tenant Assn.* (2001) 26 Cal.4th 1013, 1031 (plur. opn.).) Second, even if the Foundation Defendants were state actors (and they are not), AFA cannot demonstrate that the Foundation Defendants engaged in discrimination when they cancelled the Event. Indeed, the evidence demonstrates that the Event was cancelled because of the unapproved press releases that had been issued regarding the Event. Finally, because AFA cannot prove a violation of its rights under the United States Constitution and the California Constitution, the cause of action for declaratory relief cannot be maintained. Because AFA "does not posses, and cannot reasonably obtain," the evidence needed to support its claims under the United States Constitution and California Constitution, summary adjudication should be granted. (*See Aguilar, supra*, 25 Cal.4th at p. 854.)

A. AFA's Claims Under The United States and California Constitutions Fail As A Matter Of Law Because The Foundation Defendants Were Not Engaged In State Action.

Because the Foundation Defendants are not state actors,[4] summary adjudication must be granted as to AFA's claims under the United States and California Constitutions.[5] "[T]he 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." (*Lugar, supra*, 457 U.S. at p. 936.) The general rule—absent some exception—is that that the actions of a private party do not constitute state action, "no matter how discriminatory or wrongful."[6] (*Am. Manufacturers Mutual Insurance Co. v. Sullivan* (1999) 526 U.S. 40, 50.) Indeed, private parties are considered state actors only "when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." (*Blum v. Yaretsky* (1982) 457 U.S. 991, 1004, emphasis in original.) Whether the actions of a private party constitute state action "is a matter of normative judgment, and the criteria lack rigid simplicity." (*Brentwood, supra*, 531 U.S. at p. 295.) "[N]or is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." (*Id.* at pp. 295–96.)

The Ninth Circuit recognizes four different tests to determine whether an exception to the general rule of no state action by a private party applies. (*Kirtley v. Rainey* (9th Cir. 2003) 326 F.3d 1088, 1093–95.) First, the joint action test evaluates whether "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged behavior" and "knowingly accepts the benefits derived from the unconstitutional behavior." (*Parks School of Business, Inc. v. Symington* (9th Cir. 1995) 51 F.3d 1480, 1486, internal citations, brackets and quotation marks omitted.) Second, the public function

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4 "If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes." (*Brentwood Academy v. Tennessee Secondary School Athletic Assn.* (2001) 531 U.S. 288, 295 fn. 2.)

5 "[U]nless persuasive reasons are presented for taking a different course," California courts should refer to federal authority. (*Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 959, citations omitted; *see also Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 365–366 [applying the same approach as federal cases concerning whether private enterprises may be regarded as state actors].) As such, this analysis applies equally to the claims under the California Constitution.

6 In any case, the Foundation Defendants' conduct was not discriminatory or wrongful. (*See infra* Part III.B.)

test considers whether a private party exercised "powers traditionally exclusively reserved to the State." (*Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 352.) A third test evaluates whether "the coercive influence or significant encouragement of the state effectively converts a private action into a government action." (*Kirtley, supra*, 326 F.3d at p. 1094, internal quotation marks omitted.) A final test considers whether "there is such a 'close nexus between the State and the challenged action' that the seemingly private behavior 'may be fairly treated as that of the State itself.'" (*Brentwood, supra*, 531 U.S. at p. 295, quoting *Jackson, supra*, 419 U.S. at p. 351.)

Regardless of the approach, state action only occurs if the "*specific conduct* of which the plaintiff complains" can be attributed to the state. (*Blum, supra*, 457 U.S. at p. 1004, emphasis added; *see also Lugar, supra*, 457 U.S. at p. 937 [holding state action requires "that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State"].) Here, because none of the tests are met, the Foundation Defendants' cancellation was not state action and summary adjudication is warranted on AFA's civil rights claims.

1. Because The State Did Not Benefit From The Allegedly Discriminatory Behavior, The Joint Action Test Does Not Apply.

Because the undisputed facts demonstrate that the State of California did not benefit from the Foundation Defendants' allegedly discriminatory behavior, there was no state action under the joint action test. Joint action "occurs when the state knowingly accepts the benefits derived from unconstitutional behavior." (*Parks School of Business, supra*, 51 F.3d at p. 1486.) The mere fact that conduct occurs on publicly-owned property does not establish state action. (*Gallagher, supra*, 49 F.3d at p. 1452.) Nor does "operat[ing] and manag[ing]" a publicly-owned facility establish state action. (*Albright v. Longview Police Dept.* (5th Cir. 1989) 884 F.2d 835, 838.) Rather, the critical factor is whether "the State's financial position[] would suffer if [the private party] did not discriminate." (*Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 843.) In *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, the Supreme Court held that state action is present where "[t]he State has so far insinuated itself into a position of interdependence with [a private party] that it must be recognized as a joint participant in the challenged activity." (*Id.* at p. 725.) The Court ultimately held that a private restaurant that leased space from the state, and engaged in discrimination, was a

state actor because the "profits earned by discrimination not only contribute[d] to, but also [were] *indispensable elements* in, the financial success of a governmental agency." (*Id.* at p. 724, emphasis added.) However, the *Burton* Court was clear that, of course, not every private lessee of public property is a state actor. (*Id.* at p. 725.) Thus, absent a link between the private party's allegedly unconstitutional conduct and a financial benefit for the state, a private entity's relationship with the state is "[no] different from that of many contractors performing services for the government."[7] (*Rendell-Baker, supra*, 457 U.S. at p. 843.)

Here, the facts demonstrate that the Foundation Defendants were private actors exercising their rights as private parties to cancel a private agreement with AFA regarding the Event. The Foundation is not a state actor under the joint action test. The Foundation leases the IMAX theater from the Science Center. (Sep. Stmt. 6.) However, the Science Center receives no funds from the Foundation. (Sep. Stmt. 10.) Because the Science Center does not receive revenue from the Foundation's activities, including leasing the IMAX theater for private events, there is no financial benefit to the Science Center resulting from the Foundation's cancellation of the Event, precluding a finding of state action under this test.[8] (*See Rendell-Baker, supra*, 457 U.S. at p. 842.)

2. The Foundation Defendants Were Not Engaged In A Traditional Public Function.

The Foundation Defendants were not engaged in a traditional public function when the Event was cancelled.[9] A finding of state action under the public function test requires a determination that the private party exercises "powers traditionally exclusively reserved to the State." (*Jackson, supra*, 419 U.S. at p. 352.) Courts recognize "[t]his test is difficult to satisfy" because "'[w]hile many functions have been traditionally performed by governments, very few have been exclusively reserved to the State.'" (*Gallagher, supra*, 49 F.3d at p. 1456, quoting *Flagg Bros., Inc. v. Brooks*

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[7] Numerous circuits require a showing that the public entity directly profited from the private entity's allegedly unconstitutional conduct. (*See, e.g., Morse v. North Coast Opportunities, Inc.* (9th Cir.1997) 118 F.3d 1338, 1343; *Gallagher, supra*, 49 F.3d at p. 1451; *Nat'l Broad. Co., Inc. v. Communications Workers of Am., AFL-CIO* (11th Cir. 1988) 860 F.2d 1022, 1027.)

[8] The Foundation actually lost money—the potential $4,310 in fees that it would have received from the AFA for use of the theater.

[9] AFA has not argued for the existence of state action under this test.

(1978) 436 U.S. 149, 158.) Further, "a private entity may be designated a state actor for some purposes but still function as a private actor in other respects." (*Caviness v. Horizon Community Learning Center, Inc.* (9th Cir. 2010) 590 F.3d 806, 814; *see also Gorenc v. Salt River Agricultural Improvement and Power District* (9th Cir. 1988) 869 F.2d 503, 507 [holding that an entity that "serves a governmental function" when it engages in certain activities is not a state actor "for the purposes of employment"].) Thus, the Ninth Circuit has held that an employee's First Amendment retaliation claims against a private company that had contracted with California to operate a correctional facility were barred by the state action doctrine because—although operating a correctional facility is a traditional public function—"[t]he relevant inquiry is whether [the defendant's] *role as an employer* was state action." (*George v. Pacific-CSC Work Furlough* (9th Cir. 1996) 91 F.3d 1227, 1230 (per curiam), internal quotation marks omitted, emphasis in original.)

Here, providing access to an IMAX theater facility for an after-hours private event is clearly not a traditional public function.[10] Indeed, prior to engaging in any discussions with the Foundation, AFA negotiated with the Bridge—a private IMAX theater—to hold its Event there.[11] (Sep. Stmt. 11.) Only when the event at the Bridge fell through did AFA contact the Foundation. (*Ibid.*) The fact that had originally planned to hold its event at an indisputably private venue forecloses any argument that the Foundation Defendants, by cancelling a private after-hours event at the IMAX theater, were engaged in a traditional or exclusive "public function." Thus, there is no state action under the "public function" test.

3. There Is No Evidence Of Coercive Influence By The State On The Foundation Defendants' Decision To Cancel The Event.

The Foundation Defendants' cancellation of the Event was not the result of coercion by or significant encouragement from a governmental entity. "[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided . . . significant

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[10] Nor, for that matter, is raising funds for exhibits in a museum considered to be a traditional public function. (*Cf. United Auto Workers v. Gaston Festivals, Inc.* (4th Cir. 1995) 43 F.3d 902, 907–08 ["The organization, management, and promotion events such as the [festival] do not fall within the domain of functions exercised traditionally and exclusively by the government."].)

[11] AFA also considered holding its event at CityWalk, another private venue, and—if necessary—at the University of Southern California, where AFA's event was ultimately held. (Sep. Stmt. 11.)

encouragement, either overt or covert," for the private party's action. (*Blum, supra*, 477 U.S. at p. 1004.) "[T]he mere existence of a lease cannot amount to coercion or significant encouragement sufficient" to establish state action. (*Nat'l Broad. Co., supra*, 860 F.2d at p. 1026.) Further, there must be evidence that the government "entered into the decision-making process" that resulted in the deprivation of rights. (*Ibid.*) Thus, for state action to apply, "both public and private actors share a common, unconstitutional goal." (*Cunningham v. Southlake Ctr. for Mental Health, Inc.* (9th Cir. 1991) 924 F.2d 106, 107.)

Here, there is no evidence that any governmental agency coerced, encouraged, or was otherwise involved in the Foundation Defendants' decision to cancel the Event. Rudolph did not consult with any employees of the Science Center prior to making the decision to cancel. (Sep. Stmt. 12.) Nor was the decision mandated by either the IMAX lease or the joint operating agreement. (*See* Sep. Stmt. 5, 6.) In fact, the IMAX agreement—which mandates compliance with applicable Federal and state laws—does not even address allowing access to the theater for private events. (Sep. Stmt. 6.) Likewise, while the Smithsonian Institution first alerted the Foundation of the unapproved press releases, its representatives never indicated that the Foundation should cancel the Event. (Sep. Stmt. 14.) In fact, the Smithsonian made no reference to cancellation, requesting only that the Foundation "issue a correction statement." (*Ibid.*) And Rudolph did not consult with any representatives of the Smithsonian prior to cancelling the Event. (Sep. Stmt. 15.) Further, while AFA alleges a "conspiracy" involving scientists at the Natural History Museum and other entities to cancel the Event because of its subject matter, there is no evidence that those parties actually contacted Rudolph ***prior to*** his decision to cancel the Event. (Sep. Stmt. 16.) Indeed, the e-mail communications identified in AFA's TAC were not delivered to Rudolph until the day ***after*** the Event was cancelled. (*Ibid.*) Because AFA has no evidence that any governmental entity coerced or encouraged the Foundation to cancel the Event, state action cannot be found under the "coercion" test.

4. There Is No Nexus Between The Foundation Defendants' Interactions With The State And The Decision To Cancel The Event.

Nor is there such a "close nexus" between the state and the Foundation Defendants' cancellation of the Event that it "may be fairly treated as that of the State itself." (*Jackson*, *supra*, 419 U.S. at p. 351.) "From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action." (*Brentwood*, *supra*, 531 U.S. at p. 295.) Thus, the determination of state action may be appropriate where "[t]he nominally private character of [the defendant] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings." (*Id.* at p. 298.) But this analysis "does not mean one can nickel and dime his way to state action by citing a laundry list of examples unrelated either in purpose or time." (*Gross v. Fond du Lac County Agricultural Society, Inc.* (E.D. Wisc. Sept. 6, 2005) 2005 U.S. Dist. LEXIS 19537 at *23.) Rather, "*Brentwood* directs courts to focus on the fact-intensive nature of the state action inquiry, mindful of its central purpose: to 'assure that constitutional standards are invoked when it can be said that the state is *responsible for the specific conduct* of which the plaintiff complains.'" (*Crissman v. Dover Downs Entertainment Inc.* (3d Cir. 2002) 289 F.3d 231, 239, en banc, quoting *Brentwood*, *supra*, 531 U.S. at p. 295, emphasis added.)

In *Brentwood*, the Supreme Court determined that the Tennessee Secondary School Athletic Association, a not-for-profit membership corporation, engaged in state action when it enforced a rule regarding the recruitment of student-athletes. (*Brentwood*, *supra*, 531 U.S. at pp. 290–91.) The Court's finding was based on several factors. Specifically, the Court noted that public high schools constituted 84% of the Association's voting membership and its rulemaking body was limited to "high school principals, assistant principals, and superintendents elected by the member schools, and the public school administrators who so serve typically attend meetings during regular school hours." (*Id.* at p. 291.) The Court determined that the Association "is an organization overwhelmingly composed of public school officials who select representatives . . ., who in turn adopt and enforce rules that make the system work." (*Id.* at p. 299 [noting that this setup "can be sensibly seen as [public schools] exercising their own authority to meet their own responsibilities"].) Further, "public

schools have largely provided" the Association's revenue. (*Ibid.*) Finally, the Court noted that the Association's employees "are treated as state employees to the extent of being eligible for membership in the state retirement system." (*Id.* at p. 300.)

None of those factors is present here. The Foundation is not an organization constituted primarily of public officials acting in that capacity. While Rudolph is a public employee, he cancelled the Event in his capacity as President of the Foundation. (Sep. Stmt. 1.) Further, unlike *Brentwood*, Foundation employees do not receive state benefits and are not civil servants as a result of their employment by the Foundation. (Sep. Stmt. 8.) And though Directors of the Science Center also serve on the Foundation's Board of Trustees, they constitute only 9 of the 83 members of the Foundation's Board (Sep. Stmt. 9)—and were not involved in the decision to cancel the Event (Sep. Stmt. 17). Finally, except for fees paid pursuant to contractual relationships between the Foundation and the Science Center, the Foundation receives no revenue from the State. (Sep. Stmt. 18.)

AFA has suggested the Foundation is a state actor because the contractual relationship between the Foundation and Science Center is referred to as a "public-private partnership" or because the Foundation is an auxiliary to the Science Center. But even where a statute designates a party as "public" or "private," it is not determinative as to state action. (*See Caviness, supra*, 590 F.3d at 815–16 [noting that it was "erroneous" to argue that "the state's statutory characterization" determines the public or private nature of a party and upholding dismissal on state action grounds].) Thus, even if the terms "public-private partnership"—which seemingly contemplates two separate parties, a state actor and a private actor—or the term "auxiliary" actually implied a governmental action (and these terms do not), it would be "erroneous" to argue that such terminology demonstrates the Foundation was engaged in state action. (*See ibid.*)

For example, in *Stark v. Seattle Seahawks* (W.D. Wash. June 22, 2007) 2007 U.S. Dist. LEXIS 45510, the court held that a private party that arguably engaged in what would otherwise be unconstitutional pat-down searches was not a state actor, despite its involvement in a relationship proclaimed to be a "model for public-private partnerships." (*Id.* at p. *19.) *Stark* involved a private party that—much like the Foundation—was engaged in a long-term lease of state property, with the

authority to enter into agreements for the use of that property. (*Id.* at p. *6.) Unlike the Foundation's relationship with the Science Center, under the terms of the lease in *Stark*, the governmental agency received direct financial benefits from the lease. (*Id.* at p. *11.) Further, the lease agreement contained provisions that "provide[d] benefits to the public not normally associated with commercial leases"—such as minority hiring requirements and funding of youth athletic facilities. (*Id.* at pp. *11–12.) Despite these facts, the court granted summary judgment on the grounds that the private party operating and conducting the pat-down searches on state property was not engaged in state action. (*Id.* at p. *23.)

Also, "it is now well-established that state regulation, even when extensive, is not sufficient to justify" finding state action. In *Caviness*, the court held that multiple statutes addressing the establishment, function, and structure of public charter schools—including requirements addressing the hiring of employees—were inadequate to create state action for discrimination stemming from an employment relationship. (590 F.3d at pp. 808–810, 818.) Here, by contrast, the only statutes referencing the Foundation are those authorizing the Science Center to enter into a lease-purchase agreement with the Foundation for the Phase II Project (Food and Agr. Code, § 4101.3) and authorizing the Science Center to enter into personal services contracts with the Foundation (*id.*, § 4101.4). Neither statute references providing access the IMAX theater for private events, the relevant activity here.

Further, the relationship between the Foundation and the Science Center is not consistent with cases in which state action has been found. For instance, the government has not established the criteria for the Foundation to use in determining with whom to enter into private event agreements, nor does the state receive income from such private events. (*See People for the Ethical Treatment of Animals v. Giuliani* (S.D.N.Y. 2000) 105 F.Supp.2d 294, 299, 304 [finding state action—which was, in fact, conceded—where the a city permit established "design and review requirements" for entries and the city received "direct [financial] benefit[s]" from the event].) Nor does any statute designate the Foundation as the agent of the Science Center or require the Science Center to approve

Foundation budgets and contracts. (*See Clark v. County of Placer* (E.D. Cal. 1996) 923 F.Supp. 1278, 1284 [finding state action on these bases].)

While the AFA's responses to interrogatories provide a list of facts connecting the Foundation and the Science Center, these connections are "unrelated in either purpose or time" to the cancellation of the Event.[12] (*See Gross, supra*, 2005 U.S. Dist. LEXIS at p. *23). AFA cannot "nickel and dime [its] way to state action." (*See ibid.*) Thus, because there is no "close nexus" between the state and the Foundation Defendants' decision to cancel the Event, state action cannot be found under this test. (*See Jackson, supra*, 419 U.S. at p. 351.)

Finally, the *Brentwood* Court noted that "facts that suffice to show public action . . . may be outweighed in the name of some value at odds with finding public accountability in the circumstances." (*Brentwood, supra*, 531 U.S. at p. 303.) AFA's expansive interpretation of the state action requirement would fundamentally alter the relationship between public agencies and private groups that support them. Applying constitutional standards to organizations like the National Park Foundation, parent-teacher organizations, or athletics booster clubs—particularly where the conduct consists only of an alleged breach of contract—contradicts the principle that "[i]ndividuals and private entities are not normally liable for violations of most rights secured by the United States Constitution." (*See Morse, supra*, 118 F.3d at p. 1340.)

5. When Defendant Rudolph Cancelled The Event, He Was Not Acting "Under The Color Of State Law."

Rudolph's employment by both the Foundation and the Science Center—a focus of AFA's previous arguments—does not remotely demonstrate that he acted "under the color of state law" when he cancelled the Event. (*See Askew v. Bloemker* (7th Cir. 1976) 548 F.2d 673, 677 ("[T]he mere assertion that one is a state officer does not necessarily mean that one is acting under color of state law."].) "In general, section 1983 is not implicated *unless* a state actor's conduct occurs in the course of performing an actual or apparent duty of his office, or unless the conduct is such that the

[12] These include, *inter alia*, "work[ing] together jointly to secure necessary funding for building construction and exhibit fabrication," pooling resources for efficiency, coordination regarding exhibits and the revenue from special exhibits, the Foundation's operation of gift centers in the Science Center, and other contractual terms. (Sep. Stmt. 22.)

actor could not have behaved in that way but for the authority of his office." (*Martinez v. Colon* (1st Cir. 1995) 54 F.3d 980, 986, emphasis added) In fact, "to trigger § 1983 liability, . . . the individual must actually be engaged in the abuse of official power granted by the government." (*Parrilla-Burgos v. Hernandez-Rivera* (1st Cir. 1997) 108 F.3d 445, 449.) "[P]urely private acts which are not furthered by any actual or purported state authority are not acts under color of state law." (*Barna v. City of Perth Amboy* (3d Cir. 1994) 42 F.3d 809, 816; *see also Johnson v. Knowles* (9th Cir 1997) 113 F.3d 1114, 1117 [upholding dismissal because defendant's "status as an Assemblyman [gave] him no direct power over the Committee and its actions"].)

Here, Rudolph did not act "under the color of state law" when he made the decision to cancel the AFA's event. Only parties to a contract have the ability to cancel the contract. (*Cf.* Cal. U. Com. Code, § 2106(4) [defining cancellation in sales contracts as "occur[ing] when either party puts an end to the contract for breach by the other . . ."].) The Foundation—and not the Science Center—was a party to the agreement. (Sep. Stmt. 19.) Nor do the agreements between the Foundation and the Science Center give the Foundation the right to contract on behalf of the State. (Sep. Stmt. 20.) Last, the Foundation is solely responsible for the operation of the IMAX theater. (Sep. Stmt. 4.)

Additional evidence supports this conclusion. Rudolph receives separate pay from the Foundation and keeps separate logs of his time spent on Foundation business and time working for the Science Center. (Sep. Stmt. 13.) Further, there is no evidence that the Foundation President must be the same individual as the President of the Science Center. Although such an outcome is authorized, it is not required or necessary. (*See* Sep. Stmt. 21.) Indeed, the position description for the President of the Foundation makes no reference to the Science Center. (*Ibid.*) Here, only the Foundation negotiated and allegedly contracted with AFA (Sep. Stmt. 19), and Rudolph—in his capacity as President of the Foundation—decided to cancel the Event (Sep. Stmt. 1).[13] Thus, Rudolph's decision was not made "under color of state law."

[13] There is no other capacity in which he could have been acting, and there is no evidence suggesting otherwise.

In summary, the Foundation Defendants are not state actors under any of the analyses set forth by the courts. Because AFA's claims under both the United States and California Constitutions require state action, the Foundation Defendants motion for summary adjudication should be granted.

B. Even If The Foundation Defendants Were State Actors, There Is No Evidence Of Intentional Discrimination

While the absence of state action is fatal to AFA's constitutional claims, AFA also cannot prove that the Foundation Defendants' decision to cancel the Event was the result of a discriminatory motive—a separate and necessary element of AFA's claims.. Rudolph's uncontradicted deposition testimony is clear—he 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. Stmt. 23.) AFA has no evidence that contradicts Rudolph's testimony. And AFA's bizarre *res ipsa loquitur* theory does not apply to these claims—AFA must support its claims with actual evidence of discrimination. AFA must demonstrate that deterrence of its First Amendment rights "was a substantial or motivating factor in [the Foundation Defendants'] conduct." (*See Sloman v. Tadlock* (9th Cir. 1994) 21 F.3d 1462, 1469–70 [applying intent-based, retaliatory discharge framework to claim that police officers' actions were intended "to prevent [plaintiff] from expressing his political views"]; *Mendocino Environmental Center v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300 [requiring evidence that the defendant "*intended* to interfere with [the plaintiff's] First Amendment rights"], citation omitted, emphasis in original.) There is no such evidence.

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." (*See Kaye v. Board of Trustees of the San Diego County Public Law Library* (2009) 179 Cal.App.4th 48, 57 [citing examples].) Because Article 1, §§ 2, 3, and 4[14] of the California Constitution are similar to

[14] AFA bases its cause of action under Article 1, § 4 on the novel allegation that Defendants cancelled the Event "on the perception that Plaintiff was engaged in religious speech." (TAC, ¶ 107.) There are no cases to support liability based on "perceived religion."

the First Amendment, the same federal standard applies to those claims absent a persuasive reason otherwise. (*See 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 alleges that the Defendants "intentionally treat[] Plaintiff differently than other similarly-situated organizations based on the viewpoint of its expression." (TAC, ¶ 67.) 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.[15] (*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.) When courts 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, 1179 [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, the Foundation Defendants can establish a rational basis for the cancellation. (*See Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564 (per curiam) [establishing the "class-of-one" analysis and noting the requirement that plaintiff be "intentionally treated differently" and "there is no rational basis for the difference in treatment"].) But even if the decision to cancel was irrational, AFA still cannot prove intentional discrimination—which it must. (*See ibid.*)

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[15] The Ninth Circuit has yet to address this issue. (*See Gilbrook v. City of Westminster* (9th Cir. 1999) 177 F.3d 839, 870 ["[W]e do not address the more interesting (and difficult) legal question posed by defendants: Can differential treatment on the basis of expressive activity give rise to an equal protection claim, separate and apart from a claim of First Amendment retaliation?"].)

Thus, each of AFA's civil rights claims requires proof that the cancellation of the Event was the result of a discriminatory motive. Such proof cannot be mere speculation. (*See Karam v. City of Burbank* (9th Cir. 2003) 352 F.3d 1188, 1194.) AFA has no evidence that the Foundation, and Rudolph in particular, cancelled the Event for any discriminatory purpose—rather than the obvious and stated reason that unapproved press materials were issued. In their depositions, AFA's own witnesses failed to identify any evidence of improper motive, except for the cancellation itself. (*See* Sep. Stmt. 32–34.) For example, when asked whether there was "anything . . . upon which you're basing your belief that the real reason for the cancellation . . . was that [the Foundation] did not want to have an open debate on intelligent design," Peter Bylsma answered "No." (Sep. Stmt. 33.)

Nevertheless, AFA in its various complaints has alleged that the Foundation Defendants and the Science Center "have instituted a policy whereby the advancement, promotion or discussion of intelligent design is prohibited." (TAC, ¶ 41.) AFA has no evidence to support this claim. In its interrogatory responses, AFA suggests that documents and testimony from Chris Sion 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. 45.)

A closer examination of this "evidence," however, demonstrates it is either misconstrued or mere speculation. AFA previously relied on e-mails from Sion and Shell Amega as purported evidence of discriminatory intent.[16] (TAC, ¶ 17.) But this Court previously held that those e-mails "don't show discriminatory intent." (Ochsenbein Decl., Ex. 1 at 6:20–23.) Moreover, Rudolph, Sion, and other Foundation witnesses, testified that Rudolph—not Sion or Amega—ultimately made the decision to cancel the Event. (Sep. Stmt. 31.) Further, Foundation witness denied the existence of any policy addressing the content of private events. (Sep. Stmt. 35.) Likewise, the e-mail from the Natural History Museum was not received by Rudolph until ***after*** the Event was cancelled. (Sep. Stmt. 35.) Nor does the mere fact that the Foundation allegedly sells books discussing evolution indicate intentional discrimination. (*See Miller v. Cal. Com. on the Status of Women* (1984) 151 Cal.App.3d 693, 700 [noting "the critical First Amendment distinction between the government's

[16] Amega testified that she used the term "creationist" in an e-mail "[b]ecause [she] was conveying Harold [Closter's] concerns and so [she] used his terminology." (Sep. Stmt. 30.)

addition of its own voice and the government's silencing of others"], internal quotations omitted; *see also Ill. Dunesland Preservation Society v. Ill. Dept. of Natural Resources* (7th Cir. 2009) 584 F.3d 719, 724 [noting that where "a government official made a statement; he would not be required to contradict himself by including a counterstatement urged by a private person"].)

In fact, the evidence demonstrates that AFA's speculation regarding a discriminatory policy is baseless. 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. 25.) 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. 37.) Indeed, AFA witness Joe Peterson testified that Sion was supportive of having a "conservative" event. (Sep. Stmt. 38.) And Avi Davis testified that Foundation employees were "very, very enthusiastic" about the Event, never expressing concerns about the content. (*Ibid.*) AFA's witnesses also testified that Foundation employees, particularly Sion, were aggressively trying to get the contract finalized so the films could be shown.[17] (Sep. Stmt. 39.) In fact, the Foundation orally agreed to modify its standard payment terms in an effort to assist AFA. (Sep. Stmt. 40.) Further, Sion and Pygin's recommendation not to cancel, even after the misleading press releases were issued, demonstrates that the Foundation had no policy to exclude discussions of intelligent design. (*See* Sep. Stmt. 41.)

Finally, the testimony of the Foundation's witnesses demonstrates that—consistent with the reasons given at the time—the Event was cancelled because AFA violated the Promotional Materials provision of the Event Policies & Procedures. All of the Foundation witnesses testified that the press releases were the reason for the cancellation. (Sep. Stmt. 42.) Rudolph ***did not*** consider the subject matter of the Event when making the decision to cancel (Sep. Stmt. 23), which is confirmed by the fact that Pygin testified that the subject matter of the Event never was discussed in her conversations with Rudolph prior to the cancellations (Sep. Stmt. 43). The bottom line is that it was Rudolph's

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[17] "Q. They were encouraging you to get your contract in and signed, right? A. They were encouraging us to show two films for a fee at their facility." (Ochsenbein Decl. Exh. 6. [Davis Dep. Tr.)] at 154:16–19.) "Chris Sion in this case was all over us. She was determined that we were going to do this event. She was absolutely determined that we were -- MR. BECKER: Avi, I'm going to stop you. You're not --" (*Id.*, Exh. 6 [Davis Dep. Tr] at 178:23–179:2.)

concerns that the press releases violated the agreement and were misleading—implying sponsorship by the Science Center and the Smithsonian when it was a private event[18]—that motivated his decision to cancel. (Sep. Stmt. 23.)

Because there is no evidence of intentional discrimination, summary adjudication should be granted as to AFA's state and federal constitutional claims.

C. Because There Is No Evidence Of Constitutional Violations, 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, 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 on these claims.

V. CONCLUSION

For the foregoing reasons, the Foundation and Jeffrey Rudolph, individually and in his official capacity as President of the Foundation, respectfully request that the Court grant the instant Motion.

DATED: March 15, 2011

GIBSON, DUNN & CRUTCHER LLP

By: _____
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[18] Even AFA's e-mails suggest the release was misleading. In a contemporaneous e-mail Joe Peterson stated: "Whomever at [*sic*] wrote the copy on the Discovery Institute press releases should have his head examined . . . I thought the problem was buried in the text of the documents . . . NOT THE HEADLINES. Talk about waving a red flag in front of a bull. It seems like they were deliberately trying to screw this up." (Sep. Stmt. 44.)