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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

AMERICAN FREEDOM ALLIANCE, a nonprofit corporation;

Plaintiff,

vs.

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

Defendants.

Case No. BC423687

PLAINTIFF AMERICAN FREEDOM ALLIANCE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS DEMURRER TO CALIFORNIA SCIENCE CENTER FOUNDATION'S AMENDED CROSS-COMPLAINT

[Notice Of Demurrer And Request For Judicial Notice And Exhibit Attached Thereto Filed Concurrently Herewith]

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

BY FAX

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff American Freedom Alliance ("AFA") filed the instant lawsuit after the Defendants cancelled AFA's planned screening of a documentary film entitled "Darwin's Dilemma" at the California Science Center's IMAX theater on October 25, 2009. The documentary explores the "Cambrian Explosion," the geologically-sudden appearance of dozens of major animal types in the fossil record without any trace of the gradual transitional steps Charles Darwin had predicted in his theory of evolution. AFA has alleged that the event's cancellation resulted from pressure placed on the Defendants by its parent affiliate, the Smithsonian Institution, and others opposed to the film's message, which they perceived to promote "creationism," a religious viewpoint incompatible with the mission of a science museum. Accordingly, as AFA also has alleged, Defendants' contractual explanation for cancelling the event is pretextual.

Defendant and Cross-Complainant California Science Center Foundation ("the Foundation") filed a cross-complaint on November 8, 2010. After meeting and conferring with AFA's counsel in an attempt to resolve certain issues, the Foundation filed an Amended Cross-Complaint ("the Cross-Complaint") on December 3, 2010, alleging causes of action substantially identical to those in the original cross-complaint: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; and (3) Fraud (promise made without any intention of performing it).[1]

II. THE CROSS-COMPLAINT'S PURPORTED BREACH OF CONTRACT CLAIM FAILS TO PLEAD A CAUSE OF ACTION AND IS UNCERTAIN.

A. *The First Cause Of Action Fails To Plead The Existence Of A Specific Contract.*

California law for over a century has held that "[a] complaint for breach of contract must state a breach ***in unequivocal language***. The necessary facts must be stated, ***and not left to inference***." *Poirier v. Gravel* (1891) 88 Cal. 79, 79-80 (emphasis added). "It is hornbook law that the essential elements to be pleaded in an action for breach of contract are: (1) ***the contract***; (2) plaintiff's performance of the contract or excuse for nonperformance; (3) defendants' breach; and (4) the resulting damage to plaintiff." *Lortz v. Connell* (1969) 273 Cal. App. 2d 286, 290 (em-

[1] Notably, although the Foundation's Cross-Complaint alleges harm to the Center's reputation, the Defendant California Science Center ("Center") and Rudolph in his official capacities as president of the Foundation and president and CEO of the Center did not file separate Cross-Complaints. Thus, neither the Center's nor Rudolph's rights are before the Court or will be implicated by the Court's ruling.

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phasis added). And it is axiomatic that "to state a cause of action for *breach* of contract, a party must plead the *existence* of a contract." *Harris v. Rudin Richman and Appel* (1999) 74 Cal.App.4th 299, 307 (emphasis added).

The Cross-Complaint's inconsistent and contradictory allegations of the existence of a contract render the breach of contract cause of action ambiguous and uncertain. In place of a simple, clear and unambiguous statement alleging the existence of a contract, the Cross-Complaint evasively superimposes *AFA's allegation* of its existence over the Foundation's claim:

> ***AFA alleges in its Complaint*** that AFA and the Foundation entered into a contract regarding the Event.... As part of this ***alleged contract***, AFA agreed to abide by the Event Services' Policies and Procedures.

(Cross-Complaint, ¶ 22, p. 7, lns. 6-9; emphasis added).

The stubborn intrusion of the "alleged" modifier is dissembling. Is there a contract or not? This "either-or" pleading gimmick – alleging the Cross-Defendant *might* have breached the contract, *assuming there is a contract* –wants it both ways. It nevertheless follows that "an allegation that a defendant *might have* breached a contract does not state a valid cause of action." *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 174.

Compounding the confusion, the Cross-Complaint ***inconsistently*** identifies a "contract" shorn of the modifying "alleged" language. For instance, the "Factual Allegations" section alleges the Foundation's Events Services Department "requires that *all contracting parties* agree to comply with the Event Services' Policies and Procedures." (Cross-Complaint, ¶ 9, p.4, lns 6-8; emphasis added). A specific term of the contract is then pled *in haec verba* (*id.* at lns 10-14) incorporating an "Exhibit A," consisting of a copy of an Event Price Estimate and an Event Services Policies and Procedures (*id.*, ¶ 11, p. 4, lns 26-27).[2] These allegations might have supplied meaning and clarity, as they would have shown the Foundation recognizes the contract, its terms, its documents and their integration. But they are rendered indefinite by the contradicting "alleged contract" terminology permeating the Cross-Complaint, introduced notably in the Cross-Complaint's opening sentence: "In clear violation of the terms of its ***alleged*** contractual agreement with the ... Foundation ... AFA ... coordinated with non-party the Discovery Institute to

[2] No exhibit was attached to the service copy of the Cross-Complaint, which by virtue of new information learned at the depositions of Foundation's witnesses has prompted the development of an issue in this case as to which specific documents constitute the integrated contract between AFA and the Foundation.

publicize an event... This publicity was not approved in advance ... as required by the ***alleged*** contract between the Foundation and AFA." (Cross-Complaint, ¶ 1, p. 2, lns. 5-11). The artifice of ***alleging the allegation of a contract*** appears, contradictorily, to disavow the existence of a contract. Whatever its purpose, the Breach of Contract claim fails utterly to satisfy a basic pleading requirement and causes needless confusion.

B. ***The First Cause of Action Fails To Allege Proximate Cause And The Origin And Nature Of Damages – Both Are Required Elements.***

If the Cross-Complaint were relieved of its baffling references to an "***alleged***" contract, it would still need to supply facts sufficient to show both causation and damages. On its face, the Cross-Complaint fails to plead these requisite elements. Specifically, the Cross-Complaint fails to demonstrate a causal connection between AFA's alleged failure to comply with the "Promotional Materials" contract provision and the Foundation's alleged damages. It additionally fails to identify the nature and type of damages that would have been reasonably contemplated by the parties as a probable result of a breach.

It is a "fundamental rule of law" that "whether the action be in tort or contract compensatory ***damages cannot be recovered unless there is a causal connection between the act or omission complained of and the injury sustained***." *McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 104, citing *Capell Associates, Inc. v. Central Valley Security Co.* (1968) 260 Cal.App.2d 773, 779 and *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.* (1970) 9 Cal.App. 3d 508, 528 (internal quotes omitted; emphasis added). Here, the Cross-Complaint alleges that AFA "collaborated" with a third party, the Discovery Institute, for the purpose of "co-sponsoring" AFA's event, in which press releases and publicity were issued "appropriating" the name of the California Science Center (a separate Defendant) without prior approval, and that, as a result, "the *Foundation* suffered damages to be proved at trial." (Cross-Complaint, ¶ 25, p.7, lns.17-18; emphasis added). These allegations raise at least two problematic causation issues: (1) whether the Cross-Complaint has alleged that AFA failed to comply with an expressly and clearly defined contractual duty; and (2) whether the Cross-Complaint has alleged the nature and type of damages that would have been reasonably contemplated by the parties as a probable result of a breach.

1. *The Cross-Complaint Does Not State Facts Showing That AFA Failed To Comply With A Duty Expressly And Clearly Described In The Contract.*

The Cross-Complaint ropes together a series of allegations purporting to show that AFA was responsible for the public release of false and/or misleading publicity that appropriated the name of the California Science Center without first obtaining the prior approval of the Foundation. At minimum, even before identifying AFA's contractual duty, the Cross-Complaint must identify *the nature* of the false or misleading publicity (what makes it false or misleading?). The Cross-Complaint fails even to allege that AFA, or, for that matter, a*nyone* in particular, issued the allegedly harmful publicity. Instead, it deploys the misleading and aggravating practice of incorporating the allegations of AFA's Complaint ("***In its various complaints, AFA states that***, because the press releases were issued by the Discovery Institute...."). (Cross-Complaint, ¶ 15, p. 5, lns. 20-21; emphasis added). Threshold facts that would gracefully escort the reader into the Cross-Complaint's promised tale of mischief are strangely AWOL. Not surprisingly, the pleading degenerates into an incomplete, aimless account of broadly identified circumstances advancing no clear explanation for why AFA would have sought to frustrate its dealings with the Foundation by ignoring the contract.

The Cross-Complaint is equally silent regarding whether AFA was obligated under the contract's terms to manage, control, police or direct the promotional activities of third parties interested or peripherally involved in the event. Thus, there is no showing of facts supporting a theory of vicarious responsibility for the alleged publicity. Not trivial, these omissions and qualified allegations underscore the Cross-Complaint's failure both to sufficiently plead material facts and to provide a logical narrative from which to draw reasonable inferences. What made the press releases false or misleading? Who is responsible for publicly distributing them? What was AFA's duty under the contract?

The California Supreme Court has stated, "[t]he existence of a contractual legal duty is determined by the terms of the parties' contract." *City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 399. It has stated as well that "the intention of the parties as expressed in the contract is the source of contractual rights and duties." *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 38. Yet the Cross-Complaint never alleges AFA's legal duties in relationship to the Foundation's claimed damages. For the Foundation to enforce its approval requirement against AFA based upon the actions of third parties, the Cross-Complaint must allege facts showing AFA's intent to accept such terms. Stated

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differently, some fact must be alleged to show that AFA understood that it was required to control the actions of third parties and agreed to do so.

"A court must ascertain and give effect to [the] intention [of the parties] by determining what the parties meant by the words they used. Accordingly, the exclusion of relevant, extrinsic evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone." *Id.* Parties to a transaction should be able to clearly express their intent regarding the nature and scope of their legal relationship *and* be able to rely on the legal certainty of that expression. *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1011.

Here, the Cross-Complaint generally alleges – and without any sufficiently laid foundation – that AFA and the Discovery Institute "collaborat[ed]" in promoting the event, even that the Discovery Institute was a "co-sponsor" of it. It implies either that the Discovery Institute was a third party beneficiary of the contract between the Foundation and AFA or that AFA was responsible under the terms of the contract for controlling the acts of third parties lacking privity. *Missing completely* from the Cross-Complaint's narrative are: (1) facts pointing to contract language creating a duty to control the actions of third parties; (2) the factors giving rise to AFA's supposed duty to enforce a provision of the contract against non-contracting third parties; (3) what the nature and scope of that duty would have been in the specific context of these facts and circumstances; (4) and how exactly AFA breached such a duty.

The Foundation appears to ask the Court to blindly accept as fact that AFA owed a legal obligation to perform some unspecified form of *ultra vires* act to ensure absolute secrecy concerning the event until the Foundation had reviewed its publicity. Further, the Foundation asserts that third parties with whom AFA may have communicated, including presumably even news reporters, should be expected to strictly comply with contract provisions they knew nothing about and would be under no legal compulsion to acknowledge. The Foundation additionally expects the Court to accept that AFA understood the purpose of the contract provision *apart from* its language providing that promotional materials must be approved "for technical and factual accuracy." Nothing in the Cross-Complaint – no reference to an integration clause or parol evidence – details an unwritten "purpose" of the approval provision. The quoted contract language nowhere imposes a duty on AFA to manage the speech rights of others, or to ensure the accuracy of promotional material over which AFA had no right or power to control.

Fatal to the Cross-Complaint's attempt to hold AFA liable for third parties' actions is the lack of agency. Normally, agency is created by an express contract or authorization. 3 Witkin, *Summary of California Law* (10th ed. 2005) Agency, § 92, p. 139; *see also* Civ. Code, §§ 2299, 2300. Here, the Cross-Complaint conclusorily refers to AFA and the Discovery Institute as "collaborators" and "co-sponsors," ambiguously suggesting some kind of intentional relationship. Yet the Cross-Complaint has not alleged clear and unambiguous facts to show that AFA owed a duty under the contract provision to perform any specific act, much less to inform the Discovery Institute or any other third party that they would also be bound (and gagged) by the contract's nebulous terms.

While the Foundation takes a broad brush to imply that AFA owed a contractual duty to it to police and monitor the actions of third parties under some hypothetical scenario faintly pixilated, the facts that would place AFA on notice of that duty are left to the imagination. Simply put, the review provision neither states nor implies such a duty. In the final analysis, the Cross-Complaint is utterly deficient in describing what duty AFA allegedly breached.

2. *The Cross-Complaint Does Not Allege The Nature And Type Of Damages That Would Have Been Reasonably Contemplated By The Parties As A Probable Result Of A Breach.*

In addition to the Cross-Complaint's gross inattention to detail in alleging AFA's contractual duty, it suffers from an equally fatal omission of facts outlining the nature, type and scope of the Foundation's alleged damages. Instead, the Cross-Complaint is content to perfunctorily and elliptically allege only that damages will be "proved at trial." (Cross-Complaint, ¶ 25, p. 7, lns 17-18). Under the law, "[c]ontract damages must be clearly ascertainable in both nature and origin." *Erlich v. Menezes* (1999) 21 Cal.4th 543, 560; *see* Civ. Code, § 3301 ("No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.") To be recoverable, ***special damages must be pleaded*** and must fall within the rule of *Hadley v. Baxendale*, i.e., they must reasonably be supposed to have been within the contemplation of the parties when making the contract as the probable result of a breach. *Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 334.[3] "In an action for breach of contract, the measure of damages is the amount which will compensate the party aggrieved for all the detriment proxi-

[3] The rule of *Hadley v. Baxendale* is adopted in California by Civ. Code, § 3300: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

mately caused thereby, ***or which, in the ordinary course of things, would be likely to result therefrom.***" *Erlich v. Menezes*, *supra*, 21 Cal.4th at p. 560 (emphasis added).

AFA (and the Court) are invited to speculate about the nature, type and origin of the Foundation's damages. The fact that the Foundation claims contract damages at all is noteworthy inasmuch as the Foundation unilaterally cancelled the contract and was to have derived a financial benefit.[4] The faint outline of something approximating a contract remedy appears in the "Introduction" section of the Cross-Complaint, where passing reference is made to the Foundation's reputational interest and "to ensure that private groups do not appropriate the reputation of the Science Center (a separate party in this action) for their own benefit...." Yet the nexus between *appropriating a reputation* (whatever that means) and damages is elusive, even as the nature, type and scope of damages contemplated by the parties for breach of the review provision are obscured by gaps in the narrative. Moreover, the line between the Foundation's interest in protecting its reputation and its alleged interest in protecting the reputation of the Defendant Center, a separate if not distinct party in this action, is blurred. Practically speaking, the *Center's* reputation – not the Foundation's – is the reputational interest at stake, and the Center would be the beneficiary of the Foundation's success in prosecuting the Cross-Complaint. After all, the Foundation exists for the purpose of promoting the work of the California Science Center. The converse is not true; the California Science Center does not exist to promote the work of the Foundation.

Among the least satisfying riddles of this case is how, on the one hand, the Foundation can seriously disavow any functional relationship with the Defendant California Science Center as a state agent for purposes of creating liability under 42 U.S.C. § 1983, bearing responsibility for violating AFA's constitutionally protected rights, while simultaneously claiming responsibility for protecting the Center's reputation. At the end of the day, the Foundation has not alleged any facts detailing the nature, type or scope of its alleged damages, much less harm to its reputation. Quite clearly, it lacks standing to assert harm to the Center's reputation as a third party beneficiary of the contract. Even so, it has described no damages based either on its own reputational interests or on the Center's reputational interests.

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[4] The Cross-Complaint even alleges that the Foundation viewed AFA's event as an opportunity to support its own fundraising efforts. See, infra, subsection C: By providing a venue to AFA for its event, "Foundation saw an opportunity to ... ***support the Foundation's own purpose of fundraising for the California Science Center***." (Cross-Complaint , ¶ 2, p. 2, lns 15-20; emphasis added).

C. *The First Cause Of Action for Breach Of Contract Action Is Uncertain Because The Foundation's Contract Was Ostensibly Entered Into As A Charitable Act.*

Paragraph 2 of the Cross-Complaint is a mash of nonsense, implying that the Foundation entered into a contract with AFA for altruistic reasons. Query how these sentences logically interconnect: "The Foundation was not concerned about the content of the film because it was, after all, to be show [sic] at a private event. ***Rather, the Foundation saw an opportunity to assist AFA*** [after its arrangement with another venue dissolved] ***in finding a venue and support the Foundation's own purpose of fundraising for the California Science Center. In an effort to be helpful***, the Foundation even offered to make an adjustment to its standard payment terms and give AFA a discounted rate and adjust its terms." (Cross-Complaint , ¶ 2, p. 2, lns 15-20; emphasis added). An opportunity to ***assist*** AFA? To support ***its*** fundraising for the Center? An effort to be ***helpful***? If the Foundation is seriously claiming that it entered into a volunteer relationship with AFA for philanthropic purposes, then it had no right to expect the object of its philanthropy to commit to vague terms limiting its right to promote its event, particularly in light of the Foundation's coterminous and compatible "fundraising" expectations from the event. Indeed, if the Foundation sought to profit from its own alleged participation in AFA's event, it contradicts itself by attempting to disavow the association alleged to have been implied by press releases announcing the event.

III. THE CROSS-COMPLAINT'S PURPORTED BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM FAILS TO PLEAD A CAUSE OF ACTION.

Just as with the First Cause of Action, the Second Cause of Action omits the necessary pleading elements of: (1) existence of a contract; (2) actual and proximate causation; and (3) damages. (Please see Sections I through II above.) The underlying theory of the claim is defective as well. "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 349. The covenant thus cannot "be endowed with an existence independent of its contractual underpinnings." *Id.* "It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Id.* The "covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement." *Waller v.*

Truck Ins. Exchange, Inc. (1995) 11 Cal.4th 1, 36. "Breach of the covenant of good faith and fair dealing gives rise to a contract action ... or, in limited contexts, a tort action with the tort measure of compensatory damages and the right to recover punitive damages." 1 Witkin, *Summary of Cal. Law* (10th ed.2005) Contracts, § 800, p. 894 (italics omitted).

The Cross-Complaint alleges "AFA entered into the alleged contract while coordinating publicity with the Discovery Institute, which—to AFA's knowledge—intended to publicize the event in a manner that took advantage of the name of the California Science Center and its relationship to [sic] the Smithsonian. Based on information and belief, AFA was fully aware that such use of the California Science Center name would impact the Foundation and was contrary to the terms of their contractual relationship and the interests of the Foundation." (Cross-Complaint, ¶¶ 29-30, p. 8, lns. 3-8).

This Court ruled previously in connection with the Foundation's Demurrer to AFA's Second Amended Complaint that there is no such thing as a separate cause of action for Breach of the Implied Covenant of Good Faith and Fair Dealing. (Request for Judicial Notice ("RJN"), Reporter's Transcript of Proceedings, July 19, 2010). This Court stated bluntly its view ["It's not a cause of action." (*Id.*, 25:1); "It's a way of breaching a contract. It's a way you breach a contract. You can breach a contract any number of ways. That's one of them." (*Id.*, 25:11-13); "It's a legal theory. It's not a cause of action." (*Id.*, 26:4-5)]. What, then, was the Foundation thinking by inserting this same theory into its Amended Cross-Complaint?[5]

This Court additionally stated that the breach of the implied covenant theory should be limited to actions involving insurance contracts and special relationships ["As to No.2, breach of covenant of good faith and fair dealing, I don't think that's a cause of action. That's a cause of action if you have a special relationship, like an insurance contract. But in your garden-variety contract ... every contract has an implied provision of good faith and fair dealing; the jury is told that, and if you breach that, you breach the contract and therefore nothing else happened. Not true in certain kinds of contracts where you have a special relationship, prime example being insurance contracts." (*Id.*, 4:19-23); "The theory has [viability in] special relationship cases and insurance cases." (*Id.*, 25:18-19)].

[5] AFA is entitled to recover its fees and costs in connection with having to file this Demurrer, particularly as to this cause of action, where the Court has made a clear record of its position.

Here, as in the case of the Foundation's Demurrer to AFA' Second Amended Complaint,[6] the Court has before it allegations sounding in contract lacking an insurance contract context and a special relationship. Here as before, no separate cause of action for Breach of the Implied Covenant of Good Faith and Fair Dealing exists. To be consistent with prior rulings, the Court must sustain the Demurrer to this cause of action without leave to amend.

IV. THE CROSS-COMPLAINT'S PURPORTED FRAUD CLAIM FAILS TO PLEAD A CAUSE OF ACTION.

The Third Cause of Action for Fraud based on promissory fraud (promise made without any intention of performing it) suffers from the same obfuscation and inattention to detail that characterizes the other allegations of the Cross-Complaint. Moreover, as with the Foundation's attempt to clone its Breach of Contract Cause of Action with a Breach of Implied Covenant Cause of Action, this cause of action simply repackages the Foundation's breach of contract argument.

A. *The "Importance" Element Is Nowhere Expressed Or Implied In The Contract.*

In California, fraud must be pleaded specifically; general and conclusory allegations do not suffice. *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184. Thus, "the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect." *Id.* (citations and internal punctuation omitted). "This particularity requirement necessitates pleading *facts* which show how, when, where, to whom, and by what means the representations were tendered." *Id.*, citing *Lazar v. Superior Court* (1996)12 Cal.4th 631, 645 (internal punctuation omitted).

The Cross-Complaint alleges that "[b]ased upon the ***plain language*** of the agreement, AFA was aware or should have been aware that the release of promotional materials was ***important*** to the ***alleged*** contract and that the Foundation ***might take action*** if unapproved promotional materials were released before or after the contract was formed." (Cross-Complaint, ¶ 38, p. 8, lns. 26-27; p. 9, lns. 1-2; emphasis added). As shown above in the context of enforcing the contract against third parties, nothing material about the contract term's language is "plain." Especially is this true concerning whether AFA was on notice that the review provision was "important" or that the Foundation "might take action" if it were not strictly followed. That provi-

[6] RJN, "Request For Judicial Notice In Support Of Defendants California Science Center Foundation And Jeffrey Rudolph's (As President Of The Founda-tion And In His Individual Cap A City) Demurrer To Plaintiff's Third Amended Complaint."

sion nowhere notified AFA that it was a particularly significant term; indeed, it is buried on page 4 of a 5-page document sandwiched between "Acts of God Clause" and "Minimum Rental/Maximum Guest Count."

Internally, the provision says nothing about its importance, legal significance or the legal consequences for violating it. There is no statement of liquidated damages anywhere and no expression of that term's importance to the Foundation (or even to the Center). Indeed, the review requirement does not mention the Foundation at all, nor, particularly, its sensitivity to reputational concerns. It rather blandly recites a requirement and a definition of "promotional materials" of limited usefulness to anyone seriously engaged in selling tickets or knowledgeable about customs and practices within the field of public relations. Moreover, the Cross-Complaint furnishes no supplementary information to show why AFA might be deemed on notice (via the process of contract negotiations) of the powerful significance of this terse (two-sentences), innocuous provision. The Cross-Complaint's assertions about what AFA *knew or should have known* of the term's "importance" are simply conclusory and self-serving.

The leap from (a) the alleged language of the Promotional Materials contract provision, to (b) the claim that AFA should have known that the Foundation "might take action if unapproved materials were released before or after the contract was formed," finds neither contractual nor extra-contractual support. Nothing in the provision points to a legal or other response the Foundation might invoke for its violation. Nothing in the contract expressly or impliedly hints at what the parties would have reasonably contemplated would result from a violation. In fact, if the Foundation had wanted to place parties on notice of the importance of the provision and effect of violating it, it easily could have stated that any violation of it would result in cancellation of the agreement. Such language would lend support to a belief that the provision's terms were important. Absent such language, no such interpretation is reasonable. Accordingly, this allegation too is conclusory, vague and self-serving. Indeed, the meaning of "might take action" is a legal "maybe," and thus generally meaningless.

B. *The Cause Of Action Rests On A Contract The Cross-Complaint Disavows.*

As with the other two cause of action, the Cross-Complaint persists in the particularly vague, unintelligible and self-serving use of the "alleged contract" allegations. If the Foundation is unwilling to allege the contract's existence, then it cannot logically exalt the importance of a provision that appears in a document it denies even binds the parties.

C. *The Alleged Facts Do Not Support The Required Element Of Wrongful Intent In A Promissory Fraud Claim.*

"Promissory fraud" is a subspecies of the action for fraud and deceit. *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638. "A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." *Id.* "The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Id.*

The Cross-Complaint tries to establish that AFA never intended to submit its promotional materials to the Foundation for review for technical and factual accuracy. Indeed, it has the temerity to allege that proof of AFA's intention not to comply with the review requirement is demonstrated by the fact that "AFA had already begun coordinating promotion for the Event before it even delivered a signed Event Price Estimate to the Foundation." (Cross-Complaint. ¶ 39, p.9, lns 4-5.) This is no doubt true, since AFA had originally planned to hold the event at another venue and had begun developing its promotional campaign for that venue, a fact known to the Foundation at the time that it negotiated the IMAX theater venue agreement.

What possible motive AFA would have had to intentionally publicize inaccurate information or to deliberately refuse to submit its promotional materials is never mentioned in the Cross-Complaint – not once! The e-mail language quoted in the Fraud cause of action discloses neither that AFA had any reason to withhold promotional materials from the Foundation to avoid review for technical and factual accuracy nor, for that matter, that AFA planned *not* to submit its material at the appropriate time. The Cross-Complaint's superficial treatment of the quoted e-mail language implies that AFA's development of its promotional campaign (e.g., preparation of draft versions of press releases, consultation with media outlets, agencies supplying speakers and development of distribution databases) formed a pattern of behavior somehow suggesting AFA's intention to ignore the review requirement. However, a respectful look at the quoted e-mails reveals neither a pattern nor a single instance in which such an intention is made apparent.

The Foundation first alleges that "five days before the Foundation received the signed event price estimate, AFA forwarded a press release to the Discovery Institute and indicated that 'we're ready to start publicizing the event.' ... This press release had not been approved by the Foundation." (Cross-Complaint, ¶ 40, p..9, lns. 6-9). Here, it is not alleged that AFA publicized

the event, or even commanded the Discovery Institute to publicize it. On its face, it simply reports that AFA turned over a release to the Discovery Institute and announced a readiness to begin "publicizing the event." It does not state that AFA issued the release for public consumption. Presumably, and as the evidence in this case is likely to ultimately bear out, AFA *was* ready to begin their publicity campaign subject to the Foundation's review and approval. The transmission of a press release to the Discovery Institute supports that interpretation of the alleged facts. It does not support an inference that AFA had authorized the Discovery Institute to either publish the press release or to publicize the event on their own initiative at that particular time. Not does it support a reasonable inference that AFA had determined not to seek prior review by the Foundation.

The Foundation next alleges that "[o]n the same day, Bylsma and Peterson discussed delivering an unapproved press release to various media outlets.... In the e-mail, Bylsma states: 'a copy of the press release is attached. You may distribute everywhere you like.'" (Cross-Complaint, ¶ 41, p. 9, lns. 10-12). Once again, the inference the Foundation wishes to draw rips the e-mail out of its contextual mooring. The e-mail does not show that Peterson, an AFA board member, was ***then*** authorized to initiate public distribution; it conveys AFA's internal approval of a press release to be positioned for wide release at no specific time. Had it stated that Peterson was authorized to distribute the release widely *at this time*, *immediately*, or using similar language, Foundation's point might be made.

Next, the Cross-Complaint alleges that later in the day, John West of the Discovery Institute forwarded an e-mail announcing the event to a representative of Biola University. (Cross-Complaint, ¶ 42, p. 9, lns.13-14). Discovery over the last year in this case shows the Foundation is well aware that West was referring Bylsma, AFA's public relations consultant, to Biola for the purpose of tapping into its student e-mail database and was merely transmitting the press release so that Biola might assist in promoting the event. If the fraud claim can be based upon a mere transmission of basic information, then any attempt to begin the foundational work of public relations prior to the issuance of press releases and other print material or broadcast appearances would be rendered impossible. West and Bylsma, under such a tortured interpretation, would be barred even from discussing the event with each other in order to trade the information they needed to organize the event. (As this Court previously learned, the Discovery Institute was providing AFA with speakers for the event). The allegation that West's e-mail contained a link

to a page on AFA's website regarding the event also is insufficient to establish the existence of a live web page for public consumption.

Next, the Cross-Complaint alleges that an unapproved press release "attributed to AFA" was posted on October 1, 2009, on the Discovery Institute's web site. If it is important to supply critical details in a fraud claim, the Cross-Complaint persists in glossing over the facts. What "attributed to AFA" means is vague and subject to multiple interpretations. Since the press release appeared on the Discovery Institute's web site, AFA has a right to expect the Foundation to allege that AFA authorized the Discovery Institute to publish press releases it authored, and to furnish sufficient factual allegations supporting the allegation. Nothing in this e-mail suggests that AFA condoned the publication of its press release by a third party.

Next, the Cross-Complaint alleges that on October 5, 2009, a press release announcing the event was sent to the California newswire and another news release was sent out through the Washington, DC newswire. Like the others in this cause of action, this allegation does not state that AFA was behind the releases or that AFA authorized them.

Next, the Cross-Complaint alleges that the same day, an unapproved "announcement" of the event appeared on AFA's website. Conveniently, it does not allege that the Foundation learned of the website on that date, what the "announcement" stated, whether the "website" was a live site or a site in development or whether any of its content was inaccurate. Note that the allegation is of an "announcement," without quoting it or identifying any particular attribute of it that would suggest that AFA *intended* to violate the agreement. Absent any such information, this allegation proves nothing.

All of the above-discussed allegations fail to show an intention to withhold promotional materials for review for technical and factual accuracy. *Yet intent is a required element of pleading.* Indeed, each allegation is foundationally deficient, lacking, in addition to facts showing intent to ignore the agreement, any explanation for why AFA, in its desperation to locate and secure an alternative venue after losing its initial venue, would have taken deliberate steps to undermine its chance to produce its event at the California Science Center.

In fact, the allegations contradict any wrongful intent. The Cross-Complaint alleges that on October 5, 2009, the Foundation received a signed event price estimate from AFA for the booking of the Science Center. (Cross-Complaint, ¶ 11, p.4, lns. 24-25). It fails to allege, however, when AFA was made aware of the review requirement. Thus, nothing establishes that AFA

was ever aware of the Promotional Materials provision of the contract prior to the its signed delivery, which is not alleged. The Foundation cannot suspend the weight of its fraud allegations on such slender allegations.

V. THE CROSS-COMPLAINANTS' PURPORTED FRAUD CLAIM SHOULD BE DISMISSED BECAUSE CROSS-COMPLAINANTS HAVE NOT AND CANNOT ALLEGE DAMAGES.

The Foundation alleges incredibly that, "the unauthorized press releases improperly utilized the California Science Center name for a private event resulting in harm to the reputation of the Foundation, and the Science Center, within the community. The Foundation has incurred costs in an effort to protect its reputation after the press releases were issued." (Cross-Complaint, ¶ 47, p. 10, lns. 5-10).[7] Allegations of reputational harm, the basis for such harm, the nature, type and scope of such harm never surface in the Cross-Complaint. There is a simple explanation for that. The Foundation runs the risk of announcing to the world that its reputation was damaged because it was planning to allow a film approving of Intelligent Design to be shown, a taboo subject in certain circles of academia and science due to institutional bias and ignorance of the subject. The Foundation would additionally have to allege that the Smithsonian Institution pressured it to cancel the event due to concerns over its reputation. Such "harm to reputation" allegations would admit to viewpoint discrimination. If the Foundation really wishes to pursue this action, it will need to come clean and expose the lie that it is merely trying to disassociate the museum from events it doesn't sponsor. AFA invites the Court to demand detail in the Foundation's allegation of fraud damages.

VI. CONCLUSION

The Court is respectfully urged to sustain the Demurrer in its entirety without leave to amend.

DATED: January 28, 2011

THE BECKER LAW FIRM

By: _____

WILLIAM J. BECKER, JR., ESQ.
Attorneys for Plaintiff,
AMERICAN FREEDOM ALLIANCE

[7] The Foundation also incredibly alleges that it has suffered monetary damages associated with the planning of the event it cancelled.

PROOF OF SERVICE

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

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

On January 28, 2011, I served the foregoing documents: **PLAINTIFF AMERICAN FREEDOM ALLIANCE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS DEMURRER TO CALIFORNIA SCIENCE CENTER FOUNDATION'S AMENDED CROSS-COMPLAINT**

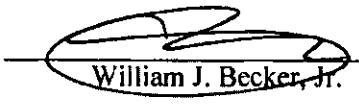
The above-referenced document was served on:

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

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

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

Executed on January 28, 2011, at Los Angeles, California.



William J. Becker, Jr.