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9 LLC, RICHARD LOUD and GARY HARKINS

10 UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 BRIAN DAWE; FLAT IRON
13 MOUNTAIN ASSOCIATES, LLC,
14 formerly known as Flat Iron Mountain
15 Associates, a Partnership,

16 Plaintiffs,

17 v.

18 CORRECTIONS USA, a California
19 Corporation; CALIFORNIA
20 CORRECTIONAL PEACE OFFICERS
21 ASSOCIATION, a California Corporation;
22 JAMES BAIARDI, an individual;
23 DONALD JOSEPH BAUMANN, an
24 individual,

25 Defendants.

26 AND RELATED CLAIMS AND
27 COUNTERCLAIMS
28

Case No. 2:07-CV-01790 LKK EFB

[Consolidated Master Case Number]

PLAINTIFFS' TRIAL BRIEF

Trial Information

DATE: July 27, 2010
TIME: 10:30 p.m.
CRTRM: Courtroom 4
JUDGE: Hon. Lawrence K. Karlton

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1 This Trial Brief is filed by BRIAN DAWE, FLAT IRON MOUNTAIN ASSOCIATES,
2 LLC (“Flat Iron”), GARY HARKINS, and RICHARD LOUD (often collectively referred to
3 herein as “Plaintiffs”) in accordance with the Section XVII of the Court’s June 15, 2010 Pretrial
4 Conference Order and the provisions of Local Rule 285, subdivision (a).

5 **I.**

6 **STATEMENT OF FACTS**

7 In this consolidated matter, Mr. Dawe, Flat Iron, and Mr. Harkins bring affirmative claims
8 arising out of misconduct undertaken by CORRECTIONS USA (“CUSA”), CALIFORNIA
9 CORRECTIONAL PEACE OFFICERS’ ASSOCIATION (“CCPOA”), DONALD JOSEPH
10 BAUMANN, and JAMES BAIARDI (often collectively referred to herein as “Defendants”)
11 relative to (a) Mr. Dawe, Flat Iron, and Mr. Harkins’ work with CUSA, and (b) Mr. Dawe, Flat
12 Iron, and Mr. Harkins’ attempted work following their dissociation from CUSA. As a general
13 matter, that misconduct consists of contract violations, interference with actual and prospective
14 economic relationships, and acts of defamation. Mr. Harkins also asserts claims arising from
15 CUSA’s failure to pay Mr. Harkins earned wages, and for acts of false imprisonment committed
16 by CUSA representatives.

17 A description of some of the salient facts is set forth below.¹

18 **A. The Birth and Growth of CUSA**

19 In late 1996, Brian Dawe, Richard Loud and a small group of correctional officers got
20 together to form the Corrections and Criminal Justice Coalition (CCJC). Gary Harkins and a
21 couple of correctional officers from Oregon became involved with CCJC at that organization’s
22 second meeting in Phoenix, Arizona in January of 1997. As time passed, CCJC gained additional
23 individual members, as well as organizational (union) members. CCJC was governed by a
24 chairman (which was rotated between the member organizations each meeting), a recording

25 _____
26 ¹ In relating these facts, Plaintiffs are making a conscious effort to abide by Local Rule 285’s
27 admonition to keep the statement of facts “short.” While it probably goes without saying, there
28 are *many* facts not referenced herein that are germane to the issues (and to Defendants’ ultimate
liability in this case), and a detailed description of the relevant facts and circumstances would
quickly turn this brief into an unmanageably long document. Thus, this factual statement is
designed to simply provide the Court with a broad factual overview.

1 secretary, and a treasurer. The organization worked on a consensus model and there was very
2 little need for formal votes. Although CCJC's main organizational goal was to fight the growth of
3 private prisons in the United States, its membership soon found out that they shared many of the
4 same issues and frustrations regarding their work in general. In that regard, the CCJC also
5 became an information sharing network for correctional problem solving.

6 In the beginning of 1998, there was a growing tension within CCJC between a national
7 labor union—the American Federation of State, County, and Municipal Employees (AFSCME)—
8 and the independent associations. At the time, Oregon correctional officers (such as Mr. Harkins)
9 were represented by two unions and one independent association. AFSCME was upset that the
10 Association of Oregon Corrections Employees (AOCE), an independent union, was involved in
11 the CCJC. The dispute came to a boil in June of 1998 at a meeting in San Antonio. AFSCME
12 submitted a resolution that would strip the AOCE of its seat on the CCJC Board of Directors and
13 thus deprive AOCE of its say in the operations of the CCJC. Because the AOCE was considered
14 one of the founding organizations, there was strong support to keep it on board. As a result of this
15 power struggle, CCJC became fractured, with the independent unions on one side and national
16 unions on the other.

17 At the meeting, just prior to the vote on the AFSCME-backed motion, the members took a
18 break. During the break, the independents (which included all of the founding members) decided
19 to leave the CCJC and form a new organization. After the break, when all of the participants were
20 assembled, the announcement was made that two-thirds of the CCJC membership were quitting
21 and were starting up a new corrections organization. CCJC was dead.

22 Thus, out of the ashes on that June afternoon, CUSA was born. The founding members
23 agreed that no one person or organization, no matter how big or powerful, would control CUSA's
24 agenda or direction. They understood that it would always be a collaborative effort ruled by
25 majority vote. The founding members believed that every correctional officer's opinion should
26 be given equal weight and consideration when addressing the universal issues those officers face.
27 CUSA would continue CCJC's efforts to share information and solve problems, continue the fight
28 against private prisons, and work to enhance the image of correctional officers through public

1 education. CUSA would pick up where the CCJC left off, but it would learn from CCJC's
2 mistakes, and be better and stronger as a result.

3 During the formation meeting that afternoon, Mike Jimenez, then CCPOA Vice President,
4 offered the services of his union's attorneys to draft up Articles of Incorporation and file them in
5 California. It is important to note that CUSA was set up as a nonprofit mutual benefit
6 corporation. For filing purposes, Mr. Jimenez would be designated as CUSA's Incorporator, but
7 it was agreed that CUSA would be governed by a Board of Directors with a President, Recording
8 Secretary, Treasurer and Sergeant at Arms.² The founding members all agreed. A draft set of
9 bylaws was quickly hammered out. Mr. Loud was voted in as President, Mr. Harkins as
10 Recording Secretary, Mr. Dawe as Treasurer, and Eric Spierer as Sergeant at Arms. The new
11 Board also decided to appoint Mr. Dawe to run the daily operations of CUSA, answerable to the
12 President and the Board. Thus, Mr. Dawe was contracted as the Director of Operations; that title
13 would later be changed to Executive Director, a capacity in which Mr. Dawe acted full-time until
14 his August 11, 2006 "suspension."

15 From that day forward, CUSA grew in size, and the Board of Directors pushed an
16 aggressive agenda on behalf of CUSA's members. Mr. Dawe and the board members regularly
17 attended meetings around the country fighting prison privatization. Protests were held at the
18 headquarters of private prison companies. Newsletters were sent out on a regular basis. A
19 website was started. CUSA regularly put out publications containing information on staffing
20 standards, safety issues and other items of importance to correctional officers. CUSA held two to
21 three conferences a year around the country where seminars were given on such topics as safety
22 items, media relations, benefit opportunities and collective bargaining. Within two to three years,
23 CUSA had approximately 35 organizational members, representing almost 80,000 correctional
24 officers from around the country.

25 As the years went on, recruitment of new organizations and individual members remained

26 ² The original board members were told by Mr. Jimenez and Lance Corcoran (CCPOA's number
27 three man at the time) that CUSA had to have an incorporator in order to file in California. The
28 board members understood and were assured that the incorporator would have no power or
authority in CUSA by virtue of that position, other than to reseal the Board of Directors once
every six years.

1 at all times an ongoing mission. At its apex in 2006, CUSA had 22 board members and 52 active
2 member organizations, representing approximately 110,000 out of the nearly 400,000 publicly-
3 employed correctional officers in the country. CUSA's annual income approached \$800,000.
4 This growth was largely due to the efforts of Messrs. Dawe and Loud, who tirelessly lobbied,
5 spoke, and traveled on behalf of CUSA and its membership.

6 **B. Mr. Dawe's Requests for an Audit, and Plaintiffs' "Suspension" and Termination**

7 CUSA's fiscal year ran from July 1 to June 30. Each year, CUSA would have a
8 conference in May, where Mr. Dawe would give an up-to-date financial review of income and
9 expenses. Also, Mr. Dawe would present a proposed budget for the upcoming year, which
10 required board approval. Early on, in July 1998, Mr. Dawe asked the board to approve the use of
11 a CPA, Robert Underwood, to assist him. Mr. Underwood was contracted on an as-needed basis
12 to conduct yearly reviews of the books, to prepare CUSA's taxes, to advise Mr. Dawe in his
13 Treasurer's role and to file CUSA's annual report with the IRS. This was done without fail every
14 year up until 2006.

15 While Defendants will likely argue that this case is all about purported financial
16 misconduct undertaken by Mr. Dawe and Mr. Loud, including an alleged failure to comply with a
17 "Demand For Inspection" of all of CUSA's corporate books directed by Mike Jimenez on August
18 2, 2006, in fact the opposite is true. Indeed, much of what ultimately transcribed in this case is a
19 function of *Mr. Dawe's* requests for an audit of CUSA's accounts, which commenced long before
20 Mr. Jimenez's self-serving backfire request. In that respect, even though CUSA's books had
21 regularly received a clean bill of health, CUSA's increasing size and income moved Mr. Dawe to
22 ask the board on several occasions to audit the books to ensure the integrity of the accounts.
23 Eventually, in August of 2005, Mr. Dawe began investigating improprieties in the CUSA
24 California bank account after receiving documents suggesting that monies had been
25 misappropriated by CCPOA.³ Two months later, and partly due to what he had thus far

26 _____
27 ³ Dating back to CUSA's inception, CCPOA representatives had consistently informed Mr. Dawe
28 that it was necessary to maintain a California bank account in order to qualify for a payroll
deduction slot through which membership dues could be automatically paid. In fact, Mr. Dawe
would ultimately come to find out that this was *not* the case.

1 uncovered, Mr. Dawe formed a CUSA Finance Committee. In March of 2006, Mr. Dawe sought
2 a recommendation from that committee for a complete audit of all of CUSA's finances. That
3 recommendation was made, and the board unanimously approved the recommendation in May of
4 2006. An audit would be held.

5 After approval for the audit was given, Mr. Dawe repeatedly asked for the books from
6 CUSA's California account to be produced so that the audit could commence. He made requests
7 on May 23 and May 31, 2006 (via email) and on July 24, 2006 (via certified mail, return receipt
8 requested), all to no avail. He would make a fourth request through attorney Barry Peek on
9 August 9, 2006; that request also received no response, and the California account records were
10 never turned over.

11 As for Mr. Jimenez's above-mentioned August 2, 2006 "Demand For Inspection," that
12 "Demand" assertedly required Mr. Dawe to ship all of CUSA's corporate books to California. As
13 with any corporation, the books are the property of the organization and are not to be shipped
14 around the country as Mr. Jimenez was demanding. At that time Corrections USA had over 50
15 organizational members—CCPOA was only one of them. Mr. Dawe's fiduciary responsibility
16 was to all members of the organization, and an audit had already been approved. With what Mr.
17 Dawe had learned about the improprieties in the California account, he felt that he would have
18 breached his fiduciary responsibility had he turned over all the CUSA records to the very
19 organization he believed had misappropriated CUSA funds.

20 Mr. Jimenez called an "emergency" meeting of the board on August 11, 2006 in
21 Sacramento. At that meeting, Mr. Jimenez again demanded to inspect the books. Mr. Dawe
22 informed Mr. Jimenez that the books were at CUSA's office in Wyoming, and that he was free to
23 inspect them as was any member of CUSA. Mr. Jimenez laughed at this and said, "I'm not going
24 to Wyoming." The simple fact is that Mr. Jimenez did not want to inspect the books, he wanted
25 them sent to him so he could control the audit.

26 At the August 11 meeting, Messrs. Dawe and Loud were "suspended without pay" by the
27 then-CCPOA controlled board (which had been reseated by Mr. Jimenez with people loyal to
28 him). As to Mr. Dawe, that "suspension" occurred despite the fact that Mr. Dawe had always

1 operated as Executive Director in an independent contractor capacity, including at that time
2 through the June 16, 2010 Agreement that had been executed between CUSA and Mr. Dawe's
3 company, Flat Iron. Via correspondence that followed, Mr. Dawe was informed that the
4 suspension was continued, and ultimately he was told that his contract was being terminated. He
5 was never paid the sums due under the Agreement.

6 In the field of corrections when officers are disciplined, a suspension with pay pending an
7 investigation is common. By contrast, it is rare when that suspension is without pay, as was the
8 case with Messrs. Dawe and Loud. A suspension without pay is reserved for only the most severe
9 offenses. When such an extreme penalty is imposed, resulting in the loss of income, it is generally
10 assumed that the evidence against the parties is substantial, and that the suspended officers are
11 guilty as charged. In the case of Messrs. Dawe and Loud, there was no evidence. Nonetheless,
12 Mr. Jimenez had decided on the outcome. Via the precipitous termination of Messrs. Dawe and
13 Loud, Mr. Jimenez eliminated any chance Messrs. Dawe and Loud had to defend themselves.
14 Emails between CUSA representatives, including Joe Baumann, Roy Pinto, James Baiardi and
15 Mike Jimenez reveal that the intention of the "suspension without pay" was to strip Dawe and
16 Loud of any financial wherewithal to defend themselves in a court of law. By way of example,
17 on January 10, 2007 at 11:17 a.m., Roy Pinto responded to an email from Joe Baumann. Mr.
18 Pinto wrote:

19 Joe, You are right this is about to cost them a lot more than they
20 have to spend. I'm hard pressed to think they are bring[ing] that
21 kind of money in a month. The sooner we get things started the
22 sooner they are empty. I want Mike to stay on top of this part of the
23 process. I think he is motivated to get it done.

24 A little over an hour later, at 12:37 p.m., Mr. Baumann replied:

25 Roy, the only groups I can think of who may deep pocket Brian are
26 SCCOA, MCOFU and maybe NJPBA. I doubt anyone other than
27 Vito has the clout to do much for him beyond a couple of grand,
28 and I don't think Vito has the kind of money were talking about
either. He's hosed.

This email was copied to Mr. Jimenez, Mr. Baiardi, CCPOA attorney Nina Salarno, and
CUSA Treasurer Todd Dunn.

The next step was for Defendants to manufacture the means to justify their conduct. That

1 came through a campaign of defamation.

2 **C. Defendants' Acts of Defamation**

3 The correctional officer community is a relatively small one, with approximately 400,000
4 officers throughout the nation.⁴ With the advent of the internet, information can be dispersed
5 widely and quickly. The defamation of Plaintiffs was broad, swift and very effective. It was
6 meant to do three things: 1) discredit Plaintiffs to the extent that anything they said would be
7 suspect; 2) minimize their past accomplishments as leaders of CUSA and career correctional
8 officers; and 3) ruin their potential for future employment in the industry thereby eliminating any
9 competition they might represent to CUSA.

10 After the aforementioned August 11, 2006 meeting, Messrs. Dawe and Loud were given
11 letters regarding their "suspension." Before they even received them, however, copies of those
12 letters were distributed to CCPOA officials and members who had attended that meeting.
13 Although Mr. Jimenez's own announcement of that meeting proclaimed that it was for members
14 of the CUSA Board of Directors only, Mr. Jimenez had no less than a dozen of his most loyal
15 CCPOA supporters present. The effect of their being in attendance was to provide a means for
16 Mr. Jimenez to disseminate information intended to defame Plaintiffs quickly throughout
17 CCPOA's 28,000 person membership, which they did.⁵

18 That, however, was just the tip of the iceberg. As has been detailed on several prior
19 occasions in this case, Defendants proceeded to transmit, over a period of months, numerous
20 defamatory publications via letter, internet postings, and emails, as well as orally. Those
21 publications falsely accused Plaintiffs of everything from "unethical tactics," to "breaching their
22 fiduciary duties," to "extortion." As a result, correctional officers, correctional organizations,

23 _____
24 ⁴ Given the nature of what correctional officers do for a living, it is also important to note that
25 trust is hard-won, and persons of honesty are held in the highest of esteem. If one's reputation for
26 trust and honesty is called into question, it is difficult—sometimes impossible—to regain that
27 reputation.

28 ⁵ Although Gary Harkins had been selected by the CUSA Board to head up the investigation and
retrieve the CUSA books from Wyoming, he, too would quickly become a target. Mr. Harkins
refused to bow to Mr. Jimenez's demands to have the audit conducted in California by Jimenez's
hand-picked auditor. He further refused to compromise the investigation of Messrs. Dawe and
Loud. As a result, Mr. Jimenez would again reseal the Board in September, 2006 and would then
remove Mr. Harkins as well.

1 correctional activists, and even academics with whom Plaintiffs had worked for years stopped
2 communicating or associating with Plaintiffs. Their efforts to succeed in new professional
3 undertakings have been substantially impeded.

4 **II.**

5 **ADMISSIONS/STIPULATIONS NOT RECITED IN PRETRIAL ORDER**

6 Other than understandings reached in connection with the parties' motions in limine and
7 the Court's rulings thereon, Plaintiffs are unaware of any admission or stipulation not
8 encompassed within the Pretrial Conference Order.

9 **III.**

10 **SUMMARY OF POINTS OF LAW**

11 **A. Plaintiffs' Legal Contentions**

12 In its June 15 Pretrial Conference Order, the Court listed the various points of law
13 pertinent to this case. (CM/ECF Doc. No. 273, at 46:8-50:12.) Below, Plaintiffs present an
14 itemized discussion of those points as they pertain to Plaintiffs' claims. Should it be necessary,
15 Plaintiffs will respond to Defendants' legal contentions regarding their claims via a response brief
16 filed in conformity with Local Rule 285(b).

17 1. **The Elements, Standards, and Burdens of Proof of a Claim for a Declaratory**
18 **Judgment Regarding the June 16, 2006 Contract Under California Law.**

19 In California, declaratory relief claims are governed by the provisions of Code of Civil
20 Procedure section 1060, which allows "any person interested under a written instrument . . . or
21 under a contract, or who desires a declaration of his or her rights or duties with respect to
22 another" to file an action seeking a judicial declaration of those rights and duties.⁶

23 In this case, the issue on which a declaration is sought is whether the June 16, 2006
24 Agreement between Flat Iron and CUSA represented an employment agreement (or whether Mr.
25 Dawe somehow otherwise operated as a CUSA employee). As Mr. Dawe has consistently

26 ⁶ The Federal Declaratory Judgment Act (22 U.S.C. §§ 2201-2202) and Federal Rule of Civil
27 Procedure 57 combine to operate to a similar effect. Thus, Plaintiffs will not tackle the issue of
28 which declaratory relief framework would technically apply (i.e., whether the matter is
substantive versus procedural, etc.). Everybody—including the Court, most importantly—
appears comfortable with the use of the California declaratory relief standard in this matter.

1 indicated in this litigation, it is his personal belief that he operated as an independent contractor,
2 and the terms of the June 16 Agreement are consistent with that belief: “This contract calls for
3 the performance of the services of consultant as an independent contractor and consultant will not
4 be considered an employee of CUSA for any purpose.”

5 However, *other* materials transmitted by CUSA (including an August 11, 2006 letter from
6 CUSA to Mr. Dawe “plac[ing] you on suspension without pay,” and a subsequent CUSA Board
7 resolution continuing that “suspension without pay”) suggest the existence of an employment
8 relationship formed via the contract. Further muddying the waters is a letter transmitted on
9 CUSA’s behalf in early August of 2006 in which CUSA states, among other things, as follows:

10 It appears that the president of CUSA is also a compensated chief
11 executive officer. *It appears that the treasurer of CUSA is also the*
12 *compensated executive director. Further, it appears that the spouse*
of the treasurer is a compensated employee who is paid for member
benefit administration.

13 (Emphasis added.)

14 CUSA’s indications, and the additional documents referenced above, evidence a
15 substantial ambiguity as to Mr. Dawe and Flat Iron’s precise status vis-à-vis the Agreement and
16 CUSA in general. That ambiguity is precisely why Mr. Dawe and Flat Iron have asked for
17 declaratory relief as to that status. Plaintiffs have also submitted jury instructions and special
18 verdict forms dealing with the various permutations of Mr. Dawe and Flat Iron’s respective
19 statuses.

20 Since Defendants have taken the position in this litigation that Mr. Dawe is *not* an
21 employee (and thus the parties seem to agree), the Court may wonder why Mr. Dawe and Flat
22 Iron wish to press their declaratory relief claim. The reason is simply this: Because Defendants
23 have been so inconsistent in their treatment of this matter (on the one hand, they now state that
24 Mr. Dawe was an independent contractor only; on the other hand, they issued contemporaneous
25 documents purporting to suspend Mr. Dawe without pay, a measure unique to employment),
26 Plaintiffs maintain this cause of action in order to preserve their full rights to available relief
27 consistent with the evidence that is ultimately elicited.

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1 2. The Elements, Standards, and Burdens of Proof of a Claim for Breach of Contract
2 Contract Under California Law.

3 a. *Mr. Dawe/Flat Iron's Breach of Contract Claims.*

4 This Court is well aware of the general elements needed to sustain a breach of contract
5 claim (and those elements are also contained in the jury instructions and special verdict forms
6 submitted concurrently herewith), so they will not be replicated here. In this case, Flat Iron and
7 Mr. Dawe have brought their Second and Third Causes of Action⁷, respectively, for breach of
8 contract. Flat Iron's claim is brought on the basis of the June 16 Agreement's status as an
9 independent contract, while Mr. Dawe's claim is brought in case the Court determines that an
10 employment relationship existed between Mr. Dawe and CUSA. Again, jury instructions and
11 verdict forms have been submitted based on both of these theories.

12 The key disputed legal issue in relation to Mr. Dawe and Flat Iron's breach of contract
13 claims pertains to Defendants' charge that "[t]here is no valid contract" because "the executive
14 director must be an *individual*" (citing to CUSA's SOPs) and because "FIMA was never
15 approved and/or ratified by the CUSA full Board of Directors to be the executive director of
16 CUSA." (These quotes are from Defendants' points and authorities supporting their summary
17 judgment motion, at 18:17-18:23 [emphasis in original].) That contention is wrong on three
18 levels.

19 First, the cited portion of the CUSA SOPs simply says that "the Board of Directors shall,
20 at its discretion, contract an individual to serve as the corporation's Executive Director." That
21 language does not specify "an individual" as being the exclusive designee who may serve in that
22 capacity, nor does it indicate that "an individual" has to be a specifically named human being,
23 rather than a person who contracts through a company. The upshot of the language is simply that
24 CUSA is free to retain someone's services as Executive Director.

25 Second, even if it was true that the "executive director must be an individual," what
26 Defendants truly fail to appreciate is that the July 1, 2006 Agreement *is not inconsistent with that*

27 ⁷ Plaintiffs recognize that the Court's Pretrial Conference Order supersedes the pleadings; the
28 references in this brief to the various numbered causes of action are for convenience only, should
the Court be inclined to review any of the parties' pleadings.

1 *requirement.* In fact, the Agreement called for the performance of the functions of both
2 Executive Director and Member Benefits Coordinator, and it is totally undisputed that the only
3 person who ever performed the functions of CUSA Executive Director between 1998 and late
4 summer 2006 was Brian Dawe. In other words, CUSA knew exactly what it was getting when it
5 signed the July 1 Agreement—Brian Dawe to serve as Executive Director, and Marilyn Dawe to
6 serve as Member Benefits Coordinator.

7 Finally, even if the Court were to buy the notion that the contract was somehow violative
8 of the SOPs, that fact appears to be of no legal significance.⁸ Although the case law dealing
9 specifically with SOPs is in very scant supply, the one case (state or federal) that the undersigned
10 has found dealing specifically with the issue supports the proposition that an act which is
11 noncompliant with an SOP does not necessarily vitiate the act. In Upper Snake River of Trout
12 Unlimited v. Hodel, 706 F.Supp. 737 (D. Idaho 1989), the court held that the Bureau of
13 Reclamation's noncompliance with its own SOPs was not fatal to the Bureau's challenged act,
14 which involved a reduction to the flow of water below a particular dam on the Snake River. In
15 reaching the conclusion that the SOPs were not binding, the court observed that the Bureau's
16 SOPs "were not implemented as a rigid barrier, but were enacted for guiding the BOR in its
17 operation of the dam." *Id.* at 741.

18 In conclusion, the June 16 Agreement is not violative of CUSA's SOPs, and even if it
19 was, it would nonetheless be valid and enforceable.

20 b. *Mr. Harkins' Breach of Contract Claims.*

21 Mr. Harkins, too, advances his Second Cause of Action against CUSA for breach of the
22 oral and implied contract formed on August 11, 2006 under which he was to act as CUSA's
23 interim administrator at a pay rate of \$3,000 per month. Mr. Harkins fulfilled his obligations
24 under that contract, yet was never paid. He is entitled to damages for that lack of payment.

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28 ⁸ The instant point is responsive to the Court's question at the June 21, 2010 hearing on the parties' motions in limine regarding what the effect of an SOP violation would be.

1 3. The Elements, Standards, and Burdens of Proof of a Claim for Breach of the
2 Implied Covenant of Good Faith and Fair Dealing Under California Law.

3 Every contract contains an implied covenant of good faith and fair dealing that prevents
4 either party from doing anything to deprive the other of the benefits of the contract. Merrit v. J.A.
5 Stafford Co., 68 Cal.2d 619, 626 (1968); Sheppard v. Morgan Keegan & Co., 218 Cal.App.3d 61,
6 66 (1990). The implied covenant imposes on each party “not only the duty to refrain from doing
7 anything to render performance of the contract impossible, but also the duty to do everything the
8 contract presupposes that party will do to accomplish the purpose of the contract.” Vol. 13,
9 California Forms of Pleading and Practice, §140.32[8][c], at p. 140-86 (Matthew Bender 2009);
10 see, also, Pasadena Live, LLC v. City of Pasadena, 114 Cal.App.4th 1089, 1092-1094 (2004).

11 Here, CUSA breached the implied covenant relative to Mr. Dawe and Flat Iron by (a)
12 transmitting a letter to Mr. Dawe (rather than Flat Iron) placing Mr. Dawe (rather than Flat Iron)
13 on “suspension without pay” even though the Agreement was between CUSA and Flat Iron, and
14 even though the Agreement contained no provisions authorizing any such “suspension”; (b)
15 continuing that “suspension without pay” by and through a September 7, 2006 Board Resolution;
16 and (c) following through on that “suspension” by failing to make any further payments to Mr.
17 Dawe or Flat Iron under the June 16, 2006 Agreement. Under the guise of “suspending” Mr.
18 Dawe even though it has throughout this litigation contended that Mr. Dawe was not an
19 employee, CUSA avoided its obligations under the Agreement and deprived Flat Iron of its
20 benefits thereunder.

21 4. The Elements, Standards, and Burdens of Proof of a Claim for Defamation Under
22 California Law.

23 The Sixth through Eighth Cause of Action contained in Mr. Dawe and Flat Iron’s
24 Complaint seeks recovery for CUSA’s acts of defamation, and are advanced by Mr. Dawe alone.
25 Mr. Harkins also advances defamation claims via his Fourth and Fifth Causes of Action.
26 Defamation consists of false and unprivileged written or oral publications (known as libel and
27 slander, respectively) that have a tendency to injure the reputation of their subject. Cal. Civil
28 Code §§ 44-46. As stated by a leading commentator, “[t]he essence of a defamatory statement is

1 an imputation which lowers a person’s reputation, either generally or with respect to his or her
2 occupation.” 4 Levy, Golden & Sacks, California Torts, § 45.02[3], at p. 45-11 (Matthew Bender
3 2009), citing MacLeod v. Tribune Publishing Co., 52 Cal.2d 536, 546 (1959); Semple v. Andrews
4 (1938) 27 Cal.App.2d 228, 232.

5 On July 13, 2010, the Court issued an order indicating its inclination to adopt the standard
6 of proof for malice (relative to California Civil Code section 47) set forth in Lytel v. Simpson,
7 No. 05-01937-FJ, 2006 WL 2263943 (N.D. Cal. Aug. 8, 2006), and directed the parties to discuss
8 whether application of that case to the instant matter is appropriate. Plaintiffs believe that the
9 standards discussed in Lytel are accurate, and are comfortable with the use of those standards *if*
10 malice is found to be a requirement in this case. However, Plaintiffs believe a showing of malice
11 is *not* required. Here is why.

12 a. *Defendants’ Defamatory Publications Are Not Privileged.*

13 Defendants’ invocation of a malice requirement in this litigation is primarily based on the
14 asserted application of the “litigation privilege, common interest privilege and/or protected First
15 Amendment Rights.” (CM/ECF Document No. 353, at 2:20-2:21.) The assertion of those
16 “privileges” is entirely without merit.

17 As to the “litigation privilege,” while Defendants have claimed that their defamatory
18 publications are “absolutely privileged” because they “were made in anticipation of litigation
19 and/or during active litigation” (referring to the petition for writ of mandate filed in Sacramento
20 County Superior Court), that claim is entirely specious, and has already been the subject of
21 skeptical comments by the Court. Not only would the making of defamatory publications “in
22 anticipation of litigation and/or during active litigation” in no way sanitize the publications, but,
23 as the Court has already succinctly opined with respect to the defamatory January 3, 2006 email
24 transmitted by the Defendants, the documents “do[] not reference, even obliquely or inferentially,
25 the writ of mandamus action.” Nor do any of the other defamatory publications at issue in this
26 case. Even more fundamentally, there is absolutely no evidence whatsoever that Defendants’
27 transmissions as a whole, or any one of them individually, constitute communications “made in
28 judicial or quasi-judicial proceedings” such that any litigation privilege would attach. See, e.g.,

1 Silberg v. Anderson, 50 Cal.3d 205, 212 (1990).

2 Defendants' arguments for application of the "common interest privilege" under which
3 "malice" must purportedly be shown (Defendants' MPA, at 24:5-24:27) are similarly misguided.
4 Not only are the communications at issue *not* "interested party communications" such as would
5 trigger a malice requirement (see, Cal. Civ. Code § 47, subd. (c)), but the substance of the
6 transmissions also makes clear that Defendants at all times affirmatively intended to damage
7 Plaintiffs via those publications.⁹ Stated another way, not only have Defendants altogether failed
8 to (a) establish that their communications are such that a "malice" requirement would apply and
9 (b) carry their initial burden of establishing a *lack* of such "malice" (Kashian v. Harriman, 98
10 Cal.App.4th 892, 915 (2002)), but the acts and conduct of Defendants show the opposite.

11 Defendants' reference to a privilege created by "protected First Amendment rights" may
12 be the most ridiculous of all. Defendants' most recent formulation of that "privilege" is as
13 follows:

14 Further, the Defendants have a First Amendment Constitutional
15 Right of Freedom of Speech and Freedom of Association. The
16 Board of Directors and its officers had a constitutionally protected
17 right to communicate with the CUSA membership, other board
18 members, officers and employees of CUSA, a non-profit mutual
benefit corporation. The defamation claims by Plaintiffs' infringe
upon these protected constitutional rights of free speech and
freedom of association, and are constitutionally barred.

19 (CM/ECF Doc. No. 308, at 6:3-6:8.)

20 One need not open *Witkin* to know that the "First Amendment Constitutional Right of
21 Freedom of Speech and Freedom of Association" does not include a license—or, in more legally
22 accurate parlance, a "privilege"—to defame. *Of course* American citizens enjoy the
23 constitutionally-embedded right to speak and associate freely; that right is one of the things that
24 makes the United States what it is. However, that right ends—and actionable defamation
25 begins—when one makes false and unprivileged statements that injure the reputation of the
26 person against whom they are made. Put simply, the "Constitutional Right of Freedom of Speech

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28 ⁹ Note also the above-excerpted email communication between Messrs. Baumann and Pinto,
which further evidences an affirmative intent to harm Plaintiffs.

1 and Freedom of Association” is not itself a panacea or a “privilege”; it is simply the baseline rule
2 out of which the various exceptions—including those relating to defamation—arise. No more
3 does that “constitutional right” protect publications of the kind at issue here than it protects one
4 who yells “fire” in a crowded theatre.

5 b. *Mr. Dawe is Not a Limited Purpose Public Figure.*

6 Defendants also assert that Mr. Dawe is a “limited public figure” such that the malice
7 requirement applies. (See, e.g., CM/ECF Doc. No. 308, at 6:10-6:20.) Not so.

8 Much as Defendants would wish it otherwise, one is not a limited purpose public figure
9 simply because he is known within the profession at issue. (Here, Plaintiffs cannot legitimately
10 dispute that Mr. Dawe was a known figure within the corrections industry.) In fact, there are
11 *three* elements—not just one—that must be satisfied in order to properly characterize a person as
12 a “limited purpose public figure”:

13 First, there must be a public controversy, which means the issue
14 was debated publicly and had foreseeable and substantial
15 ramifications for nonparticipants. Second, the plaintiff must have
16 undertaken some voluntary act through which he or she sought to
17 influence resolution of the public issue. In this regard it is
sufficient that the plaintiff attempts to thrust him or herself into the
public eye. And finally, the alleged defamation must be germane to
the plaintiff’s participation in the controversy.

18 Ampex v. Cargle, 128 Cal.App.4th 1569, 1577 (2005).

19 Defendants cannot establish *any* of these elements, and have at no time even conducted an
20 assessment of what the “issue” and “controversy” really are. Here, the pertinent “issue” and
21 “controversy” is *not* corrections issues in general or Mr. Dawe’s involvement in those issues—to
22 assert otherwise would be absurd. Instead, the “issue” and “controversy” relate to the specific
23 actions Mr. Dawe undertook during his time with CUSA, and Defendants’ false and misleading
24 claims regarding those actions. Until Defendants opted to tar Mr. Dawe’s name and reputation
25 through their defamatory statements, those matters had at no time been “debated publicly,” nor
26 did the “resolution” of those matters have “foreseeable and substantial ramifications for
27 nonparticipants.”

28 Also, lest Defendants attempt to argue otherwise, they cannot manufacture a “public

1 issue” by themselves taking the matter public.

2 [T]here should be some degree of closeness between the challenged
3 statements and the asserted public interest; *the assertion of a broad*
4 *and amorphous public interest is not sufficient.* [T]he focus of the
5 speaker’s conduct should be the public interest rather than a mere
6 effort “to gather ammunition for another round of [private]
7 controversy” “[T]hose charged with defamation cannot, by
8 their own conduct, create their own defense by making the claimant
9 a public figure.” *A person cannot turn otherwise private*
10 *information into a matter of public interest simply by*
11 *communicating it to a large number of people.*

12 Weinberg v. Feisel, 110 Cal.App.4th 1122, 1132-1133 (2003) (emphasis added, internal citations
13 omitted).

14 The principles set forth in seminal California cases such as Reader’s Digest Association v.
15 Superior Court, 37 Cal.3d 244 (1984) and Rudnick v. McMillan, 25 Cal.App.4th 1183 (1994) also
16 bolster Mr. Dawe’s position. In Reader’s Digest, the California Supreme Court discussed the two
17 “public figure” classifications, noting as follows: “Unlike the ‘all purpose’ public figure, the
18 ‘limited purpose’ public figure loses certain protections only to the extent that the allegedly
19 defamatory communications relates to his role in a public controversy.” 37 Cal.3d at 253-254. In
20 Rudnick, the court held that “[t]o qualify as a limited purpose public figure, a plaintiff must have
21 undertaken some *voluntary* [affirmative] act[ion] through which he seeks to influence the
22 resolution of the public issues involved.” 25 Cal.App.4th at 1190 [emphasis and bracket in
23 original], citing Reader’s Digest. “Accordingly, courts consider the ‘nature and extent of an
24 individual’s participation in the **particular controversy** . . .” in deciding whether a plaintiff is a
25 limited purpose public figure. Ibid. [emphasis added], citing Gertz v. Robert Welch, Inc., 418
26 U.S. 323, 352 (1974) and Wolston v. Reader’s Digest Assn., Inc., 443 U.S. 157, 167 (1979).

27 Under Defendants’ apparent construct, none of the above would matter—if a person has in
28 any way become publicized in relation to his her profession, however generally, that person
would be a public figure for every single thing pertaining in any way to his or her practice of that
profession. Plaintiffs submit that that is an untenable construct that is not only at swords’ points
with clearly-stated decisional law, but, if accepted, would serve to substantively and unduly alter
the mechanics of the “limited purpose public figure” doctrine. At the end of the day, since Mr.

1 Dawe is *not* a limited purpose public figure relative to the matters in dispute, Defendants’
2 “malice” in publishing their defamatory statements is neither here nor there with regard to the
3 required analysis.

4 c. *Mr. Harkins is Not a Limited Purpose Public Figure.*

5 As to Mr. Harkins’ defamation claims, Plaintiffs’ reiterate the discussion set forth in the
6 preceding section, and additionally note that Mr. Harkins is not nearly as well known in the
7 corrections field as Mr. Dawe. Even in the lay sense, then, Mr. Harkins cannot be considered a
8 “public” figure.

9 5. The Elements, Standards, and Burdens of Proof of a Claim for Interference With
10 Prospective Economic Advantage and Contractual Relations Under California
11 Law.

12 In their Ninth Cause of Action, Mr. Dawe and Flat Iron advance a claim for interference
13 with prospective economic advantage. As noted by the Court in its May 20, 2009 ruling on
14 Defendants’ motion to dismiss, such a claim requires a plaintiff to show the following:

- 15 (1) An economic relationship between the plaintiff and some third
16 party, with the probability of future economic benefit to the
17 plaintiff; (2) the defendant’s knowledge of that relationship; (3)
18 intentional acts on the part of the defendant designed to disrupt that
relationship; (4) actual disruption of the relationship; and (5)
economic harm to the plaintiff proximately caused by the acts of the
defendant.

19 Id. at 27:11-27:22, citing Youst v. Longo, 43 Cal.3d 64, 71 fn. 6 (1987) and Della Penna v.
20 Toyota Motor Sales, U.S.A., Inc., 11 Cal.4th 376 (1995).

21 Here, the defamatory communications transmitted by Defendants in this case facially
22 evidence both Defendants’ knowledge of the economic relationships Mr. Dawe was attempting to
23 cultivate by virtue of his post-CUSA work and an affirmative intent to interfere with those
24 relationships. Among many other things, the communications urge recipients not to associate
25 with Mr. Dawe, not to join the organizations that Mr. Dawe is affiliated with, and to “exercise
26 extreme caution when and if you consider entering into any business or financial arrangement
27 with Brian Dawe, Richard Loud, or Gary Harkins.” And, in fact, Defendants’ conduct *has*
28 *worked*, as Mr. Dawe and Flat Iron have been affirmatively thwarted in their efforts to do

1 business as a result of Defendants' communications.

2 6. The Elements, Standards, and Burdens of Proof of a Claim for Failure to Pay
3 Wages Under California Labor Code Sections 201, 203, and 218.5.

4 Wages earned and unpaid at the time of an employee's discharge are payable
5 immediately. Cal. Lab. Code § 201. A cause of action for such sums requires proof that the
6 plaintiff performed work for the defendant and is owed wages, as well as an establishment of the
7 amount of unpaid wages. A waiting-time penalty (not to exceed thirty days) is also tacked on
8 under Labor Code section 203 for employers who willfully fail to pay the earned wages at the
9 time of discharge. Cal. Lab. Code § 203.

10 Via his First Cause of Action, Mr. Harkins seeks recovery against CUSA for a failure to
11 pay wages. Candidly, like Mr. Dawe, Mr. Harkins does not believe he was a CUSA employee.
12 However, Defendants' own actions have once again created ambiguity as to Mr. Harkins' status.
13 For many years, Mr. Harkins operated as CUSA's recording secretary. On or about August 11,
14 2006, the CUSA Board of Directors—at a meeting at which Mr. Harkins was present—appointed
15 Mr. Harkins as interim administrator for CUSA and authorized a monthly salary to be paid in the
16 amount of \$3,000. Beginning on that day, Mr. Harkins performed the duties of interim
17 administrator. Notwithstanding his full performance of those duties, he has never been
18 compensated for his services in the agreed-upon amount, or in any amount. Furthermore, CUSA
19 has issued documentation which reflects their possible treatment of officers who hold additional
20 positions as employees. Like Mr. Dawe, Mr. Harkins was an officer (recording secretary) who
21 took an additional position (interim administrator) with CUSA. He was not paid any portion of
22 the amounts owed relative to that latter position, and was thereafter discharged therefrom. If Mr.
23 Harkins was indeed an employee, he is entitled to the protections of the aforementioned Labor
24 Code provisions, which collectively require payment of earned and unpaid wages at the time of
25 termination, as well as penalties for failure to make such payment.

26 7. The Elements, Standards, and Burdens of Proof of a Claim for False Imprisonment
27 Under California Law.

28 Mr. Harkins' Third Cause of Action is for false imprisonment. False imprisonment is

1 defined in California as the unlawful violation of the personal liberty of another; the essential
 2 element of the tort is restraint of the person by express or implied force. Onick v. Long, 154
 3 Cal.App.2d 381, 386 (1957). Importantly, physical force is not the only means of restraint which
 4 will support a finding of false imprisonment; words or conduct furnishing a reasonable
 5 apprehension on the part of the one restrained that he or she will not be allowed to leave is
 6 sufficient. Schanafelt v. Seaboard Fin. Co., 108 Cal.App.2d 420, 422-423 (1951). Moreover, a
 7 private employer may be held liable for a false imprisonment committed by an employee or
 8 representative thereof either (a) indirectly under the doctrine of respondent superior or (b) directly
 9 as a joint and concurrent tortfeasor (where the employer directs or does not forbid the tortious
 10 action). McInerny v. United R.R., 50 Cal.App. 538, 550 (1920); Benson v. Southern Pac. Co.,
 11 177 Cal. 777, 779-780 (1918); Canadian Indem. Co. v. Ohio Farmers' Indem. Co., 251 F.2d 563,
 12 567 (9th Cir. 1958).

13 In this case, Mr. Harkins was confronted on September 7, 2006—immediately following a
 14 CUSA Board meeting—by two Sergeants-at-Arms who insisted on searching his luggage in the
 15 lobby of the Silver Legacy hotel in Reno, Nevada. Those gentlemen aggressively got into Mr.
 16 Harkins' face, and when Mr. Harkins attempted to back away from them, they came forward and
 17 closed that gap. Unless Mr. Harkins wanted to run through the lobby of the hotel without his
 18 luggage, there was nowhere for him to go. Having a reasonable apprehension for his safety and
 19 welfare, Mr. Harkins succumbed and opened his luggage. This encounter took place in a hotel
 20 lobby in the presence of others, and caused embarrassment for Mr. Harkins. It was apparently
 21 also the subject of much “buzz” at the CCPOA meeting held shortly thereafter.

22 8. The Elements, Standards, and Burdens of Proof of the Defenses that a Contract is
 23 Illegal, Unlawful, Void, Voidable, and Subject to the California Corporate Law
 24 Ultra Vires Doctrine, Under California Law.

25 Plaintiffs are unclear as to what Defendants contend by way of this “defense.” To the
 26 extent the defense is intended to invoke California Corporations Code section 7233(a) (which
 27 Defendants have previously referenced in this action), it appears to be based on Defendants'
 28 claim that the June 16 Agreement was an “interested transaction” that “was not presented or

1 disclosed to the full Board of Directors, nor was it authorized, approved or voted upon by the full
2 CUSA Board of Directors.” (Defendants’ Points and Authorities supporting their MSJ, at 12:23-
3 12:28.)

4 If that is indeed the thrust of Defendants’ argument, it is immaterial to the issue of the
5 Agreement’s validity. In fact, *no* contracts were submitted to the Board of Directors, and Mr.
6 Loud was the sole person to sign contracts on CUSA’s behalf. Therefore, even if the contract was
7 not “disclosed to the full CUSA Board of Directors for a vote,” that fact would in no way
8 establish that the Agreement was an “interested transaction,” or in any way improper. To the
9 contrary, the Agreement was consummated in the same manner as CUSA’s other agreements.
10 That Defendants would seek to suddenly vitiate *this and only this Agreement* with reference to
11 some ascribed failure to comply with provisions of the Corporations Code speaks to the catch-as-
12 catch-can nature of Defendants’ assertions.

13 Furthermore, Defendants are also wrong on the law. Contrary to Defendants’ prior
14 indications in this case, Corporations Code section 7233(a) does *not* void contracts that are not
15 disclosed to the relevant organization’s board. In fact, that section simply provides a safe harbor
16 to certain specified contracts that *are* so disclosed. *Id.* at subs. (a), (a)(1), and (a)(2). If “the
17 material facts as to the transaction and as to [the] director’s interest” are *not* disclosed, that only
18 means that the burden is on “the person asserting the validity of the contract . . . of proving that
19 the contract . . . was just and reasonable.” *Id.* at subd. (a)(3). Here, the contract was eminently
20 reasonable, and memorialized a continuation of the services that Mr. Dawe had provided to
21 CUSA since 1998.

22 9. The Elements, Standards, and Burdens of Proof of the Defense that a Contract Was
23 Produced by Fraud, Concealment or Misrepresentation Under California Law.

24 Plaintiffs truly have no idea what this defense is intended to represent. If circumstances
25 warrant, they will address this item by way of a response brief under Local Rule 285(b).

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