

1 DAVID P. MASTAGNI, ESQ. (SBN 057721)  
JAMES B. CARR, ESQ. (SBN 053274)  
2 PHILLIP MASTAGNI, ESQ. (SBN 238254)  
**MASTAGNI, HOLSTEDT, AMICK,  
3 MILLER & JOHNSEN**  
*A Professional Corporation*  
4 1912 "T" Street  
Sacramento, California 95811  
5 Telephone: (916) 446-4692  
Facsimile: (916) 447-4614

6 Attorneys for Defendants  
7 Corrections USA, a California Corporation,  
California Correctional Peace Officers  
8 Association, a California Corporation,  
Donald Joseph Baumann, and  
9 James Baiardi

10  
11 UNITED STATES DISTRICT COURT  
12 EASTERN DISTRICT OF CALIFORNIA

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

16 Plaintiffs, )

17 v. )

18 CORRECTIONS USA, a California )  
19 Corporation; et al., )  
20 Defendants. )

21 AND RELATED COUNTERCLAIMS )  
22 AND CROSS-COMPLAINTS )  
23 \_\_\_\_\_ )

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

[Consolidated Master Case]

**DEFENDANTS' TRIAL BRIEF**

[Local Rule 285]

Date: July 13, 2010  
Time: 10:00 a.m.  
Courtroom: 4  
Judge: Hon. Lawrence K. Karlton  
Trial: July 27, 2010

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE FACTS ..... 1

SUMMARY OF POINTS OF LAW ..... 4

    A. Opposition to Plaintiffs’ Claims. .... 4

        (1) Defamation ..... 4

        (2) Common Interest Privilege ..... 6

        (3) Litigation Privilege/Immunity ..... 7

        (4) Constitutional Malice/Public Figure ..... 8

        (5) Re-publication of Defamatory Statements ..... 9

        (6) Truth is a Defense ..... 9

        (7) Corporate Capacities/Individual Liability of Baiardi/Baumann ..... 9

        (8) Plaintiffs’ Employee Status ..... 11

        (9) Contract Formation/Illegal Contract ..... 12

        (10) Interference With Contract ..... 14

        (11) Good Faith and Fair Dealing ..... 15

        (12) Declaratory Relief ..... 16

        (13) Reformation of Contract/Extrinsic Evidence ..... 16

        (14) False Imprisonment/Gary Harkins ..... 17

        (15) Unclean Hands/The Plan/Breach of Fiduciary Duties ..... 18

            (a) Unclean Hands ..... 18

            (b) The Plan/Fraud/Breach of Fiduciary Duty ..... 19

            (c) Alter-ego/Piercing the Corporate Veil (FIMA LLC, ACO, ACOIN)  
                ..... 20

        (16) Whistleblower Evidence/Conspiracy/Collusion Claim ..... 21

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

B. Defendants’ Counter-Claims . . . . . 21

(1) Breach of Fiduciary Duties . . . . . 21

(2) Interference With Business Relations . . . . . 24

(3) Interference With Prospective Economic Advantage . . . . . 25

(4) Unauthorized Use of Another’s Name . . . . . 26

(5) Prohibited Use of Membership List . . . . . 26

(6) Fraud and Concealment of Material Facts . . . . . 27

(7) Conversion of CUSA Property . . . . . 29

(8) Accounting . . . . . 31

(9) Fraud, False Advertising, Chain Scheme, Unfair Business Practices/Civil  
Conspiracy and Racketeering Activities (Civil RICO) . . . . . 31

(10) Other Relief Sought . . . . . 34

C. Reasonably Anticipated Disputes Concerning Admissibility of Evidence . . . . . 35

**TABLE OF AUTHORITIES**

**UNITED STATES SUPREME COURT CASES**

*Ashcroft v. Iqbal*  
129 S.Ct. 1937 (2009) ..... 18

*Beck v. Prupis*  
529 U.S. 494, 120 S.Ct. 1608 (2000) ..... 34

*Bell Atlantic Corp. v. Twombly*  
550 U.S. 544 (2007) ..... 18

*Fitzgerald & Mallory Construction Co. v. Fitzgerald*  
137 U.S. 98 (1890) ..... 11

*Gertz v. Robert Welch*  
418 U.S. 323 (1974) ..... 8

*H.J. Inc. v. Northwestern Bell Telephone Co.*  
492 U.S. 229 (1989) ..... 34

*Linn v. United Plant Guard Workers of America, Local 114*  
383 U.S. 53 (U.S. Mich. 1966) ..... 9

*McKennon v. Nashville Banner Publishing Co.*  
513 U.S. 352 (1995) ..... 12

*New York Times v. Sullivan*  
376 U.S. 254 (1964) ..... 5, 8

*Precision Instrument Mfg. Co. v. Auto Maint. Mach. Co.*  
324 U.S. 806 (1945) ..... 14, 18, 19, 21

**UNITED STATES APPELLATE COURT CASES**

*Arabian American Oil Co. v. Scarfone*  
939 F.2d 1472 (11th Cir. 1991) ..... 34

*Boston Educational Research Co., Inc. v. American Mach. & Foundry Co.,*  
488 F.2d 344 (1st Cir. 1973) ..... 30

*Cox v. Administrator United States Steel & Carnegie*  
17 F.3d 1386 (11th Cir. 1994) ..... 34

*Dworkin v. Hustler Magazine, Inc.*  
867 F.2d 1188 (9th Cir. 1989) ..... 5, 8

*Gilbrook v. City of Westminster*  
177 F.3d 839 (9th Cir. 1999) ..... 9

*Gritchen v. Collier*  
254 F.3d 807 (9th Cir. 2001) ..... 18

1 *Manufactured Home Communities, Inc. v. County of San Diego*  
 544 F.3d 959 (9th Cir. 2008) . . . . . 9

2

3 *McElyea v. Babbitt*  
 833 F.2d 196 (9th Cir. 1987) . . . . . 13

4 *Oshiver v. Levin, Fishbein, Sedran & Berman*  
 38 F.3d 1380 (3rd Cir. 1994) . . . . . 7

5

6 *Pearson v. Dodd*  
 410 F.2d 701 (D.C. Cir. 1969) . . . . . 30

7 *Scheiber v. Dolby Labs., Inc.*  
 293 F.3d 1014 (7th Cir. 2002) . . . . . 19

8

9 *Schroder v. McDonald*  
 33 F.3d 454 (9th Cir. 1995) . . . . . 13

10 *Sikes v. Teletelne, Inc.*  
 281 F.3d 1350 (11th Cir. 2002) . . . . . 34

11

12 *Solano v. Playgirl, Inc.*  
 292 F.3d 1078 (9th Cir. 2002) . . . . . 8

13 *TWA v. American Coupon Exchange*  
 913 F.2d 676 (9th Cir. 1990) . . . . . 20

14

15 *U.S. Jaycees v. San Francisco Jr. Chamber of Commerce*  
 354 F.Supp. 61 (NDCA 1972), judgment affirmed, 513 F.2d 1226 (9th Cir. 1975) . . . 26,  
 34

16

17 *U.S. v. 1402 Acres of Land More or Less in Fresno County*  
 530 F.3d 883 (9th Cir. 2008) . . . . . 7

18 *U.S. v. Goss*  
 803 F.2d 638 (11th Cir.1986) . . . . . 33

19

20 *U.S. v. Pecora*  
 798 F.2d 614 (3d Cir. 1986) . . . . . 32

21 *U.S. v. Seregos*  
 655 F.2d 33 (2d Cir. 1981) (certiorari denied 455 U.S. 940) . . . . . 32

22

23 *Warren v. Fox Family Worldwide, Inc.*  
 328 F.3d 1136 (9th Cir. 2003) . . . . . 11

24 *Zeran v. America Online, Inc.*  
 129 F.3d 327 (4th Cir. 1997) . . . . . 9

25

26 **UNITED STATES DISTRICT COURT CASES**

27 *Bryant v. Mattel, Inc.*  
 573 F.Supp.2d 1254 (C.D. Cal. 2007) . . . . . 32

28

1 *Intamin, Ltd. v. Magnetar Technologies Corp.*  
623 F.Supp.2d 1055 (CDCA 2009) ..... 19, 20

2

3 *Lytel v. Simpson*  
No. 05-01937-FJ, 2006 WL 2263943 (N.D. Cal. Aug. 8, 2006) ..... 5-7, 10, 15

4 *Norberg v. Tillamook County Creamery Association*  
74 F.Supp.2d 1002 (Dist. Oregon 1999) ..... 11

5

6 *Ruiz v. Gap, Inc.*  
540 F.Supp.2d 1121 (NDCA 2008) ..... 30

7 *Schulthies v. National Passenger R.R. Corp.*  
2009 WL 2524580 (NDCA 2009) ..... 11

8

9 *Vacker v. Package Machinery Co.*  
841 F.Supp. 310 (N.D. Cal., 1993) ..... 15

10 *Yow v. National Enquirer, Inc.*  
550 F.Supp.2d 1179 (EDCA 2008) ..... 5

11

12 **CALIFORNIA SUPREME COURT CASES**

13 *Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.*  
7 Cal.4th 503 (1994) ..... 10, 14, 15, 32

14

15 *Bancroft-Whitney Co. v. Glen*  
64 Cal.2d.327 (1966) ..... 22

16 *Barrett v. Rosenthal*  
40 Cal.4th 33 (2006) ..... 9

17

18 *Black v. Harrison Home Co.*  
155 Cal. 121 (1909) ..... 13

19 *Brewer v. Second Baptist Church of Los Angeles*  
32 Cal.2d 791 (1948) ..... 6

20

21 *Brown v. Kelly Broadcasting Co.*  
48 Cal.3d 711 (1989) ..... 4, 9

22 *Buckaloo v. Johnson*  
14 Cal.3d 815 (1975) ..... 10, 14, 24, 25

23

24 *Campbell v. Regents of University of California*  
35 Cal.4th 311 (2005) ..... 12

25 *Cole v. Fairs Oaks Fire Protection District*  
43 Cal.3d 148 (1987) ..... 18

26

27 *Collyer v. S. H. Kress Co.*  
5 Cal.2d 175 (1936) ..... 18

28

1 *D. N. & E. Water & Co. v. Zuckerman*  
 214 Cal. 418 (1931) ..... 20

2 *Degarmo v. Goldman*  
 3 19 Cal.2d 755 (1942) ..... 20

4 *Della Penna v. Toyota MotorSales, USA., Inc.*  
 11 Cal.4th 376 (1995) ..... 10, 14

5 *Dore v. Arnold Worldwide, Inc.*  
 6 39 Cal.4th 384 (2006) ..... 11, 16, 17

7 *Engalla v. Permanente Medical Group, Inc.*  
 15 Cal.4th 951 (1997) ..... 27, 29, 31

8 *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*  
 9 12 Cal.3d 493 (2004) ..... 5

10 *Fermino v. Fedco, Inc.*  
 7 Cal.4th 701 (1994) ..... 18

11 *Foley v. Interactive Data Corp.*  
 12 47 Cal.3d 654 (1988) ..... 15, 16

13 *Frances T. v. Village Green Owners Assn.*  
 42 Cal.3d 490 (1986) ..... 10, 21

14 *Guz v. Bechtel, Inc.*  
 15 24 Cal.4th 317 (2000) ..... 11, 16

16 *Johnson v. City of Loma Linda*  
 24 Cal.4th 61 (2000) ..... 12

17 *Jones v. H. F. Ahmanson & Co.*  
 18 1 Cal.3d 93 (1969) ..... 27

19 *Jones v. Kelly*  
 20 208 Cal. 251 (1929) ..... 15

21 *Khawar v. Globe Int’l, Inc.*  
 19 Cal.4th 254 (1998) ..... 5, 8

22 *Lazar v. Superior Court*  
 12 Cal.4th 631 (1991) ..... 27

23 *Lewis Jorge Construction, Inc. v. Pomona Unified School District*  
 24 34 Cal.4th 960 (2004) ..... 16

25 *Livitsanos v. Superior Court*  
 2 Cal.4th 744 (1992) ..... 18

26 *Lundquist v. Reusser*  
 27 7 Cal.4th 1193 (1994) ..... 7

28

1 *Mesler v. Bragg Management Co.*  
39 Cal.3d 290 (1985) ..... 20

2

3 *Milklosky v. Regents of University of California*  
44 Cal.4th 876 (2008) ..... 12

4 *Molko v. Holy Spirit Assn.*  
46 Cal.3d 1092, cert. denied 490 U.S. (1988) ..... 17

5

6 *Moore v. Conliffe*  
7 Cal.4th 634 (1994) ..... 7

7 *P.A. Smith Co. v. Muller*  
201 Cal. 219 (1927) ..... 12, 14

8

9 *Pacific Gas & Electric Co. v. Bear Stearns & Co.*  
50 Cal.3d 1118 (1990) ..... 25, 26

10 *People v. Zelinski*  
24 Cal.3d 357 (1979) ..... 18

11

12 *Quelimane Co. v. Stewart Title Guaranty Co.*  
19 Cal.4th 26 (1998) ..... 11, 14, 25

13 *Schachter v. Citigroup, Inc.*  
47 Cal.4th 610 (2009) ..... 11

14

15 *Severance v. Knight-Counihan Co.*  
29 Cal.2d 561 (1947) ..... 12, 14

16 *Shoemaker v. Meyers*  
52 Cal.3d 1 (1990) ..... 10, 14

17

18 *Silberg v. Anderson*  
50 Cal.3d 205 (1990) ..... 7

19 *Slaughter v. Friedman*  
32 Cal.3d 149 (1982) ..... 5

20

21 *Stationers Corp. v. Dun & Bradstreet, Inc.*  
62 Cal.2d 412 (1965) ..... 15

22 *Youst v. Longo*  
43 Cal.3d 64 (1987) ..... 26

23

24 **CALIFORNIA APPELLATE COURT CASES**

25 *Kendall-Jackson Winery, Ltd. v. Superior Court*  
76 Cal.App.4th 970 (2000) ..... 20

26

27 *Angelus Securities Corp. v. Ball*  
20 Cal.App.2d 436 (1937) ..... 13

28

1 *Anmaco, Inc. v. Bohlken*  
 13 Cal.App.4th 891 (1993) ..... 12, 13, 17

2

3 *Atwood v. Elwood*  
 132 Cal.App.2d 761 (1955) ..... 29, 30

4 *Balboa Ins. Co. v. Trans Global Equities*  
 218 Cal.App.3d 1327 (1990) ..... 20

5

6 *Barnes- Hind, Inc. v. Superior Court*  
 181 Cal.App.3d 377 (1986) ..... 5

7 *Bionghi v. Metropolitan Water District of Southern California*  
 70 Cal.App.4th 1358 (1999) ..... 11, 16, 17

8

9 *Brose v. Union-Tribune Publishing Co.*  
 183 Cal.App.3d 1079 (1986) ..... 14

10 *Bulesci v. Petersen*  
 68 Cal.App.4th 1062 (1998) ..... 29, 31

11

12 *Camp v. Jeffer, Mangels, Butler & Marmaro*  
 35 Cal.App.4th 620 (1995) ..... 12

13 *Campanelli v. Regents of University of California*  
 44 Cal.App.4th 572 (1996) ..... 9

14

15 *Choate v. County of Orange*  
 86 Cal.App.4th 312 (2000) ..... 32

16 *Civic Western Corp. v. Zila Industries, Inc.*  
 66 Cal.App.3d 1 (1977) ..... 31

17

18 *Copp v. Paxton*  
 45 Cal.App.4th 829 (1996) ..... 5

19 *Corporation of America v. Harris*  
 5 Cal.App.2d 452 (1935) ..... 13

20

21 *Deaile v. General Telephone Co. of California*  
 40 Cal.App.3d 841 (1974) ..... 6

22 *DeCampos v. State Comp. Ins. Fund*  
 122 Cal.App.2d 519 (1954) ..... 27, 35

23

24 *Edwards v. Centex Real Estate Corp.*  
 53 Cal.App.4th 15 (1997) ..... 7

25 *Felton v. Schaeffer*  
 229 Cal.App.3d 229 (1991) ..... 15

26

27 *Fremont Indemnity Company v. Fremont General Corp.*  
 148 Cal.App.4th 97 (2007) ..... 29

28

1 *Healy v. Tuscany Hills Landscape & Recreation Corp.*  
 137 Cal.App.4th 1 (2006) ..... 7, 8

2

3 *Institute of Athletic Motivation v. University of Illinois*  
 114 Cal.App.3d 1 (1980) ..... 7

4 *Kashani v. Tsann Kuen China Enterprises Co., Ltd*  
 118 Cal.App.4th 531 (2004) ..... 12, 16

5

6 *Kashian v. Harriman*  
 98 Cal.App.4th 892 (2002) ..... 6, 7

7 *Kasparian v. County of Los Angeles*  
 38 Cal.App.4th 242 (1995) ..... 25

8

9 *Kelly v. General Telephone Co.*  
 136 Cal.App.3d 278 (1982) ..... 6

10 *King v. King*  
 22 Cal.App.3d 319 (1971) ..... 29, 30

11

12 *Limandri v. Judkins*  
 52 Cal.App.4th 326 (1997) ..... 28

13 *Lyons v. Fire Ins. Exchange*  
 161 Cal.App.4th 880 (2008) ..... 17

14

15 *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*  
 6 Cal.App.4th 603 (1992) ..... 28

16 *Marsili v. Pacific Gas & Elect. Co.*  
 51 Cal.App.3d 313 (1975) ..... 13

17

18 *Mayes v. Sturdy Northern Sales, Inc.*  
 91 Cal.App.3d 69 (1979) ..... 10

19 *McKell v. Washington Mutual. Inc.*  
 142 Cal.App.4th 1457 (2006) ..... 29, 35

20

21 *Melaleuca, Inc. v. Clark*  
 66 Cal.App.4th 1344 (1998) ..... 4

22 *Mendoyomia, Inc. v. County of Mendocino*  
 8 Cal.App.3d 873 (1970) ..... 15

23

24 *Mintz v. Blue Cross of California*  
 172 Cal.App.4th 1594 (2009) ..... 10, 14

25 *Mosesian v. McClatchy Newspapers*  
 233 Cal.App.3d 1685 (1991) ..... 4

26

27 *Murrillo v. Rite Stuff Foods, Inc.*  
 65 Cal.App.4th 833 (1998) ..... 12

28

1 *Neville v Chudacoff*  
 160 Cal.App.4th 1255 (2008) . . . . . 7, 8

2

3 *Oppenheimer v. City of Los Angeles*  
 104 Cal.App.2d 551 (1951) . . . . . 18

4 *Palm Springs Tennis Club v. Rangel*  
 73 Cal.App.4th 1 (1999) . . . . . 5

5

6 *People v. Frederick*  
 142 Cal.App.4th 400 (2006) . . . . . 33

7 *People v. Russell*  
 81 Cal.App.4th 96 (2002) . . . . . 18

8

9 *Peterson v. Larquier*  
 84 Cal.App. 174 (1927) . . . . . 15

10 *Phan v. Phan*  
 182 Cal.App.4th 323 (2010) . . . . . 9

11

12 *PMC, Inc. v. Saban Entertainment, Inc.*  
 45 Cal.App.4th 579 (1996) . . . . . 25

13 *Remillard Brick Co. v. Remillard-Dandini Co.*  
 109 Cal.App.2d 405 (1952) . . . . . 22

14

15 *Remme v. Herzog*  
 222 Cal.App.2d 863 (1963) . . . . . 31

16 *Retirement Group v. Galante*  
 176 Cal.App.4th 1226 (2009) . . . . . 21, 26, 34

17

18 *Rudnick v. McMillan*  
 25 Cal.App.4th 1183 (1994) . . . . . 4

19 *Sammis v. Stafford*  
 48 Cal.App.4th 1935 (1996) . . . . . 13, 14

20

21 *Sawyer v. Bank of America*  
 83 Cal.App.3d 135 (1978) . . . . . 15

22 *Sealand Investment Company v. Emprise, Inc.*  
 190 Cal.App.2d 305 (1961) . . . . . 17

23

24 *Sequoia Vacuum Systems v. Strancsky*  
 229 Cal.App.2d 281 (1964) . . . . . 20

25 *Service by Medallion, Inc. v. Clorox Co.*  
 44 Cal.App.4th 1807 (1996) . . . . . 29

26

27 *Settimo Associates v. Environ Systems, Inc.*  
 14 Cal.App.4th 842 (1993) . . . . . 26

28

1 *Shopoff & Cavallo LLP v. Hyon*  
167 Cal.App.4th 1489 (2008) ..... 31

2

3 *Smith v. Maldonado*  
72 Cal.App.4th 637 (1999) ..... 4

4 *Snyder v. Evangelical Orthodox Church*  
216 Cal.App.3d 297 (1989) ..... 17

5

6 *Stafford v. Fabric and Structural Technology, Inc.*  
48 Cal.App.4th 1935 (1996) ..... 21

7 *Stoner v. Williams*  
46 Cal.App.4th 986 (1996) ..... 28

8

9 *Terry v. Davis Community Church*  
131 Cal.App.4th 1534 (2005) ..... 6, 9

10 *Teselle v. McLoughlin*  
173 Cal.App.4th 156 (2009) ..... 31

11

12 *Tevis v. Beigel*  
174 Cal.App.2d 90 (1959) ..... 13

13 *Traditional Cat Association v. Gilbreath*  
118 Cal.App.4th 392 (2004) ..... 9

14

15 *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port District*  
106 Cal.App.4th 1219 (2003) ..... 24, 25

16 *Varisco v. Gateway Science and Engineering, Inc.*  
166 Cal.App.4th 1099 (2008) ..... 11, 16, 17

17

18 *Weddington Productions, Inc. v. Flick*  
60 Cal.App.4th 793 (1998) ..... 11, 16

19

20 **FEDERAL STATUTES**

21 18 U.S.C. § 1952 ..... 32

22 29 U.S.C. § 501 ..... 32

23 Communications Decency Act of 1996  
47 U.S.C. § 230(c)(1) ..... 6, 9

24 Labor-Management Reporting and Disclosure Act (LMRDA) 501(c) ..... 32

25 No Electronic Theft (“NET”) Act  
17 U.S.C. § 506 ..... 33

26 Racketeer Influenced and Corrupt Organizations Act (RICO)  
18 U.S.C. §§ 1961-1968 ..... 32, 35

27

28

1 **FEDERAL RULES**

2 Fed. Rules of Civil Procedure, rule 12 ..... 11, 14  
 3 Fed. Rules of Civil Procedure, rule 16 ..... 11, 14  
 4 Fed. Rules of Civil Procedure, rule 54 ..... 11, 14  
 5 Fed. Rules of Evidence, rule 401-404. .... 15, 36  
 6 Fed. Rules of Evidence, rule 404 ..... 35, 36

7  
 8 **STATE STATUTES**

9 Cal. Business & Professions Code § 17200 ..... 31, 32, 35  
 10 Cal. Business & Professions Code § 17500 ..... 31, 32, 35  
 11 Cal. Civil Code § 45 ..... 5  
 12 Cal. Civil Code § 47 ..... 4-7  
 13 Cal. Civil Code § 48 ..... 5, 6  
 14 Cal. Civil Code § 1567 ..... 16  
 15 Cal. Civil Code § 1571-1575 ..... 27, 31  
 16 Cal. Civil Code § 1572 ..... 14, 16, 28, 29  
 17 Cal. Civil Code § 1573 ..... 16  
 18 Cal. Civil Code § 1598 ..... 13  
 19 Cal. Civil Code § 1638 ..... 12, 16  
 20 Cal. Civil Code § 1654 ..... 16  
 21 Cal. Civil Code § 1667-1668 ..... 13, 14  
 22 Cal. Civil Code § 1709 ..... 29  
 23 Cal. Civil Code § 1710 ..... 27, 29, 31  
 24 Cal. Civil Code § 1713 ..... 29  
 25 Cal. Civil Code § 2223 ..... 29, 30  
 26 Cal. Civil Code § 2224 ..... 29, 30  
 27 Cal. Civil Code § 3300 ..... 15  
 28 Cal. Civil Code § 3333 ..... 15

1 Cal. Civil Code § 3425.3 . . . . . 9  
 2 Cal. Code of Civil Procedure § 1856 . . . . . 13  
 3 Cal. Corporations Code § 310 . . . . . 13  
 4 Cal. Corporations Code § 7141 . . . . . 13  
 5 Cal. Corporations Code § 7210 . . . . . 13, 14, 16  
 6 Cal. Corporations Code § 7231 . . . . . 10, 11, 15-17, 20-22  
 7 Cal. Corporations Code § 7233 . . . . . 13, 14, 16  
 8 Cal. Corporations Code § 7235 . . . . . 21, 22  
 9 Cal. Corporations Code § 8320 . . . . . 19, 21, 23, 26-28  
 10 Cal. Corporations Code § 8338 . . . . . 26, 35  
 11 Cal. Corporations Code § 8812 . . . . . 21, 23  
 12 Cal. Corporations Code § 8813 . . . . . 19, 21, 23, 26, 27  
 13 Cal. Corporations Code § 8814 . . . . . 26, 27  
 14 Cal. Corporations Code § 8816 . . . . . 26  
 15 Cal. Labor Code § 2922 . . . . . 11, 12, 16, 17  
 16 Cal. Penal Code § 327 . . . . . 32, 33  
 17 Cal. Penal Code § 490.5 . . . . . 18  
 18 Cal. Penal Code § 641.3 . . . . . 32  
 19 New York Penal Law § 180.00 . . . . . 32

20

21 **CALIFORNIA REGULATIONS**

22 Cal. Code Regulations, tit. 8 § 11040(2)(F) . . . . . 12

23

24 **OTHER AUTHORITIES**

25 15 Cal. Jur.3d Corporations § 26 (2009) . . . . . 20  
 26 18 Corpus Juris Secundum, Corps. § 1(fn. 10) (June 2009) . . . . . 12  
 27 C.J.S., Fraud §§ 7 to 8, 10, 28, 31, 35 to 36 . . . . . 28

28

1 *Gilbert v. Walker*  
64 Conn. 390 (1894) ..... 30

2

3 *Hadley v Baxendale*  
156 Eng. Rep. 145 (1884) ..... 15

4 Rest. Torts (1977), §§ 766 - 774A ..... 10

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **TO THE COURT AND ALL PARTIES AND ATTORNEYS OF RECORD:**

2 Defendants, Corrections USA, California Correctional Peace Officers Association, James  
3 Baiardi, and Joseph Baumann (hereafter collectively “Defendants”), hereby submit their Trial Brief,  
4 as follows:

5 **STATEMENT OF THE FACTS**

6 Corrections USA (CUSA) is a non-profit California Mutual Benefit Corporation originally  
7 incorporated in June 1998. Its current headquarters is in Auburn, California. It also has offices in  
8 Pennsylvania and in Florida. [Undisputed Fact No. 1]

9 CUSA is a coalition of individual correctional officers and correctional officer unions,  
10 associations and fraternal orders from around the nation that came together to promote the  
11 corrections profession and address issues such as prison privatization. [Undisputed Fact No. 2]

12 CUSA is comprised of a Board of Directors and voting member organizations. It has  
13 corporate officers and corporate directors. From June 1998 until June 30, 2006 Plaintiff Brian Dawe  
14 served as CUSA’s Executive Director, pursuant to a series of contracts, and as CUSA’s treasurer.  
15 [Undisputed Fact Nos. 3 and 4]

16 During the time frame of June, 1998 to June 30, 2006, Plaintiff and Counter-Defendant  
17 Richard Loud served as the president of CUSA. He was then removed as president. During this same  
18 time, Gary Harkins served as the Recording Secretary of CUSA. [Undisputed Facts Nos. 5 and 6]

19 The California Correctional Peace Officers Association (CCPOA) is one of CUSA’s  
20 organizational members. CCPOA is a public correctional officers’ union and also a California non-  
21 profit corporation. Michael Jimenez is the president of CCPOA. He is the original incorporator of  
22 CUSA and a member of the CUSA Board of Directors. [Undisputed Fact No. 7]

23 Donald Joseph Baumann is the recording secretary and a member of the CUSA Board of  
24 Directors. He is a member of the CUSA finance committee and was put on the restructuring  
25 committee on October 14, 2006. He is also a Board Member of CCPOA. James Baiardi is the current  
26 chairman of CUSA and a member of the CUSA Board of Directors. He is also the president of the  
27 Florida Police Benevolent Association. [Undisputed Facts Nos. 8 and 9]

28 This dispute involves the removal of corporate officers and directors Brian Dawe,

1 Richard Loud and Gary Harkins from CUSA. This series of events started on or about January of  
2 2006, when Robert Dean of CUSA began investigating CUSA expenditures of Brian Dawe and  
3 Richard Loud, as well as the (sexual and job) harassment of Shannon Lahey by Richard Loud and  
4 Brian Dawe. Ms. Lahey was the Washington, D.C. lobbyist for CUSA. She also performed a similar  
5 role for CCPOA.

6 Other disputes arose between Brian Dawe, Richard Loud and the CUSA Board of Directors  
7 involving the CUSA budget, its income and expenses, and the continued flow of dues monies from  
8 California. This involved the control of West America Bank Accounts, changing signature cards, and  
9 the ultimate control of the California Payroll deduction slot.

10 In May of 2006, at a CUSA Budget Meeting, the Board of Directors approved a proposed  
11 Budget which included amounts for the executive director position. Plaintiff Brian Dawe is claiming  
12 that this constituted full Board of Director approval of his alleged contract with CUSA, *Exhibit A* to  
13 the FAC, which was not signed until June 16, 2006. This alleged contract was never presented to the  
14 full Board of Directors for approval, adoption and/or ratification. The alleged contract was officially  
15 disavowed.

16 In addition, the alleged contract makes FIMA the executive director of CUSA and provides  
17 the consultant with a severance package of a \$111,000.00. Mr. Dawe is claiming to be the consultant,  
18 who is a contractor/vendor. Mr. Dawe is simultaneously claiming that he is an employee of CUSA  
19 and that he was wrongfully terminated from his position as Executive Director. It should be noted  
20 that Mr. Dawe is not listed as the consultant (executive director) on the alleged contract.

21 Plaintiff Gary Harkins is claiming that he has a contract with CUSA to be the CUSA Interim  
22 Administrator, and at the same time, claims to be an employee of CUSA who was wrongfully  
23 terminated. He has stated that he was "appointed" by the CUSA Board of Directors on August 11,  
24 2006 to be the Interim Administrator. Mr. Harkins was officially removed from all positions with  
25 CUSA by Board Resolution on October 14, 2006.

26 In the summer of 2006, Mr. Dawe and Mr. Loud realized that they did not have a sufficient  
27 number of CUSA Board of Directors' votes necessary to control CUSA and have the alleged June  
28 16, 2006 contract approved. Furthermore, on July 20, 2006, Mr. Dawe was removed from the CUSA

1 Board of Directors. On August 11, 2006, at another CUSA Board of Directors meeting, Mr. Dawe  
2 was suspended from all positions without pay, pending an investigation and further action by the  
3 Board of Directors.

4 Before August 11, 2006, Mr. Dawe, Loud and Harkins fashioned a “plan” to take over  
5 control of the CUSA corporation and to convert it into a for-profit organization that was to be  
6 controlled by Brian Dawe and his wife, Marilyn Dawe. They had Gary Harkins attempt to trademark  
7 the CUSA name and logo.

8 On August 11, 2006, the CUSA Board of Directors sent Mr. Dawe a letter confirming the  
9 Dawe suspension and ordering him to return all CUSA property to the Board of Directors, care of  
10 the Law Office of Nina Salarno Ashford by August 30, 2006. Mr. Dawe was expressly ordered not  
11 to use any of the assets belonging to the CUSA corporation, which included the CUSA membership  
12 list, website information, contact information and other CUSA property. CUSA sent a similar letter  
13 to Mr. Richard Loud. Mr. Dawe and Mr. Loud continued to use the CUSA corporate property and  
14 did not return all CUSA property.

15 On August 11, 2006, the CUSA Board of Directors authorized Mr. Harkins to travel to  
16 Thayne, Wyoming to recover all CUSA corporate property in the possession of Brian Dawe and  
17 return it to West Sacramento, California. This included the books and records necessary for an  
18 investigation, as directed by the Board of Directors. He withheld the books and lied to the CUSA  
19 representatives about not having the books, sometime during the period August 13 through 18, 2006.  
20 Mr. Harkins took the CUSA corporate property to his home in Salem, Oregon. He intentionally  
21 withheld the CUSA corporate records, books, and property from the CUSA Board of Directors. The  
22 CUSA Board was not aware that Mr. Harkins was in fact a co-conspirator with Mr. Dawe and  
23 Mr. Loud on August 11, 2006.

24 On September 29, 2006, CUSA filed a Petition for Writ of Mandate, in the Sacramento  
25 County Superior Court against Brian Dawe, Richard Loud and Gary Harkins, in order to recover the  
26 CUSA books, records and property. The three conspirators began sending defamatory emails to the  
27 CUSA membership, using the CUSA membership list, and using CUSA property. They tried to steal  
28 CUSA’s name and logo to set up a for-profit corporation in another state. When they were

1 unsuccessful, they changed the plan and set up ACO/ACOIN using CUSA assets. This was the  
2 “plan.”

3 On October 17, 2006 the CUSA Board of Directors passed a resolution and transmitted a  
4 letter to Mr. Dawe, which terminated any and all contracts entered into by Mr. Dawe, Mr. Loud,  
5 and/or Mr. Harkins. This resolution was done in accordance with California Corporations Code  
6 section 7213. Mr. Loud was sent a similar letter.

7 The three conspirators launched the “plan” to take control of CUSA and turn it into a for-  
8 profit business controlled by Brian Dawe and his wife, Marilyn Dawe, under the auspices of Flat Iron  
9 Mountain Associates LLC. They are the managers of the LLC. The “plan” included numerous  
10 defamatory emails and website comments to which the CUSA defendants responded and commented.  
11 CUSA asserts their responses are privileged communications, under California Civil Code § 47(b) and  
12 (c), and are entitled to constitutional protection under the First Amendment. The responses are  
13 entitled to the defense of constitutional malice and the right of fair comment.

14 On January 5, 2007, Brian Dawe filed a lawsuit in state court in Wyoming, which was  
15 removed and transferred to the Eastern District of California. Various counter-claims were filed.

## 16 SUMMARY OF POINTS OF LAW

### 17 **A. Opposition to Plaintiffs’ Claims.**

#### 18 **(1) Defamation:**

19 In California, defamation is defined by statute. Cal. Civ. Code §§ 44 – 48. The elements of  
20 common defamation are: 1. That the defendant made one or more statements to a person or persons  
21 other than plaintiff; 2. That these people reasonably understood that the statements were about  
22 plaintiff; 3. That these people reasonably understood the statements to mean that plaintiff committed  
23 illegal and unethical acts; 4. That the statements were false; and by clear and convincing evidence that  
24 Defendants knew the statements were false or had serious doubts about the truth of the statements.  
25 *Smith v. Maldonado*, 72 Cal.App.4th 637, 645 (1999); *Rudnick v. McMillan*, 25 Cal.App.4th 1183,  
26 1190 (1994); see also *Mosesian v. McClatchy Newspapers*, 233 Cal.App.3d 1685, 1689 (1991);  
27 *Melaleuca, Inc. v. Clark*, 66 Cal.App.4th 1344, 1359 (1998) [78 Cal.Rptr.2d 627], citing *Brown v.*  
28 *Kelly Broadcasting Co.*, 48 Cal.3d 711, 740-742 (1989).

1 A libel which is alleged to be defamatory without the necessity of explanatory matter, such  
2 as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Cal. Civ. Code §  
3 45. This is recognized as libel per se. If an explanation is necessary, then it is libel *per quod*. *Palm*  
4 *Springs Tennis Club v. Rangel*, 73 Cal.App.4th 1, 5 (1999); *Slaughter v. Friedman*, 32 Cal.3d 149,  
5 153-154 (1982); *Yow v. National Enquirer, Inc.*, 550 F.Supp.2d 1179, 1183 (EDCA 2008); Cal. Civ.  
6 Code § 45a; *Barnes-Hind, Inc. v. Superior Court*, 181 Cal.App.3d 377, 387 (1986). *Actual special*  
7 *damages* must be alleged and proved by the Plaintiffs. Cal. Civ. Code § 48a(4)(b). Defamatory  
8 language not libelous on its face, is not actionable, unless the Plaintiff alleges and proves that he has  
9 suffered special damages. Cal. Civ. Code § 48a(4)(b).

10 Truth is a defense to any defamation. *Fashion 21 v. Coalition for Humane Immigrant Rights*  
11 *of Los Angeles*, 12 Cal.3d 493 (2004); *Lytel v. Simpson*, No. 05-01937-FJ, 2006 WL 2263943 (N.D.  
12 Cal. Aug. 8, 2006). In the libel context, “inducement and innuendo” are terms of art. Plaintiffs must  
13 do two things: 1) allege the Plaintiffs’ interpretation of the defamatory meaning of the language (the  
14 innuendo); and 2) support that interpretation by alleging facts showing that the readers to whom it  
15 was published would understand it in that defamatory sense (the inducement). *Barnes-Hind, Inc. v.*  
16 *Superior Court*, 181 Cal.App.3d 377, 387 (1986).

17 Plaintiff Brian Dawe has waived any claims for defamation based upon the “falling on and off  
18 the wagon” statements. It is irrelevant to Dawe’s defamation claims because it has been voluntarily  
19 waived. Plaintiffs’ defamation claims are barred by the common interest privilege and the litigation  
20 privilege, discussed *infra*, at pages 6-8. Cal. Civ. Code §§ 47(b) and 47(c).

21 Plaintiffs are both public and/or limited public figures in the corrections industry and CUSA.  
22 They have the burden of proving actual malice, knowledge that the statements were false or made  
23 with a reckless disregard for their falsity. *Copp v. Paxton*, 45 Cal.App.4th 829 (1996). The issue of  
24 constitutional malice (*New York Times* actual malice) is more fully briefed *infra*, at pages 8-9.  
25 *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1196 (9th Cir. 1989). *Actual malice* is a higher  
26 fault standard than mere negligence. *Khawar v. Globe Int’l, Inc.*, 19 Cal.4th 254, 279 (1998). The  
27 burden of proof is on the Plaintiffs to prove *constitutional malice*. *Dworkin, supra*, at 1193; *Lytel v.*  
28 *Simpson*, No. 05-01937-FJ, 2006 WL 2263943 (N.D. Cal. Aug. 8, 2006).

1 Malice for purposes of these California statutes means a state of mind arising from hatred or  
2 ill will, evidencing a willingness to vex, annoy or injure another person. *Kashian v. Harriman*, 98  
3 Cal.App.4th 892, 915 (2002). Malice is not inferred from the communication itself. *Ibid*, at 915;  
4 *Lytel v. Simpson*, No. 05-01937-FJ, 2006 WL 2263943 (N.D. Cal. Aug. 8, 2006). Defendants are  
5 entitled to the opinion and fair comment privilege, and to immunity under section 230 of the  
6 Communications Decency Act of 1996, discussed *infra*, at pages 7-9.

7 As to Defamation claims by Harkins, there is a statute of limitations issue as to whether or  
8 not evidence of events occurring before June 28, 2008, can be used to support Harkins' claim of  
9 defamation against CCPOA. Harkins' action was not filed until June 29, 2009.

10 **(2) Common Interest Privilege:**

11 Defendants contend that all of the alleged defamatory statements claimed by the Plaintiffs are  
12 non-action statements between an interested person and an interested group. [*Exhibit E* to the FAC]  
13 They were made without malice. *Terry v. Davis Community Church*, 131 Cal.App.4th 1534, 1551-  
14 1552 (2005). They were publications made by members or representatives of CUSA, relating to  
15 actions and breaches of fiduciary duties by the Plaintiffs, who were officers and directors of CUSA.  
16 They were reports to the CUSA membership, and/or they were reports/statements that were only sent  
17 between members/representatives. They were not published to any uninterested third parties. Cal. Civ.  
18 Code § 47(c)(1).

19 This issue should be decided by the Court. For example, the qualified privilege of Civil Code  
20 section 47(c) applies to the statements that the Plaintiffs falsified invoices. *Kelly v. General*  
21 *Telephone Co.*, 136 Cal.App.3d 278, 285 (1982). Communications among a company's employees  
22 that are designed to insure honest and accurate records involves a common interest. *Deaile v.*  
23 *General Telephone Co. of California*, 40 Cal.App.3d 841, 846 (1974).

24 The burden of proof to establish *malice* is on the Plaintiffs. Cal. Civ. Code § 48. Malice for  
25 purposes of this statute means a state of mind arising from hatred or ill will, evidencing a willingness  
26 to vex, annoy or injure another person. *Kashian v. Harriman*, 98 Cal.App.4th 892, 915 (2002).  
27 Malice is not inferred from the communication itself. *Ibid*, at 915; *Brewer v. Second Baptist Church*  
28 *of Los Angeles*, 32 Cal.2d 791 (1948).

1 Defendants have the initial burden of showing the allegedly defamatory statement was made  
2 on a privileged occasion, whereupon the burden shifts to the Plaintiffs to show malice. *Kashian*,  
3 *supra*, at 915; *Lundquist v. Reusser*, 7 Cal.4th 1193, 1206 fn. 12 (1994). The existence of the  
4 privilege(s) is a question of law. *Institute of Athletic Motivation v. University of Illinois*, 114  
5 Cal.App.3d 1, 7 (1980).

6 **(3) Litigation Privilege/Immunity:**

7 All of the alleged defamatory statements are made either in anticipation of litigation and/or  
8 during the course of pending litigation. They are statements reasonably related to and/or connected  
9 with the litigation. Cal. Civ. Code § 47(b).

10 The California Litigation Privilege is an absolute defense. *Moore v. Conliffe*, 7 Cal.4th 634,  
11 638 fn. 1 (1994). Litigation was contemplated and threatened in 2006, and on September 29, 2006,  
12 the Defendants filed a Sacramento County Superior Court Writ of Mandate, Case No. 06CS01418,  
13 against the Plaintiffs. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 fn. 2 (3rd  
14 Cir. 1994); *U.S. v. 1402 Acres of Land More or Less in Fresno County*, 530 F.3d 883, 894 (9th Cir.  
15 2008).

16 All publications, re-publications, letters or emails reasonably connected to the Petition for  
17 Writ of Mandate, Case No. 06CS01418, are absolutely privileged. Cal. Civ. Code § 47(b);  
18 *Lytel, supra*, at \*2; *Silberg v. Anderson*, 50 Cal.3d 205, 212 (1990); *Kashian v. Harriman*, 98  
19 Cal.App.4th 892, 913 (2002); *Neville v Chudacoff*, 160 Cal.App.4th 1255, 1267-1268 (2008);  
20 *Edwards v. Centex Real Estate Corp.*, 53 Cal.App.4th 15, 29 (1997).

21 The issues raised in the allegedly defamatory statement attached to the Plaintiffs' verified First  
22 Amended Complaint, *Exhibit E*, mirror the issues raised in the Petition for Writ of Mandate, Case No.  
23 06CS01418, including *Exhibit A*. These statements are absolutely privileged. Cal. Civ. Code § 47(b);  
24 *Healy v. Tuscany Hills Landscape & Recreation Corp.*, 137 Cal.App.4th 1, 5 (2006). In *Healy*, the  
25 local homeowners' association sent a letter to the other homeowner members, indicating that a weed  
26 abatement program had to be implemented as to all association members. They did so because one  
27 homeowner (who was named in the letter) had refused to allow the homeowners' association access  
28 to curb weed growth on a named homeowner's adjacent property. The named homeowner sued for

1 defamation. Dawe and Harkins are public figures within the CUSA Association.

2 In *Healy*, the Court found *the purpose of the letter was to inform members of the association*  
3 *of pending litigation* and that the letter was in connection with legal proceedings. *Healy, supra*, at  
4 5-6; *Neville v. Chudacoff, supra*, at 1265-1266. In the *Neville v. Chudacoff* case, the letter was sent  
5 to customers of Maxsecurity and not directly to Neville. The Court found that this communication  
6 was reasonably relevant to pending or contemplated litigation, and analogous to the *Healy* case.  
7 *Neville, supra*, at 1268.

8 All allegedly defamatory statements made after September 29, 2006, and continuing into the  
9 present, are absolutely privileged. On January 5, 2007, Plaintiff Brian Dawe commenced an action  
10 against Corrections USA, the California Correctional Peace Officers Association, James Baiardi, and  
11 Joseph Baumann. At all times from 2006 to the present, there has been pending litigation (or  
12 threatened litigation) between the parties.

13 **(4) Constitutional Malice/Public Figure:**

14 The Defendants have a First Amendment Constitutional Right of Freedom of Speech to  
15 communicate with the CUSA membership, CUSA Board members, officers and employees. *Dworkin*  
16 *v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1196 (9th Cir. 1989); *Gertz v. Robert Welch*, 418 U.S.  
17 323, 348 (1974).

18 Plaintiffs are “limited public figures” by their own admissions. *Chapman v. Journal Concepts,*  
19 *Inc.*, 528 F.Supp.2d 1081, 1089 (D. Hawaii 2007). In *Chapman*, a surfer was a limited public figure  
20 because he was an expert in the surfing industry and well-known in the surfing community. Brian  
21 Dawe and Gary Harkins are both experts and well known in the corrections industry.

22 Plaintiffs are required to allege and prove constitutional malice. *Dworkin, supra*, at 1192-  
23 1193; *New York Times v. Sullivan*, 376 U.S. 254 (1964). *New York Times* malice exists only if the  
24 defendant knowingly falsifies or in fact entertained serious doubts as to the truth of his publication.  
25 *Dworkin, supra*, at 1194. This is also a complete defense.

26 Proving *actual malice* must be by clear and convincing evidence. *Solano v. Playgirl, Inc.*, 292  
27 F.3d 1078, 1084-0185 (9th Cir. 2002). *Actual malice* is a higher fault standard and burden of proof.  
28 *Khawar v. Globe Int’l, Inc.*, 19 Cal.4th 254, 279 (1998). This is an issue of law.

1 Constitutional malice is required in the federally pre-empted field of labor disputes. *Linn v.*  
2 *United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 57-58 (U.S. Mich. 1966).

3 **(5) Re-publication of Defamatory Statements:**

4 California has a single publication rule. See: Uniform Single Publication Act, Cal. Civ. Code  
5 § 3425.3; *Traditional Cat Association v. Gilbreath*, 118 Cal.App.4th 392, 395, 399, 401 (2004).  
6 Under the Communications Decency Act of 1996, 47 U.S.C. 230(c)(1), Defendants are entitled to  
7 distribution immunity for the republication or re-broadcasting of alleged defamatory statements.  
8 *Barrett v. Rosenthal*, 40 Cal.4th 33, 43, 45, 62 (2006); *Phan v. Phan*, 182 Cal.App.4th 323, 324-  
9 326, 328 (2010). *Zeran v. America Online, Inc.*, 129 F.3d 327, 331-333 (4th Cir. 1997).

10 **(6) Truth is a Defense:**

11 Truth is a complete defense to a defamation claim. *Campanelli v. Regents of University of*  
12 *California*, 44 Cal.App.4th 572, 575-577, 581-582 (1996); *Terry v. Davis Community Church*, 131  
13 Cal.App.4th 1534, 1553. The statements regarding Plaintiffs, including the October 3, 2006 and  
14 January 3, 2007 emails/letters, are true. Plaintiffs stole and misappropriated the CUSA name, the  
15 logo, corporate assets, and corporate property, including CUSA laptops (information thereon).  
16 Plaintiffs made false statements to the CUSA Board of Directors, and they lied to the CUSA Board  
17 about returning the CUSA corporation's books and records.

18 Defendants had a *right of fair comment and to express opinions* regarding the actions of Brian  
19 Dawe, Gary Harkins and Richard Loud. *Terry, supra*, at 1552. The *fair comment privilege* is separate  
20 from the common interest privilege. *Brown v. Kelly Broadcasting Co.*, 48 Cal.3d 711 (1989). Also,  
21 if in context, no reasonable person would interpret the challenged statement to be a false factual  
22 imputation, then the First Amendment protects the speech. *Manufactured Home Communities, Inc.*  
23 *v. County of San Diego*, 544 F.3d 959 (9th Cir. 2008); see, 269 Fed. Appx. 627 (9th Cir. 2008).

24 The First Amendment protects opinion addressing matters of public concern. *Gilbrook v. City*  
25 *of Westminster*, 177 F.3d 839 (9th Cir. 1999).

26 **(7) Corporate Capacities/Individual Liability of Baiardi/Baumann:**

27 Defendants Joseph Baumann and James Baiardi were/are members of CUSA and/or CCPOA.  
28 Mr. Baumann is the Recording Secretary of CUSA and a member of the CUSA Finance Committee.

1 He is also a member of the CUSA Restructuring Committee, and he is a Board Member of CCPOA.  
2 Mr. Baiardi is the current Chairman of CUSA.

3       There is no cause of action against a volunteer director or volunteer executive officer of a  
4 California non-profit corporation for a failure to discharge that person's duties if: (a) the duties are  
5 performed in good faith; (b) the duties are performed in a manner such director believes to be in the  
6 best interests of the corporation; and (c) the duties are performed with such care, including reasonable  
7 inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. Cal.  
8 Corp. Code § 7231.5(a)(1-3).

9       The Plaintiffs claim James Baiardi and Joseph Baumann acted on behalf of CUSA and  
10 CCPOA. The Plaintiffs have further claimed that the publications relating to their interference with  
11 contract claims were made by James Baiardi and Joseph Baumann acting on behalf of the corporate  
12 entities, CUSA and CCPOA. Therefore, their alleged acts must be imputed to the two corporate  
13 entities in order for the Plaintiffs to recover against the two corporations.

14       If they committed the defamation and breached the alleged contracts in their individual  
15 capacity, by committing tortious conduct on their own, then the two corporations are not liable to  
16 the Plaintiffs. *Frances T. v. Village Green Owners Assn.*, 42 Cal.3d 490, 503 (1986). If the officer  
17 or board member's allegedly tortious acts are privileged or justified, tort liability will not be imposed  
18 *individually* on those officers or board members. *Mayes v. Sturdy Northern Sales, Inc.*, 91  
19 Cal.App.3d 69, 78 (1979); Rest. Torts (1977), §§ 766 - 774A; Cal. Corp. Code. § 7231.5.  
20 "Corporate agents and employees acting for and on behalf of a corporation cannot be held liable for  
21 inducing a breach of the corporation's contract." *Shoemaker v. Meyers*, 52 Cal.3d 1, 24-25 (1990);  
22 *Mintz v. Blue Cross of California*, 172 Cal.App.4th 1594, 1604 (2009).

23       These individual Defendants cannot be liable for interference with their corporation's own  
24 contract. *Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.*, 7 Cal.4th 503, 521 (1994);  
25 *Buckaloo v. Johnson*, 14 Cal.3d 815, 827 (1975); *Lytel v. Simpson, supra*, at \*8-\*9. There must be  
26 proof of a wrongful act, other than the interference with the contract, in order to have a breach of the  
27 contract predicated upon a claim of interference with contract. Evidence of normal contract damages,  
28 or normal contract breaches, are not evidence of interference with contract. *Della Penna v. Toyota*

1 *MotorSales, USA, Inc.*, 11 Cal.4th 376, 393 (1995); *Quelimane Co. v. Stewart Title Guaranty Co.*,  
2 19 Cal.4th 26, 55 (1998).

3 They were not acting in their individual capacities. The Court should dismiss the claims of  
4 individual liability against James Baiardi and Joseph Baumann. Fed. Rules Civ.Proc., rules 12(c),  
5 16(c)(2)(A), and 54(b).

6 **(8) Plaintiffs' Employee Status:**

7 Neither Brian Dawe nor Gary Harkins were employees of the CUSA corporation. They were  
8 not treated as employees, and they have admitted they were not employees. CUSA did not withhold  
9 taxes, nor pay employee benefits. Dawe was only given 1099 tax statements. Brian Dawe has  
10 stipulated that all services he rendered to CUSA, prior to June 30, 2006, were by contract.  
11 [Undisputed Fact No. 3] Brian Dawe's verified pleading, *Exhibit A*, states that the consultant is not  
12 an employee for any purpose, and that the consultant is an independent contractor consultant for all  
13 purposes. This is an admission against interest.

14 There are no express contracts making them employees of CUSA, and under California law,  
15 they cannot be made implied-in-fact employees. *Bionghi v. Metropolitan Water District of Southern*  
16 *California*, 70 Cal.App.4th 1358, 1361-1362 (1999); *Dore v. Arnold Worldwide, Inc.*, 39 Cal.4th  
17 384, 389-390 (2006). Cal. Lab. Code § 2922; *Varisco v. Gateway Science and Engineering, Inc.*,  
18 166 Cal.App.4th 1099, 1104-1105 (2008); *Weddington Productions, Inc. v. Flick*, 60 Cal.App.4th  
19 793, 811 (1998); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003).

20 Gary Harkins claims he was "appointed" to his alleged corporate position of interim  
21 administrator. He was not hired as an employee. *Guz v. Bechtel, Inc.*, 24 Cal.4th 317, 335, 337, 340  
22 (2000); *Schachter v. Citigroup, Inc.*, 47 Cal.4th 610 (2009); *Norberg v. Tillamook County Creamery*  
23 *Association*, 74 F.Supp.2d 1002, 1005, 1008 (Dist. Oregon 1999); *Schulthies v. National Passenger*  
24 *R.R. Corp.*, 2009 WL 2524580 (NDCA 2009). He was a *volunteer* for the CUSA corporation, who  
25 performed services gratuitously for the corporation. Cal. Corp. Code § 7231.5(b) and (c); *Fitzgerald*  
26 *& Mallory Construction Co. v. Fitzgerald*, 137 U.S. 98, 112 (1890). He did not lose his *volunteer*  
27 *status* by being paid expenses for his services. Cal. Corp. Code § 7231.5(b).

28 If Brian Dawe and Gary Harkins are declared to be employees of CUSA, they are subject to

1 the California “*after-acquired-evidence*” rule. Their acts subjected them to immediate termination.  
2 *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal.App.4th 620, 632 (1995); *Murrillo v. Rite Stuff*  
3 *Foods, Inc.*, 65 Cal.App.4th 833, 842, 845-846 (1998); *McKennon v. Nashville Banner Publishing*  
4 *Co.*, 513 U.S. 352, 362-363 (1995).

5 The Plaintiffs failed to exhaust both internal and external administrative remedies, and their  
6 wrongful termination (wrongful discharge) claims fail. CUSA SOP No. 5. They did not file claims,  
7 letters, and/or complaints with the EEOC, the California Fair Employment and Housing Department,  
8 nor with any Wyoming state agency. *Campbell v. Regents of University of California*, 35 Cal.4th  
9 311, 321-322 (2005); *Johnson v. City of Loma Linda*, 24 Cal.4th 61, 70 (2000). Only an employer  
10 can discharge an employee. *Milklosky v. Regents of University of California*, 44 Cal.4th 876, 901  
11 (2008).

12 **(9) Contract Formation/Illegal Contract:**

13 There is no enforceable contract between Plaintiff Brian Dawe, d/b/a Flat Iron Mountain  
14 Associates/LLC, and the CUSA corporation, *see*: CUSA SOP No. 3. This corporate rule states that  
15 an “*individual*” must serve as the Executive Director of CUSA. FIMA Associates/LLC is not an  
16 individual, as a matter of law, and it cannot serve as the Executive Director. Cal. Civ. Code § 1638.  
17 This makes the alleged contract, *Exhibit A* to the FAC, an illegal contract, and unenforceable against  
18 CUSA. *Kashani v. Tsann Kuen China Enterprises Co., Ltd*, 118 Cal.App.4th 531, 540, 557 (2004);  
19 *P.A. Smith Co. v. Muller*, 201 Cal. 219, 222-223 (1927); *Severance v. Knight-Counihan Co.*, 29  
20 Cal.2d 561, 568-569 (1947). FIMA LLC has sued, FIMA Associates has not. Whether there is an  
21 enforceable contract is a question of law. *Kashani, supra*, at 547.

22 The Executive Director assists the CUSA Board of Directors. The Board of Directors may  
23 remove the Executive Director by a majority vote. Only the CUSA Board of Directors had discretion  
24 to select an Executive Director, as long as that person was an individual. CUSA SOP No. 3. The  
25 Board of Directors expressly rejected the FIMA contract.

26 FIMA Associates/LLC is not an employee of CUSA. Cal. Lab. Code § 2922; Cal. Code  
27 Regs., tit. 8 § 11040(2)(F). Employee means any *person* employed by an employer. Only an individual  
28 can be an employee. 18 Corpus Juris Secundum, Corps. § 1(fn. 10) (June 2009); *Anmaco, Inc. v.*

1 *Bohlken*, 13 Cal.App.4th 891, 898-899 (1993); Cal. Civ. Code § 1598; Cal Civ. Code § 1667-1668;  
2 Cal. Code Civ. Proc. § 1856. This is a matter of law.

3 In a nonprofit corporation, a contract must be authorized, ratified and/or approved by a  
4 majority of the board of directors; otherwise it is null and void. Cal. Corp. Code § 7141(b); Cal.  
5 Corp. Code § 310; *Sammis v. Stafford*, 48 Cal.App.4th 1935, 1944 (1996). The president of the  
6 corporation (Richard Loud) had no authority by virtue of his office alone to bind the corporation to  
7 a contract. *Black v. Harrison Home Co.*, 155 Cal. 121, 126-127 (1909); *Corporation of America v.*  
8 *Harris*, 5 Cal.App.2d 452, 458-459 (1935).

9 There is no enforceable contract between Brian Dawe and CUSA. See *Exhibit A*. This  
10 document is part of a verified complaint, and it is an “*admission against interest.*” *Schroder v.*  
11 *McDonald*, 33 F.3d 454, 460 (9th Cir. 1995); *McElyea v. Babbitt*, 833 F.2d 196, 197-198 (9th Cir.  
12 1987). *Exhibit A* to the FAC was signed by Brian Dawe on behalf of Flat Iron Mountain Associates,  
13 not disclosed to the full CUSA Board, and FIMA Associates is not an individual.

14 The three prior contracts between CUSA and Brian Dawe were presented to the CUSA Board  
15 of Directors for a vote of approval.

16 A director must make a full disclosure to the full Board of Directors when the director has  
17 an interest in the transaction. Failure to do so amounts to misappropriation of funds. *Tevis v. Beigel*,  
18 174 Cal.App.2d 90, 98 (1959); *Angelus Securities Corp. v. Ball*, 20 Cal.App.2d 436, 440 (1937).  
19 Absent full disclosure to the Board of Directors, the transaction is voidable. *Sammis v. Stafford*, 48  
20 Cal.App.4th 1935, 1944 (1996); Cal. Corp. Code § 7210 and § 7233(a)(1). The alleged FIMA  
21 contract was not disclosed, nor was Dawe’s interest. *Anmaco, Inc. v. Bohlken*, 13 Cal.App.4th 891,  
22 898-899 (1993).

23 The alleged new contract was dated June 16, 2006, (*Exhibit A* to FAC) and signed by Richard  
24 Loud, who did not have authority (*Exhibit A* to FAC). It was never approved by CUSA’s Board of  
25 Directors. CUSA SOP Nos. 3-5. This was an ultra vires act on the part of Mr. Richard Loud. CUSA  
26 SOP No. 3, and the contract is void.

27 An ultra vires act refers to an act which is beyond the powers conferred upon a corporation  
28 by its charter or by the laws of the state of incorporation. *Marsili v. Pacific Gas & Elect. Co.*, 51

1 Cal.App.3d 313, 322 (1975). A corporation may recover damages when a director engages in ultra  
2 vires activities, and the director may not defend such action by alleging ratification. *Sammis, supra*,  
3 at 1942. There was no ratification of these undisclosed ultra vires acts by Dawe and Loud.

4 The Court should void this undisclosed interested transaction as it was rejected by CUSA and  
5 FIMA is not an individual. Cal. Corp. Code § 7210 and § 7233(a)(1). Fed. Rules Civ.Proc., rule  
6 12(c), 16(c)(1)(A) and 54(b). FIMA Associates/LLC cannot be declared an employee of CUSA.  
7 *Brose v. Union-Tribune Publishing Co.*, 183 Cal.App.3d 1079, 1082 (1986). The alleged contract  
8 cannot be reformed.

9 The alleged contract had for its objective a provision to exempt the consultant, Brian Dawe  
10 and/or FIMA Associates/LLC, from responsibility for the consultant's own fraud, willful violations  
11 of law, and wilful injury to persons and property. Cal. Civ. Code § 1668. The contract is illegal and  
12 part of the "unclean hands" "plan." *Precision Instrument Mfg. Co. v. Auto Maint. Mach. Co.*, 324  
13 U.S. 806, 814 (1945). *P.A. Smith Co. v. Muller*, 201 Cal. 219, 222-223 (1927). It was formed for  
14 an improper purpose, and it is unlawful under California law. Cal. Civ. Code § 1572, § 1667-1668;  
15 *Severance v. Knight-Counihan Co.*, 29 Cal.2d 561, 568 (1947).

16 **(10) Interference With Contract:**

17 Interference with contract must be predicated and alleged against a third party. The  
18 Defendants cannot be liable for interference with their own contract. *Applied Equipment Corp. v.*  
19 *Litton Saudi Arabia, Ltd.*, 7 Cal.4th 503, 521 (1994); *Buckaloo v. Johnson*, 14 Cal.3d 815, 827  
20 (1975). *Della Penna v. Toyota Motor Sales, USA., Inc.*, 11 Cal.4th 376, 393 (1995); *Quelimane Co.*  
21 *v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 55 (1998). (See pages 25 and 26, *infra*, for elements).

22 CUSA cannot interfere with the Brian Dawe and/or FIMA LLC alleged contract, *Exhibit A*  
23 to the FAC. Defendants James Baiardi, Joseph Baumann and CCPOA are all officers, members and/or  
24 directors of CUSA, and they cannot have interfered with the alleged Brian Dawe/FIMA  
25 Associates/LLC contract with CUSA. *Shoemaker v. Meyers*, 52 Cal.3d 1, 24-25 (1990); *Mintz v.*  
26 *Blue Cross of California*, 172 Cal.App.4th 1594, 1604 (2009). When defendants are the agents of  
27 the employer, who were vested with the power to act for the employer (rightly or wrongly), they  
28 stand in the place of the employer, because the corporation cannot act except through such agents.

1 *Applied Equipment, supra*, at 512, fn. 4. There is no cause of action against Baiardi and Baumann.  
2 Cal. Corp. Code § 7231.5, *supra*, at 10.

3 There is no basis in California law to make James Baiardi, Joseph Baumann and/or CCPOA  
4 “*third parties*” for purposes of liability for interference with the alleged Brian Dawe/FIMA  
5 Associates/LLC contract. There is no legal basis to hold any of the Defendants liable for interference  
6 with Mr. Dawe’s prospective new for-profit start-up business, known as ACO/ACoin/FIMA  
7 Associates/LLC or any claimed existing contracts if there is no actionable defamation. *Lytel, supra*,  
8 at \*9-\*10; *Stationers Corp. v. Dun & Bradstreet, Inc.*, 62 Cal.2d 412 (1965); *Felton v. Schaeffer*,  
9 229 Cal.App.3d 229 (1991); *Vacker v. Package Machinery Co.*, 841 F.Supp. 310 (N.D. Cal., 1993).

10 **(11) Good Faith and Fair Dealing:**

11 First, there cannot be any claims by Plaintiffs Brian Dawe and/or FIMA LLC for breach of  
12 the duty of good faith and fair dealing against CUSA because the alleged contract is void.

13 Second, under California law, a claim of “breach of the duty of good faith and fair dealing”  
14 cannot be predicated upon *normal contract damages*. *Applied Equipment Corp. v. Litton Saudi*  
15 *Arabia, Ltd.*, 7 Cal.4th 503, 515, 521 (1994). Rather, they must be based upon some separate tort  
16 (duty of care) and a breach of that duty of care. *Ibid.*, at 515, 521.

17 An omission to perform a contract obligation is never a tort, unless that omission is also an  
18 omission of a legal duty. *Jones v. Kelly*, 208 Cal. 251, 255 (1929); *Applied Equipment, supra*, at 515;  
19 *Peterson v. Larquier*, 84 Cal.App. 174, 179 (1927). For breach of contract, the measure of damages  
20 is the amount which will compensate the party for the detriment proximately caused thereby. Cal. Civ.  
21 Code § 3300; *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1884); *Mendoyomia, Inc. v. County of*  
22 *Mendocino*, 8 Cal.App.3d 873, 879 (1970). Tort damages are awarded to compensate the victim for  
23 injury suffered. Cal. Civ. Code § 3333. Consistent with these distinctions, damages for mental  
24 suffering and emotional distress are generally not compensable in contract actions. *Sawyer v. Bank*  
25 *of America*, 83 Cal.App.3d 135, 139 (1978); *Applied Equip., supra*, at 516.

26 The motivation (conduct) for the breach of contract is irrelevant. Fed. Rules Evid., rules 401-  
27 403. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 699 (1988); *Applied Equip., supra*, at 516. A  
28 party may breach a contract for personal, racial, ethnic animus or any other nefarious reason and there

1 are no additional damages. *Lewis Jorge Construction, Inc. v. Pomona Unified School District*, 34  
2 Cal.4th 960, 997 (2004). On May 20, 2009, tort claim for breach of the implied covenant of good  
3 faith and fair dealings in tort was dismissed. [Ct. Doc. No. 183] *Guz v. Bechtel, Inc.*, 24 Cal.4th 317,  
4 349-352; *Foley v. Interactive Data Corp.*, 47 Cal.3d. 654, 698; Cal. Lab. Code § 2922.

5 **(12) Declaratory Relief:**

6 The Plaintiffs are not entitled to favorable declaratory relief from the Court. Plaintiffs are not  
7 employees of CUSA. The Court cannot create an employment contract. *Weddington Productions,*  
8 *Inc. v. Flick*, 60 Cal.App.4th 793, 811 (1998); *Bionghi v. Metropolitan Water District of Southern*  
9 *California*, 70 Cal.App.4th 1358, 1361-1362 (1999); *Dore v. Arnold Worldwide, Inc.*, 39 Cal.4th  
10 384, 389-390 (2006). Cal. Lab. Code § 2922; *Varisco v. Gateway Science and Engineering, Inc.* 166  
11 Cal.App.4th 1099, 1104-1105 (2008).

12 The alleged contract is complete by its own terms. Cal. Civ. Code § 1638. The language of  
13 the contract governs its interpretation, if the language is clear and explicit. In cases of uncertainty,  
14 the language of a contract must be interpreted against the party who caused the uncertainty. Cal. Civ.  
15 Code § 1654. The most that the alleged contract can be is an independent contractor agreement. The  
16 Court should declare the contract null, ultra vires, and void as by interested parties. Cal. Corp. Code  
17 § 7210; *Kashani v. Tsan Kuen China Enterprise Co. Ltd.*, 118 Cal.App.4th 531, 540-541 (2004);  
18 Cal. Corp. Code §§ 7233(a)(1), (a)(2) and (a)(3); Cal. Civ. Code §§ 1567(3), 1572 and 1573. Thus,  
19 the Plaintiffs are not entitled to favorable declaratory relief. Cal. Lab. Code § 2922.

20 **(13) Reformation of Contract/Extrinsic Evidence:**

21 The Plaintiffs are prohibited from introducing extrinsic evidence to alter the terms of their  
22 alleged contracts with CUSA.

23 Gary Harkins has alleged in his counter-claim that he was appointed by the CUSA Board of  
24 Directors to the corporate position of interim administrator on August 11, 2006. He wanted his  
25 company, TJ Consultants, to become a vendor/independent contractor of CUSA. Therefore, he  
26 should be estopped from introducing extrinsic evidence that he was either an independent contractor,  
27 vendor or an employee of CUSA. Cal. Corp. Code § 7231.5.

28 Under California law, a contract must be interpreted by its clear and explicit language. Cal.

1 Civ. Code § 1638. The Dawe alleged contract is not reasonably susceptible to a meaning that Dawe  
2 is an employee of CUSA. *Dore v. Arnold Worldwide, Inc.*, 39 Cal.4th 384, 389-390 (2006). Gary  
3 Harkins is bound by his allegation and testimony that he was *appointed* as a volunteer CUSA  
4 corporate officer/director to fill a corporate role. Cal. Corp. Code § 7231.5. He was not hired as an  
5 employee. There is no express employment contract. Cal. Lab. Code § 2922. No implied-in-fact  
6 employment relationship was created. *Bionghi v. Metropolitan Water District of Southern California*,  
7 70 Cal.App.4th 1358, 1361-1362 (1999). *Varisco v. Gateway Science and Engineering, Inc.*, 166  
8 Cal.App.4th 1099, 104-1105 (2008).

9 Furthermore, Gary Harkins is an officer and director, who served at the pleasure of the Board  
10 of Directors of CUSA. He was voted out on September 7, 2006, and even voted in favor of his own  
11 removal. *Sealand Investment Company v. Emprise, Inc.*, 190 Cal.App.2d 305, 321-322 (1961);  
12 *Anmaco v. Bohlken*, 13 Cal.App.4th 891, 898 (1993). He was a corporate officer, the Recording  
13 Secretary of CUSA, who voluntarily accepted the job of retrieving records. Cal. Corp. Code §  
14 7231.5.

15 **(14) False Imprisonment/Gary Harkins:**

16 Plaintiff Gary Harkins claims that he was falsely imprisoned when two CUSA corporation  
17 sergeants-at-arms approached him in the lobby of the Silver Legacy Casino in Reno, Nevada, on  
18 September 7, 2006, during a CUSA Board of Directors meeting. They asked him to let them search  
19 his luggage for a CUSA corporate laptop computer, which he had previously agreed to turn over to  
20 CUSA.

21 Mr. Gary Harkins was not physically touched, confined, detained, restrained, arrested, and/or  
22 threatened by the CUSA sergeants-at-arms. He consented to the search of his luggage for the  
23 corporate property. *Snyder v. Evangelical Orthodox Church*, 216 Cal.App.3d 297 (1989).

24 The elements of false imprisonment are: (1) the non-consensual, intentional confinement of  
25 a person; (2) without lawful privilege; and (3) for an appreciable period of time, however brief. *Lyons*  
26 *v. Fire Ins. Exchange*, 161 Cal.App.4th 880, 888 (2008). Harkins does not meet these elements. He  
27 has admitted in his deposition testimony that he could have run through the hotel lobby at any time  
28 and left the presence of the sergeants-at-arms. *Molko v. Holy Spirit Assn.*, 46 Cal.3d 1092, cert.

1 denied 490 U.S. 1094 (1988); *People v. Russell*, 81 Cal.App.4th 96, 102 (2002). He consented to  
2 the search of his luggage, and there was no “state” action.

3 The search of Harkins’ luggage (bag) for CUSA corporate property was subject to executive  
4 corporate privilege to retrieve and to prevent the theft of is property. *Collyer v. S. H. Kress Co.*, 5  
5 Cal.2d 175, 180-181 (1936). CUSA was justified in briefly questioning Harkins regarding the CUSA  
6 corporate property. *Ibid.*, at 108-181; 11 R.C.L. 805. This is analogous to a merchant keeping a  
7 shoplifter for a reasonable time and to conduct a reasonable investigation. Cal. Pen. Code §  
8 490.5(f)(7); *People v. Zelinski*, 24 Cal.3d 357 (1979); *Fermino v. Fedco, Inc.*, 7 Cal.4th 701, 718  
9 (1994).

10 If the Court should declare that Gary Harkins is a CUSA employee, then his false  
11 imprisonment claim would be covered by the exclusive remedy of workers’ compensation, and he  
12 would not state any civil law claim against CUSA. *Cole v. Fairs Oaks Fire Protection District*, 43  
13 Cal.3d 148, 160-161 (1987); *Livitsanos v. Superior Court*, 2 Cal.4th 744, 754-756 (1992). Gary  
14 Harkins made no workers’ compensation claim.

15 Gary Harkins has testified that his real claim is not for false imprisonment, but for a Section  
16 1983 civil rights claim for an unconstitutional search of his luggage. There is no state action in this  
17 matter and no plausible claim for false imprisonment and/or violation of the Fourth Amendment.  
18 *Gritchen v. Collier*, 254 F.3d 807, 812-813 (9th Cir. 2001); *Bell Atlantic Corp. v. Twombly*, 550  
19 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

20 Mr. Gary Harkins does not and cannot meet the elements necessary to prove a 1983 claim for  
21 unlawful search and seizure. *Oppenheimer v. City of Los Angeles*, 104 Cal.App.2d 551, 552-553  
22 (1951).

23 **(15) Unclean Hands/The Plan/Breach of Fiduciary Duties:**

24 **(a) Unclean Hands.**

25 The Defendants are entitled to judgment against the Plaintiffs because the Plaintiffs have  
26 unclean hands. *Precision Instrument Mfg. Co. v. Auto Maint. Mach Co.*, 324 U.S. 806, 814 (1945).  
27 The Plaintiff Brian Dawe is the alter ego of ACO/ACOIN and Flat Iron Mountain Associates/LLC.

28 The Defendants are entitled to the equitable maxim that “he who comes into equity must come

1 with clean hands.” *Precision Instrument, supra*, at 814. *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014,  
2 1021 (7th Cir. 2002); *Intamin, Ltd. v. Magnetar Technologies Corp.*, 623 F.Supp.2d 1055, 1074-  
3 1076 (CDCA 2009).

4 **(b) The Plan/Fraud/Breach of Fiduciary Duty.**

5 The Plaintiffs, Brian Dawe, Richard Loud and Gay Harkins launched a “Plan” to take over  
6 control of CUSA and to turn it into a for-profit entity, designed to funnel the dues of public employee  
7 correctional officers to the personal financial benefit of Brian Dawe, Marilyn Dawe and their LLC  
8 known as Flat Iron Mountain Associates. Brian Dawe’s articulated goal was to “*never again be*  
9 *under the control of any board of directors.*” He wanted to have total control over the dues monies.  
10 Harkins and Loud were part of the Plan.

11 Mr. Dawe’s rival organization was called ACO/ACOIN, ACOIN is a d/b/a of FMIA LLC.  
12 Dawe, Loud and Harkins did the following fraudulent and deceitful acts (partial list):

- 13 (1) Trade-marking the CUSA name and logo for their own account;
- 14 (2) Misappropriating CUSA personal property for their own account;
- 15 (3) Refusing to return CUSA business records, accounts and documents when requested  
16 by the Board of Directors (hiding excessive undocumented expenses);
- 17 (4) Purchasing a Florida condominium timeshare using CUSA funds and credit cards;
- 18 (5) Purchasing a Ford Expedition SUV and a trailer for \$52,000.00 when the CUSA  
19 Board of Directors had only authorized an expenditure of \$24,000.00 for a van;
- 20 (6) Keeping CUSA laptop computers after they were removed from CUSA, using these  
21 laptops for their own accounts, and not returning said computers to CUSA;
- 22 (7) Misappropriating and using the CUSA membership list for their own accounts;
- 23 (8) Establishing a competing internet association, known as ACO/ACOIN/ACOAI, using  
24 the misappropriated (stolen) membership list, which is operated from Mr. Dawe’s  
25 residence in Thayne, WY;
- 26 (9) Launching the “Plan” to take over control of CUSA, to keep the money (dues) from  
27 the individual California correctional officers flowing to them, and “to not miss a  
28 beat”; and
- 29 (10) Utilizing Mr. Harkins as an inside man (industrial spy) to aid and abet Mr. Dawe and  
30 Mr. Loud in carrying out their “Plan” to take control of CUSA.

31 Every corporation shall keep books, records , minutes and records of accountings. Cal. Corp.  
32 Code § 8320. Every officer or director shall refrain from knowingly publishing false reports and  
33 records to the corporation or to its members. Cal. Corp. Code § 8813. Brian Dawe, as a director and  
34 the treasurer of CUSA, and Gary Harkins, as a director and recording secretary, breached their  
35 fiduciary duties to CUSA by intentionally, wilfully and knowingly providing false and fraudulent  
36 accounting reports to CUSA, refusing to return CUSA property and by not disclosing conflicts of

1 interest.

2 These wrongful acts establish the Plaintiffs' "plan," *unclean hands*, breach of fiduciary duties,  
3 and self-interest. *Intamin, supra*, at 1074 – 1076; *TWA v. American Coupon Exchange*, 913 F.2d  
4 676, 695 (9th. Cir. 1990). *Sequoia Vacuum Systems v. Strancsky*, 229 Cal.App.2d 281, 287-288  
5 (1964); Cal. Corp. Code § 7231; *Balboa Ins. Co. v. Trans Global Equities*, 218 Cal.App.3d 1327,  
6 1350, 1351 (1990).

7 **(c) Alter-ego/Piercing the Corporate Veil (FIMA LLC, ACO, ACOIN).**

8 Brian Dawe has treated the assets of these entities as his own. He has not maintained minutes  
9 or adequate business records. He has knowingly and intentionally confused the business records of  
10 these entities. He has misrepresented the identity of the entities' ownership and used these entities to  
11 procure labor, services and merchandise, with the intent to avoid personal liability. They are a  
12 subterfuge for illegal transactions. Brian Dawe has used these entities as a shell and conduit for his  
13 own singular business venture. 15 Cal. Jur.3d Corporations § 26 (2009). The veil of duplicity that Mr.  
14 Dawe has placed over himself must be pierced by the Court. *Degarmo v. Goldman*, 19 Cal.2d 755  
15 (1942); *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal.App.4th 970 (2000). Alter ego  
16 theory posits that the individual plaintiffs are inseparable from each other and in legal effect should  
17 be treated as one. *D. N. & E. Water & Co. v. Zuckerman*, 214 Cal. 418, 420 (1931). *Mesler v. Bragg*  
18 *Management Co.*, 39 Cal.3d 290, 300 (1985).

19 ACO, ACOIN and FIMA LLC are all d/b/a's and/or subsidiaries and/or arms of Brian Dawe.  
20 They are alter egos of each other. The ACO entity was defaulted on December 29, 2009. ACO, an  
21 alleged non-profit corporation must appear through counsel and cannot represent itself in this trial.

22 Brian Dawe, d/b/a FIMA LLC, also owns ACOIN (American Correctional Officer Intelligence  
23 Network), controls ACO ( American Correctional Officer) and ACOAI (American Correctional  
24 Officer Associates Incorporated). Mr. Brian Dawe functions as the executive director of all of these  
25 entities. Mr. Dawe has admitted in discovery that ACOIN is a d/b/a of FIMAL LLC and arm of ACO.  
26 He admits he is the executive director of ACO.

27 Defendants' contend that ACO is a shell organization created by Plaintiffs and FIMA LLC  
28 designed to insulate Plaintiffs from personal liability. This has always been part of the Plaintiffs'

1 “plan” to take over CUSA. It is part of the illegal RICO enterprise and the “plan” to create a for-  
2 profit competing organization. ACO did not have a separate existence in 2006. It/they should be  
3 treated as one entity.

4 **(16) Whistleblower Evidence/Conspiracy/Collusion Claim:**

5 Defendants do not object to Plaintiffs bringing forth motive evidence, as it is relevant to the  
6 claims and counter-claims. Defendants intend to bring forth all such motive evidence (including  
7 Lahey) as permitted and set forth by the Court, on Page 16, Lines 20-21. It is irrelevant to the breach  
8 of contract claims, and determination as to whether Plaintiffs are employees or independent  
9 contractors.

10 Mr. Dawe is asserting that the Defendants colluded to discharge him from CUSA because of  
11 the alleged Shannon Lahey sexual harassment complaints against CUSA and CCPOA. Mr. Dawe will  
12 attempt to justify his wrongful acts and his breaches of fiduciary duties to CUSA by claiming that  
13 Shannon Lahey and others did similar or worse wrongful acts than he did.

14 This is the Dawe “*pot calling the kettle black*” defense. Defendants agree that this evidence  
15 (sexual and otherwise) is relevant to other issues and will produce it at trial. This justification defense  
16 is not a recognized defense for the commission of illegal or wrongful acts by Plaintiffs. *Retirement*  
17 *Group v. Galante*, 176 Cal.App.4th 1226, 1239-1240 (2009); *Precision Instrument Mfg. Co. v. Auto*  
18 *Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). This evidence is relevant to Plaintiffs’ breaches of  
19 fiduciary duty, their removal from corporate offices, other torts against Defendants and Defendants’  
20 claim of punitive damages against Plaintiffs.

21 **B. Defendants’ Counter-Claims:**

22 The Defendant CUSA has brought counter-claims against the Plaintiffs Brian Dawe, FIMA  
23 LLC, Gary Harkins and Richard Loud, and their subsidiaries/and alter egos ACO/ACoin hereafter  
24 referred to as the Counter-Defendants.

25 **(1) Breach of Fiduciary Duties:**

26 Counter-defendants were directors and officers of CUSA who committed wrongful acts that  
27 breached their statutory and common law fiduciary obligations. Cal. Corp. Code §§ 7231, 7235,  
28 8320, 8812, 8813. *Frances T. v. Village Green Owners Assn.*, 42 Cal.3d 490 (1986); *Stafford v.*

1 *Fabric and Structural Technology, Inc.*, 48 Cal.App.4th 1935, 1942 (1996); *Bancroft-Whitney Co.*  
2 *v. Glen*, 64 Cal.2d.327 (1966), citing *Gruth v. Loft, Inc.*, 23 Del.Ch.255, 270 (1939); *Remillard Brick*  
3 *Co. v. Remillard-Dandini Co.*, 109 Cal.App.2d 405, 419 (1952).

4 California Corporations Code § 7231 states:

- 5 (a) A director shall perform the duties of a director, including duties as a member  
6 of any committee of the board upon which the director may serve, in good  
7 faith, in a manner such director believes to be in the best interests of the  
8 corporation and with such care, including reasonable inquiry, as an ordinarily  
9 prudent person in a like position would use under similar circumstances.
- 10 (b) In performing the duties of a director, a director shall be entitled to rely on  
11 information, opinions, reports or statements, including financial statements  
12 and other financial data, in each case prepared or presented by:
- 13 (1) One or more officers or employees of the corporation whom the  
14 director believes to be reliable and competent in the matters presented;
- 15 (2) Counsel, independent accountants or other persons as to matters  
16 which the director believes to be within such person's professional or  
17 expert competence; or
- 18 (3) A committee upon which the director does not serve that is composed  
19 exclusively of any or any combination of directors, persons described  
20 in paragraph (1), or persons described in paragraph (2), as to matters  
21 within the committee's designated authority, which committee the  
22 director believes to merit confidence, so long as, in any case, the  
23 director acts in good faith, after reasonable inquiry when the need  
24 therefor is indicated by the circumstances and without knowledge that  
25 would cause such reliance to be unwarranted.
- 26 (c) A person who performs the duties of a director in accordance with  
27 subdivisions (a) and (b) shall have no liability based upon any alleged failure  
28 to discharge the person's obligations as a director, including, without limiting  
the generality of the foregoing, any actions or omissions which exceed or  
defeat a public or charitable purpose to which assets held by a corporation are  
dedicated.

19 California Corporations Code § 7235 states:

- 20 (a) A corporation may loan money or property to any director or officer provided  
21 that:
- 22 (1) The board determines the loan may reasonably be expected to benefit  
the corporation.  
Prior to entering into a transaction, the loan of money or property to  
a director or officer must be:
- 23 (A) Approved by the board members without counting the vote of  
the director or officer who is to receive the loan of money or  
24 property; or
- 25 (B) Approved by a majority vote of the directors then in office,  
without counting the vote of the director or officer who is to  
receive the loan of money or property.
- 26 (b) A corporation may advance money to a director or officer of the corporation  
27 for any expenses reasonably anticipated to be incurred in the performance of  
the duties of the director or officer of the corporation, provided that in the  
28 absence of such an advance the director or officer would be entitled to be  
reimbursed for these expenses by the corporation.

1 California Corporations Code § 8320 states:

- 2 (a) Each corporation shall keep:  
3 (1) Adequate and correct books and records of accounting;  
4 (2) Minutes of the proceedings of its members, board and committees of  
5 the board; and  
6 (3) A record of its members giving their names and addresses and the  
7 class of membership held by each.

8 California Corporations Code § 8812 states:

9 Any director of any corporation who knowingly and with dishonest or fraudulent  
10 purpose, to make any distribution of assets, with the design of defrauding members  
11 or of giving a false appearance to the value of the membership and thereby defrauding  
12 purchasers is liable to the corporation.

13 California Corporations Code § 8813 states:

- 14 (a) Every director or officer of any corporation is liable to the corporation if such  
15 director or officer knowingly concurs in making or publishing, either generally  
16 or privately, to members or other persons:  
17 (1) any materially false report or statement as to the financial condition of  
18 the corporation; or  
19 (2) any willfully or fraudulently exaggerated report, prospectus, account  
20 or statement of operations, financial condition or prospects; or  
21 (3) any other paper intended to give, and having a tendency to give, a  
22 membership in such corporation a greater or lesser value than it really  
23 possesses.  
24 (b) Every director or officer of any corporation is liable to the corporation who  
25 refuses to make or direct to be made any book entry or the posting of any  
26 notice required by law in the manner required by law.

27 These are some of the wrongful acts committed by the counter-defendants:

- 28 (a) Trade-marking the CUSA name and logo for their own account;  
(b) Misappropriating CUSA personal property for their own account;  
(c) Refusing to return CUSA business records, accounts and documents when  
requested by the Board of Directors;  
(d) Purchasing a Florida condominium timeshare using CUSA funds and credit  
cards;  
(e) Purchasing a Ford Expedition SUV and a trailer for \$52,000.00 when the  
CUSA Board of Directors had only authorized an expenditure of \$24,000.00  
for a van;  
(f) Keeping CUSA laptop computers after they were removed from CUSA, using

1 these laptops for their own accounts, and not returning said computers to  
2 CUSA;

3 (g) Misappropriating and using the CUSA membership list for their own  
4 accounts;

5 (h) Establishing a competing internet association, known as  
6 ACO/ACoin/ACoAI, using the misappropriated (stolen) membership list,  
7 which is being operated from Mr. Dawe's residence in Thayne, WY;

8 (i) Hatching the "Plan" to take over control of CUSA, to keep the money (dues)  
9 from the individual California correctional officers flowing to them, and to not  
10 miss a beat; and

11 (j) Utilizing Mr. Harkins as an inside man (industrial spy) to aid and abet  
12 Mr. Dawe and Mr. Loud in carrying out their "Plan" to take control of  
13 CUSA.

14 (k) Misuse of CUSA funds, credit cards, ATM cards and undocumented  
15 disbursements of CUSA funds.

16 (l) Failing to keep accurate records and destroying them.

17 **(2) Interference With Business Relations.**

18 The second CUSA counter-claim is for interference with business relations. *Buckaloo v.*  
19 *Johnson*, 14 Cal.3d 815, 827 (1975); *Tuchscher Development Enterprises, Inc. v. San Diego Unified*  
20 *Port District*, 106 Cal.App.4th 1219, 1239 (2003). CUSA claims that Brian Dawe, FIMA, ACO,  
21 ACOIN, Gary Harkins and Richard Loud intentionally interfered with the contracts between it and  
22 third parties and/or former members of CUSA whom have subsequently terminated their contracts  
23 with CUSA.

24 In order for CUSA to prove its burden for interference with business/contractual relations,  
25 the following must be proved:

26 (a) That there was a contract between CUSA and at least one other third party;

27 (b) That Cross-Defendant's knew of the contract;

28 (c) That Cross-Defendant's intended to disrupt the performance of this contract;

- 1 (d) That Cross-Defendant's conduct prevented performance or made performance  
2 more expensive or difficult;
- 3 (e) That CUSA was harmed; and
- 4 (f) That Cross-Defendant's conduct was a substantial factor in causing CUSA's  
5 harm.

6 *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 (1990); *PMC, Inc. v. Saban*  
7 *Entertainment, Inc.*, 45 Cal.App.4th 579, 601 (1996); *Quelimane Co. v. Stewart Title Guaranty Co.*,  
8 19 Cal.4th 26, 55 (1998); *Kasparian v. County of Los Angeles*, 38 Cal.App.4th 242, 261 (1995).

9 **(3) Interference With Prospective Economic Advantage.**

10 The third CUSA counter-claim is for interference with prospective business advantage.  
11 *Buckaloo v. Johnson*, 14 Cal.3d 815, 827 (1975); *Tuchscher Development Enterprises, Inc. v. San*  
12 *Diego Unified Port District*, 106 Cal.App.4th 1219, 1239 (2003). CUSA claims that Brian Dawe,  
13 FIMA, ACO, ACOIN, Gary Harkins and Richard Loud intentionally interfered with economic  
14 relationships between it and third parties that probably would have resulted in an economic benefit  
15 to CUSA.

16 In order for CUSA to prove its burden for interference with prospective economic relations,  
17 the following must be proved:

- 18 (a) That CUSA had economic relationships between it and third parties which  
19 probably would have resulted in an economic benefit to CUSA;
- 20 (b) That cross-defendant's knew of the relationship;
- 21 (c) That cross-defendant's intended to disrupt the relationship;
- 22 (d) That cross-defendant's engaged in wrongful conduct through oral and written  
23 communications with CUSA members and potential CUSA members;
- 24 (e) That the relationship was disrupted;
- 25 (f) That CUSA was harmed; and
- 26 (g) That cross-defendant's wrongful conduct was a substantial factor in causing  
27 CUSA's harm.

28 *Settimo Associates v. Environ Systems, Inc.*, 14 Cal.App.4th 842, 845 (1993); *Pacific Gas & Electric*

1 *Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 (1990); *Youst v. Longo*, 43 Cal.3d 64, 71, fn. 6  
2 (1987).

3 **(4) Unauthorized Use of Another's Name:**

4 The fourth CUSA counter-claim is for the unauthorized use of the CUSA name. *U.S. Jaycees*  
5 *v. San Francisco Jr. Chamber of Commerce*, 354 F.Supp. 61 (NDCA 1972), judgment affirmed, 513  
6 F.2d 1226 (9th Cir. 1975).

7 CUSA is bringing a claim against Brian Dawe, FIMA, ACO, ACOIN, Gary Harkins and  
8 Richard Loud for the unauthorized usage of the CUSA name and/or prospectus. California  
9 Corporations Code section 8816 states:

10 Every person who, without being authorized so to do, subscribes the name of another  
11 to or inserts the name of another in any prospectus, circular or other advertisement  
12 or announcement of any corporation, whether existing or intended to be formed, with  
13 intent to permit the document to be published and thereby to lead persons to believe  
14 that the person whose name is so subscribed is an officer, agent or promoter of such  
15 corporation, when in fact no such relationship exists to the knowledge of such person,  
16 is liable to the corporation.

14 **(5) Prohibited Use of Membership List:**

15 The CUSA fifth counter-claim is for the illegal misappropriation and use of the CUSA  
16 membership list by the counter-defendants, under the Cal. Corp. Code §§ 8813, 8814 and 8320 and  
17 under the common law. *Retirement Group v. Galante*, 176 Cal.App.4th 1226, 1237-1238 (2009).

18 CUSA is bringing a claim against Brian Dawe, FIMA, ACO, ACOIN, Gary Harkins and  
19 Richard Loud for the prohibited usage of CUSA's membership list.

20 California Corporations Code Section 8338 states:

21 (a) A membership list is a corporate asset. Without consent of the board a  
22 membership list or any part thereof may not be obtained or used by any person  
23 for any purpose not reasonably related to a member's interest as a member.  
24 Without limiting the generality of the foregoing, without the consent of the  
25 board a membership list or any part thereof may not be:

24 (1) Used to solicit money or property unless such money or property will  
25 be used solely to solicit the vote of the members in an election to be  
26 held by their corporation.

25 (2) Used for any purpose which the user does not reasonably and in good  
26 faith believe will benefit the corporation.

26 (3) Used for any commercial purpose or purpose in competition with the  
27 corporation.

27 (b) Any person who violates the provisions of subdivision (a) shall be liable for  
28 any damage such violation causes the corporation and shall account for and  
pay to the corporation any profit derived as a result of said violation. In

1 addition, a court in its discretion may award exemplary damages for a  
2 fraudulent or malicious violation of subdivision (a).

3 (d) In any action or proceeding under this section, a court may award the  
4 corporation reasonable costs and expenses, including reasonable attorneys'  
5 fees, in connection with such action or proceeding.

6 (e) As used in this section, the term "membership list" means the record of the  
7 members' names and addresses.

8 **(6) Fraud and Concealment of Material Facts:**

9 The CUSA sixth counterclaim is a cause of action for fraud and concealment of material facts  
10 and for the fraudulent acquisition of CUSA corporate property by the counter-defendants, under Cal.  
11 Corp. Code §§ 8813, 8814 and 8320 and under the common law. Cal. Civ. Code §§ 1571-1575 and  
12 1710; *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93, 106 (1969); *Lazar v. Superior Court*, 12 Cal.4th  
13 631, 645 (1991); *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 974 (1997);  
14 *DeCampos v. State Comp. Ins. Fund*, 122 Cal.App.2d 519, 525 (1954).

15 California Corporations Code § 8813 states:

16 (a) Every director or officer of any corporation is liable to the corporation if such  
17 director or officer knowingly concurs in making or publishing, either generally  
18 or privately, to members or other persons:

- 19 (1) any materially false report or statement as to the financial condition of  
20 the corporation; or  
21 (2) any willfully or fraudulently exaggerated report, prospectus, account  
22 or statement of operations, financial condition or prospects; or  
23 (3) any other paper intended to give, and having a tendency to give, a  
24 membership in such corporation a greater or lesser value than it really  
25 possesses.

26 (b) Every director or officer of any corporation is liable to the corporation who  
27 refuses to make or direct to be made any book entry or the posting of any  
28 notice required by law in the manner required by law.

California Corporations Code § 8814 states:

(a) Every director, officer or agent of any corporation, who knowingly receives  
or acquires possession of any property of the corporation, otherwise than in  
payment of a just demand, and, with intent to defraud, omits to make, or to  
cause or direct to be made, a full and true entry thereof in the books or  
accounts of the corporation is guilty of a crime.

(b) Every director, officer, agent or member of any corporation who, with intent  
to defraud, destroys, alters, mutilates or falsifies any of the books, papers,  
writings or securities belonging to the corporation or makes or concurs in  
omitting to make any material entry in any book of accounts or other record  
or document kept by the corporation is guilty of a crime.

(c) Each crime specified in this section is punishable by imprisonment in state  
prison, or by imprisonment in a county jail for not exceeding one year, or a  
fine not exceeding one thousand dollars (\$1,000), or both such fine and  
imprisonment.

1 California Corporations Code § 8320 states in pertinent parts:

- 2 (a) Each corporation shall keep:  
3 (1) Adequate and correct books and records of accounting;  
4 (2) Minutes of the proceedings of its members, board and committees of  
5 the board; and  
6 (3) A record of its members giving their names and addresses and the  
7 class of membership held by each.

8 CUSA also seeks to recover damages based upon a claim of fraud. Conduct may be fraudulent  
9 because of an intentional misrepresentation, concealment or a negligent misrepresentation. *Stoner*  
10 *v. Williams*, 46 Cal.App.4th 986, 1002-1003 (1996); C.J.S., Fraud §§ 7 to 8, 10, 28, 31, 35 to 36.

11 Fraud under California Civil Code § 1572 states:

- 12 (1) The suggestion, as a fact, of that which is not true, by one who does not  
13 believe it to be true;  
14 (2) The positive assertion, in a manner not warranted by the information of the  
15 person making it, of that which is not true, though he believes it to be true;  
16 (3) The suppression of that which is true, by one having knowledge or belief of  
17 the fact;  
18 (4) A promise made without any intention of performing it;  
19 (5) Any other act fitted to deceive.

20 To establish a claim for concealment, the following must be proved:

- 21 (a) (1) That CUSA and cross-defendants' were in a fiduciary relationship;  
22 and  
23 (2) That cross-defendants' intentionally failed to disclose an important  
24 fact to "CUSA";  
25 (b) That CUSA did not know of the concealed fact;  
26 (c) That cross-defendants intended to deceive CUSA by concealing the fact;  
27 (d) That CUSA reasonably relied on cross-defendants' deception;  
28 (e) That CUSA was harmed; and  
29 (f) That cross-defendants' concealment was a substantial factor in causing  
30 CUSA's harm.

31 *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal.App.4th 603, 612-613 (1992); *Limandri*  
32 *v. Judkins*, 52 Cal.App.4th 326, 336-337 (1997).

33 To establish a claim for intentional misrepresentation, the following must be proved:

- 1 (a) That cross-defendants' represented to CUSA that an important fact was true;
- 2 (b) That cross-defendants' representation was false;
- 3 (c) That cross-defendants' knew that the representation was false when he made
- 4 it, or that he made the representation recklessly and without regard for its
- 5 truth;
- 6 (d) That cross-defendants' intended that CUSA rely on the representation;
- 7 (e) That CUSA reasonably relied on cross-defendants' representation;
- 8 (f) That CUSA was harmed; and
- 9 (g) That CUSA's reliance on cross-defendants' representation was a substantial
- 10 factor in causing its harm.

11 Cal. Civ. Code §§ 1572, 1709, and 1710; *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th  
12 951, 974, 976-977 (1997); *Service by Medallion, Inc. v. Clorox Co.*, 44 Cal.App.4th 1807, 1816  
13 (1996).

14 **(7) Conversion of CUSA Property:**

15 The seventh CUSA counterclaim is against the counter-defendants for the theft, use and  
16 conversion of CUSA corporate property, funds and assets. CUSA also seeks the imposition of a  
17 constructive trust on all CUSA property in the hands, control and possession of the counter-  
18 defendants as well as CUSA property and funds transferred to third-persons by the counter-  
19 defendants. Cal. Civ. Code § 1713; *McKell v. Washington Mutual, Inc.*, 142 Cal.App.4th 1457, 1491  
20 (2006); *Fremont Indemnity Company v. Fremont General Corp.*, 148 Cal.App.4th 97, 119-126  
21 (2007); *Bulesci v. Petersen*, 68 Cal.App.4th 1062, 1066 (1998).

22 One who gains property of another by fraud, accident, mistake, undue influence, the breach  
23 of fiduciary duty, or other wrongful act, holds such property or its proceeds in a constructive trust  
24 for the benefit of the person who would otherwise have had it, unless he or she has some other and  
25 better right to the property or its proceeds. California Civil Code §§ 2223, 2224; *King v. King*, 22  
26 Cal.App.3d 319, 329 (1971); *Atwood v. Elwood*, 132 Cal.App.2d 761, 767-768 (1955).

27 “Conversion is usually defined to be an unauthorized assumption and exercise of the right of  
28 ownership over goods belonging to another, to the exclusion of the owner’s right . . . . The essence

1 of the wrong is that the property rights of the plaintiff have been dealt with in a manner adverse to  
2 him, inconsistent with his right to dominion, and to his harm.” *Boston Educational Research Co., Inc.*  
3 *v. American Mach. & Foundry Co.*, 488 F.2d 344, 348 (1st Cir. 1973) (quoting, *Gilbert v. Walker*,  
4 64 Conn. 390, 394-395 (1894)). Underprivileged destruction of goods is a classic case of conversion.  
5 *Boston, supra*, at 348. The most distinctive feature of conversion is its measure of damages, which  
6 is the value of the goods converted. *Pearson v. Dodd*, 410 F.2d 701, 706 (D.C. Cir. 1969). An  
7 intentional exercise of dominion or control over a chattel which so seriously interferes with the right  
8 of another to control it that the actor may justly be required to pay the other the full value of the  
9 chattel.” *Id.* Under California law, damages under bailment are typically related to the reasonable  
10 value of the property that was not returned. *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121 (NDCA 2008)  
11 (applying California law).

12 A constructive trust may be imposed on wrongfully appropriated property or its proceeds that  
13 are transferred to a third person where the property or proceeds can be sufficiently identified and  
14 traced and where the third person had knowledge or was charged with notice of the constructive trust  
15 at the time of transfer. Cal. Civ. Code §§ 2223, 2224; *King v. King*, 22 Cal.App.3d 319, 329  
16 (1971); *Atwood v. Elwood*, 132 Cal.App.2d 761, 767-768 (1955).

17 To establish this claim for conversion, CUSA must prove all of the following:

- 18 (a) That CUSA owned and/or had a right to possess it's computers, fax machines,  
19 promotional items, promotional clothing, membership lists, member's fees,  
20 initiation fees, intellectual property and electrical data;
- 21 (b) That cross-defendants intentionally: took possession of the CUSA property  
22 for a significant period of time; and/or as bailees, or otherwise, prevented  
23 CUSA from having access to CUSA property for a significant period of time;  
24 and/or destroyed CUSA property.
- 25 (c) That CUSA did not consent;
- 26 (d) That CUSA was harmed; and
- 27 (e) That cross-defendants' conduct was a substantial factor in causing CUSA's  
28 harm.

1 *Shopoff & Cavallo LLP v. Hyon*, 167 Cal.App.4th 1489, 1507 (2008); *Burlesci v. Petersen*, 68  
2 Cal.App.4th 1062, 1066 (1998).

3 **(8) Accounting:**

4 The CUSA eighth claims is for an accounting against the counter-defendants relating to  
5 corporate property converted for their own use, including but not limited to, use of CUSA credit  
6 cards and funds for personal purposes unrelated to CUSA business, failing to provide proper  
7 documentation of the expenditure of CUSA expenses, membership dues, membership lists, intellectual  
8 property, promotional items, equipment, asserting personal ownership rights over CUSA's property,  
9 disputing CUSA's ownership rights in its own corporate property, illegal use of CUSA's funds for  
10 counter-defendants' interests which were adverse to CUSA's interests, and withholding and refusing  
11 to return CUSA property to the corporation. The right to an accounting is asserted under the Cal.  
12 Corporations Code, equity and the common law.

13 If plaintiff has a cause of action of which the court has jurisdiction, and it is necessary to have  
14 an accounting to determine his rights, it will be done. *Remme v. Herzog*, 222 Cal.App.2d 863, 865  
15 (1963). "A cause of action for an accounting requires a showing that a relationship exists between  
16 the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that  
17 can only be ascertained by an accounting. An action for accounting is not available where the plaintiff  
18 alleges the right to recover a sum certain or a sum that can be made certain by calculation." *Teselle*  
19 *v. McLoughlin*, 173 Cal.App.4th 156, 179 (2009); but see *Civic Western Corp. v. Zila Industries,*  
20 *Inc.*, 66 Cal.App.3d 1, 14 (1977) [accounting remedy is available when the accounts are so  
21 complicated as to render a legal action impracticable].

22 **(9) Fraud, False Advertising, Chain Scheme, Unfair Business Practices/Civil**  
23 **Conspiracy and Racketeering Activities (Civil RICO):**

24 The CUSA ninth counterclaim is for fraud, false advertising , endless chain-scheme, unfair  
25 business practices, civil conspiracy, and racketeering activities (RICO). Cal. Bus. & Prof. Code §  
26 17200 and § 17500; Cal. Civ. Code §§ 1571-1575 and 1710; *Engalla v. Permanente Medical Group,*  
27 *Inc.*, 15 Cal.4th 951, 974 (1997); Cal. Pen. Code § 327; 18 U.S.C. §§ 1961-1968; LMRDA 501(c);  
28 Cal. Pen. Code § 641.3; and *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503,

1 510-511 (1994); *Choate v. County of Orange*, 86 Cal.App.4th 312, 333 (2000).

2 CUSA has claimed that the conduct of cross-defendants constitutes false advertising under  
3 California law. To prevail on a claim for false advertising under California law, CUSA must prove,  
4 by a preponderance of the evidence that:

5 1. That cross-defendants made or disseminated a public statement in California that concerned  
6 goods and services provided by cross-defendants;

7 2. That when cross-defendants made that statement, it knew or reasonably should have  
8 known, that it was untrue or misleading;

9 3. That cross-defendants made that statement in a newspaper or other publication, or in an  
10 advertising device, or by public outcry or proclamation, or by any other means, including over the  
11 internet; and

12 4. That cross-defendants intended that statement to induce the public to enter into business  
13 with them and to purchase goods and service from them. Cal. Bus. & Prof. Code § 17500.

14 Under California Business and Professions Code section 17200, unfair competition shall mean  
15 and include any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue  
16 or misleading advertising under California Business and Professions Code section 17500 (false  
17 advertising). California Business and Professions Code section 17200.

18 Thirty-Four (34) U.S. States have statutes prohibiting bribery, including California. Plaintiffs’  
19 payments of bribes, “reimbursements,” kick-backs, finders-fees, and slush funds to local unions  
20 constitute unfair business practices, civil conspiracy, fraud, and RICO violations. Cal. Pen. Code §  
21 641.3; New York Penal Law § 180.00; 18 U.S.C. § 1952; 29 U.S.C. § 501, *U.S. v. Pecora*, 798 F.2d  
22 614, 623 (3d Cir. 1986) (union bribery in violation of LMRDA); *U. S. v. Seregos*, 655 F.2d 33 (2d  
23 Cir. 1981) (certiorari denied 455 U.S. 940) (corrupt kickbacks in violation of The Travel Act).

24 “Direct or indirect” “participation” in corporate espionage, concealment thereof, and violation  
25 of copy right law as alleged against Plaintiffs, specifically, the use of Harkins as an inside man to steal  
26 CUSA trademark in furtherance of the “plan” “if proven true, are sufficient to impose RICO liability.”  
27 *Bryant v. Mattel, Inc.*, 573 F.Supp.2d 1254, 1261 (C.D. Cal. 2007); 17 U.S.C. § 506, *U.S. v. Goss*,  
28 803 F.2d 638, 642 (11th Cir.1986).

1 Furthermore, CUSA contends that cross-defendants have violated section 327 of the  
2 California Penal Code which prohibits the operation of an endless chain scheme, and they seek to  
3 recover monies based on this claim. Section 327 provides that every person who willfully contrives,  
4 prepares, sets up, or operates any endless chain scheme is liable for damages. An 'endless chain' means  
5 any scheme for the disposal or distribution of property whereby a participant pays a valuable  
6 consideration for the chance to receive compensation for introducing one or more additional persons  
7 into participation in the scheme, or for the chance to receive compensation when a person introduced  
8 by the participant introduces a new participant. In order to prove this, each of the following elements  
9 must be proven:

- 10 (a) a person willfully contrived, prepared, set up, or operated a business entity or  
11 other organization; and  
12 (b) the business entity or other organization gives compensation to a participant;  
13 and  
14 (c) the participant pays valuable consideration for the chance to receive such  
15 compensation for introducing one or more additional persons into  
16 participation in the scheme, or, for the chance to receive compensation when  
17 a person introduced by the participant introduces a new participant.

18 Cal. Pen. Code § 327; *People v. Frederick*, 142 Cal.App.4th 400, 415 (2006).

19 In order to prevail on the RICO claim, CUSA must prove each of the following facts by a  
20 preponderance of the evidence:

- 21 (a) That the cross-defendants or two or more of them was associated with an  
22 "enterprise.;"  
23 (b) That cross-defendants or two or more of them "knowingly" committed at least  
24 two of the predicate acts hereafter described;  
25 (c) That the predicate acts formed a pattern by having the same or similar  
26 purposes, results, participants, victims, or methods of commission, or were  
27 otherwise interrelated by distinguishing characteristics so that there were not  
28 isolated events;

1 (d) That the predicate acts amounted to, or threatened the likelihood of,  
2 continued activity posing a threat of continuity projecting into the future;

3 (e) That through the commission of the two or more connected predicate acts,  
4 cross-defendants or two or more of them conducted or participated in the  
5 conduct of the affairs of the "enterprise;"

6 (f) That the "enterprise" was engaged in, or that its activities affected, interstate  
7 commerce; and

8 (g) That CUSA was injured in its business and/or property as a proximate result  
9 of cross-defendants or two or more of them commissions of the pattern of  
10 racketeering activity.

11 *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989); *Cox v. Administrator United*  
12 *States Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir. 1994); *Sikes v. Teleline, Inc.*, 281 F.3d 1350,  
13 1360-61 (11th Cir. 2002); *Beck v. Prupis*, 529 U.S. 494, 120 S.Ct. 1608 (2000); *Arabian American*  
14 *Oil Co. v. Scarfone*, 939 F.2d 1472, 1478 (11th Cir. 1991).

15 **(10) Other Relief Sought:**

16 (a) CUSA also is seeking the imposition of a permanent restraining order  
17 prohibiting the use of the CUSA name, intellectual property and logo by counter-defendants. *U.S.*  
18 *Jaycees v. San Francisco Jr. Chamber of Commerce*, 384 F.Supp. 61 (NDCA 1972), judgment  
19 affirmed, 513 F.2d 1226 (9th Cir. 1975).

20 (b) CUSA is seeking a permanent injunction against the counter-defendants to bar  
21 them from soliciting existing CUSA members and customers by the use of CUSA trade secret  
22 information and stolen CUSA customer lists, which are protected CUSA trade secrets. *Retirement*  
23 *Group v. Galante*, 176 Cal.App.4th 1226, 1237-1238 (2009). It is also seeking an order compelling  
24 the surrender of and/or the destruction of the original and copies of the CUSA membership list from  
25 the counter-defendants.

26 (c) CUSA is seeking damages for the conversion of its corporate property and the  
27 imposition of a constructive trust over all property that has been misappropriated by the counter-  
28 defendants.

1 (d) CUSA is seeking damages for fraud, deceit, theft of corporate property,  
2 equipment and business records. *DeCampos v. State Comp. Ins. Fund*, 122 Cal.App.2d 519, 525  
3 (1954); *McKell v. Washington Mutual. Inc.* 142 Cal.App.4th 1457, 1491 (2006).

4 (e) CUSA is further seeking compensatory damages, consequential damages and  
5 interest, according to proof at trial.

6 (f) CUSA is also claiming statutory damages, treble damages and penalties, as  
7 well as attorneys fees and costs, under the California Unfair Business Practices Act. Cal. Bus. & Prof.  
8 Code § 17200 and § 17500.

9 (g) CUSA is further claiming statutory damages, treble damages and penalties, in  
10 addition to attorneys fees and costs, under civil RICO, 18 U.S.C. §§ 1961-1968.

11 (h) CUSA is also entitled to an award of reasonable attorneys fees under California  
12 Corporations Code section 8338.

13 **C. Reasonably Anticipated Disputes Concerning Admissibility of Evidence.**

14 (1) Extent of Use of Sexual Discrimination/Harassment Evidence.

15 (2) Introduction of Evidence of State Bar Complaints, beyond party admissions.

16 (3) Motivation Evidence for Discharge (Employees). (Fed. Rules Evid., rule 404(b))

17 (4) Motivation Evidence (Breaches of Contract). (Fed. Rules Evid., rule 404(b))

18 (5) Introduction of Attorney General Complaint, beyond party admissions.

19 (6) Introduction of Secretary of State Complaint Letter, beyond party admissions.

20 (7) Introduction of Machanich Lawsuit.

21 (8) Exclusion of Machanich as Witness.

22 (9) Admission of Cohen, Volk & Drabkin Expert Opinion.

23 (10) Exclusion of Evidence of Punitive Damage for Breach of Contract Claims.

24 (11) Use of Evidence of Corporate Derivative Claims as Motivation Evidence. (Fed. Rules  
25 Evid., rule 404(b)) There has been no proper challenge to the corporate status of  
26 CUSA, CCPOA or California Employees Chapter of CUSA.

27 (12) Introduction of Defamation Claims/Waiver of On and Off the Wagon Defamation  
28 Claim.

- 1 (13) Introduction of Discrimination/Wrongful Termination Issues.
- 2 (14) Limiting Instructions on the Use of Emotional Distress Damages in Contract Claims.
- 3 (15) Introduction of Whistleblower Evidence as motivation evidence. (Fed. Rules Evid.,
- 4 rule 404(b))
- 5 (16) Limitation of Use of Evidence of Motivation/Motives/Admissibility Issues. (Fed.
- 6 Rules Evid., rule 404(b))
- 7 (17) Exclusion and Admissibility Issues Relating to Evidence of Plaintiffs' Attorneys Fees
- 8 and Costs. (Fed. Rules Evid., rules 401-403)
- 9 (18) Interference With CUSA Contract by Corporate Officials.
- 10 (19) Introduction of Actual Words to Prove Malice (Per se and Per Quod).
- 11 (20) Trade Secret Issues. (Question of Law)
- 12 (21) California Statutory Immunities and Privileges. (Questions of Law)
- 13 (22) Gary Harkins Defamation Claims Against CCPOA/Statute of Limitations. (Question
- 14 of Law)
- 15 (23) Re-Publications of Statements/Single Publication Rule/Common Decency Act
- 16 Immunity. (Question of Law)
- 17 (24) Brian Dawe's Justification Evidence/Payouts. ( Motivation)
- 18 (25) FIMA Associates/LLC as Executive Director (ultra vires acts)(conflicts of interest).
- 19 (26) Unlawful/Illegal/Void/Voidable Contract/Corporate SOP's. (Question of Law)
- 20 (27) Extrinsic Evidence/Reformation of Contracts.
- 21 (28) Employee Status/Declaratory Relief.
- 22 (29) False Imprisonment/Search of Luggage.
- 23 (30) Individual Liability of James Baiardi and Joseph Baumann.
- 24 (31) Alter Ego Evidence.
- 25 (32) Default of ACO. (Prove-up Damages)

26 ///

27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

(33) Admissibility of Tim Bryan Expert Testimony.

Dated: July 13, 2010

**MASTAGNI, HOLSTEDT, AMICK,  
MILLER & JOHNSEN**

By: /s/ David P. Mastagni  
DAVID P. MASTAGNI  
Attorneys for Defendants, Corrections USA,  
CCPOA, James Baiardi, and Donald Joseph  
Baumann