

Nos. 11-16284 and 11-16416
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brian Dawe and Flat Iron Mountain Associates, LLC,
formerly known as Flat Iron Mountain Associates, a
Partnership, *Plaintiffs and Appellees/Cross-Appellants*,

vs.

Corrections USA, California Correctional Peace Officers
Association, Donald Joseph Baumann, and James Baiardi,
Defendants and Appellants/Cross-Appellees.

On Appeal from the United States District Court
Eastern District of California No. 2:07-cv-01790-LKK-EFB
(CONSOLIDATED MASTER CASE)
The Honorable Lawrence K. Karlton

**FIRST BRIEF ON CROSS-APPEAL:
APPELLANTS' OPENING BRIEF
OF CORRECTIONS USA, CALIFORNIA CORRECTIONAL
PEACE OFFICERS ASSOCIATION, DONALD JOSEPH
BAUMANN AND JAMES BAIARDI**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants and Appellants declare that Appellant Corrections USA is a California non-profit mutual benefit corporation. California Correctional Peace Officers Association is also a California non-profit mutual benefit corporation and a union consisting of correctional peace officers.

Dated: October 25, 2011

Respectfully submitted,
Manatt, Phelps & Phillips

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I. INTRODUCTION

This suit arose out of Defendants' allegations of self-dealing and other corporate malfeasance against Plaintiffs,¹ and the events that followed those allegations. The Plaintiffs asserted various tort and contract claims, but their case primarily focused on what they viewed as defamatory comments by Defendants. As their counsel put it in his opening statement to the jury:

“I want to talk to you about what really I think the core matter in this case is, and that’s defamation.” (1 RT 99 [5 ER 67, p. 1120].)²

Counsel stuck to that theme throughout the trial and featured it in his closing argument:

“I would like to now talk about what is the crux of why we’re here today. That’s defamation.” (30 RT 4871 [5 ER 82, p. 1213].)

Plaintiffs’ portrayed themselves as the victims of a “smear

¹ Because of the consolidated complaints, counter-claims, and cross-complaints, parties occupied different technical positions. For simplicity of discussion, this brief re-aligns the parties into interest groups. Thus, all those aligned with original Plaintiff Brian Dawe are referred to as “Plaintiffs,” even though technically Loud was a cross-defendant and Harkins a counter-claimant. All sought and obtained recovery from Defendants.

² The Excerpts of Record will be cited by volume, tab, and page.

campaign” by defendants who maliciously set out to do them harm. The tactic worked. The jury awarded them — as *actual damages for defamation* — the sum of \$2,139,405. (1 ER 5, pp. 28-31.) On top of that, the jurors were so inflamed by the Plaintiffs’ presentation that they gave the Plaintiffs *another* \$4,050,000 as *punitive* damages for defamation. (1 ER 4,, pp. 18-19.) Acknowledging the Constitutional infirmity of the latter, the district court cut the punitive damages in half, remitting the punitive damages to \$2,004,405. (1 ER 1, p. 2.)³ Even so, that left the Plaintiffs’ total recovery for defamation alone at \$4,143,810.

There are, however, additional insurmountable problems with the jury’s decision. The first is that, while harsh words were indeed exchanged by both sides, the statements upon which Plaintiffs based their defamation claim all occurred in the context of this litigation — primarily in communications sent from Defendants to the membership

³ Indicative of how far the jury went in awarding disproportionate punitive damages is a punitive award against one defendant of \$25,000 for an actual damage award of \$1 and a punitive award against another defendant of \$3,000,000 for an actual damage award of \$1. The district court eliminated the \$3,000,000 award, but not the other. (Compare 1 ER 2, pp. 6, 7 with 1 ER 2, p. 12.) Presumably, Plaintiffs will argue on their cross-appeal for reinstatement of their 3 million to one windfall.

of Appellant CUSA for purposes of informing those members *about this litigation*. California Civil Code §47⁴ makes such statements absolutely privileged:

“The litigation privilege is *absolute*; it applies, if at all, *regardless whether the communication was made with malice or the intent to harm*. Put another way, application of the privilege *does not depend on the publisher’s motives, morals, ethics or intent*. Although originally applied only to defamation actions, the privilege has been extended to *any* communication, not just a publication, having *some relation to a judicial proceeding*, and to *all* torts other than malicious prosecution.

* * *

“Any doubt about whether the privilege applies is resolved in favor of applying it.” (*Kashian v. Harriman*, 98 Cal.App.4th 892, 913 [2002]; emphasis added; internal citations and quotation marks omitted.)

As will be shown, all of the allegedly “defamatory” remarks by defendants were made in the context of the multiple litigations that were either being prepared (by both sides) or already in process.

Defendants sought to eliminate the defamation claims both before (3 ER 16, p. 602) and after (4 ER 58, p. 965) trial, but the

⁴ All statutory references are to California statutes unless otherwise noted.

district court refused (1 ER 8, p. 134, 1 ER 2, p. 5) based on an improperly narrow interpretation of Civil Code §47.

In addition, there are other serious problems with the judgment, including the district court's erroneous about-face on Plaintiff Dawe's status as a public figure (thus prejudicially decreasing his burden of proof on the defamation claims), the district court's decision to allow Plaintiff Harkins' defamation claim to proceed despite coming nearly three years after the expiration of the statute of limitations, and the Plaintiffs' multiple recoveries for the same item of contract damages.

II. JURISDICTIONAL STATEMENT

A more detailed procedural statement appears *post*, pp. 12-13. In sum, Plaintiffs sued Defendants seeking damages for tort and contract claims. The court exercised diversity jurisdiction over the claims (28 U.S.C. §§1331, 1367) and applied California law (1 ER 9, pp. 156, 158).

Jury trial resulted in a verdict for over two and a half million dollars in compensatory damages and another ten million in punitive damages against Defendants. (1 ER 4, p. 16; 1 ER 5, p. 23.) The punitive award was reduced and then judgment was entered on Oct. 25, 2010. (1 ER 3, p. 5.) Notice of Appeal was filed May 18, 2011.

(5 ER 65.) This Court has appellate jurisdiction. (28 U.S.C. §§ 41, 1291, 1294[1].)

III. ISSUES AND STANDARDS OF REVIEW

- The California courts have applied Civil Code §47 very broadly, so as to immunize a wide variety of statements that might otherwise be considered the subject of a tort action for defamation, interference with contract, interference with prospective economic advantage and the like. Was it reversible error for the district court, applying California law, to refuse to enforce Civil Code §47? As an issue of law, the standard of review is *de novo*.

- As a proper application of California case law would have led to rejection of the tort claims for defamation, interference with contract, and interference with prospective economic advantage, was it error for the district court to allow these claims to go to trial or, having so allowed, to allow the verdicts thereon to stand after trial? Because the district court had no discretion to exercise in the application of the absolute immunity under Civil Code §47, review is *de novo*.

- Where the executive director of a national organization

holds himself out as an expert on issues related to his profession and organization and testifies as an expert before legislative bodies and at universities, is that person at least a “limited” public figure for the purpose of his defamation suit, so that it was error to refuse to instruct the jury of his heightened burden of proof under *New York Times v. Sullivan*, 376 U.S. 254 (1964)? As the uncontested facts demonstrate that Plaintiff Dawe had injected himself into public debate as an expert, review of his legal status is *de novo*.

- Where the undisputed facts show that any statements that could potentially establish defamation liability in favor of one of the Plaintiffs occurred beyond the period of the statute of limitations, was it error to allow such a defunct claim to proceed and to let stand an award for substantial damages? Application of the law to undisputed facts is reviewed *de novo*.

- Where the same evidence is used to recover the same damage multiple times under different labels, must the duplicative awards be reversed? The law is settled against duplicative recovery, and review of this legal issue is *de novo*.

IV. STATEMENT OF FACTS

If this were a substantial evidence appeal, Defendants would provide the Court with an elaborate summary of the testimony. However, it is not. The foundation of this appeal is legal error. Indeed, the absolute privilege of California Civil Code §47 is so all-encompassing that it applies *regardless* of most of the evidence adduced below. (Compare, e.g., cases discussed *post*, pp. 15-20.) Thus, the facts will be abbreviated and the focus will be on the legal issues. (Additional facts are discussed in the specific argument sections where needed.)

We anticipate that Plaintiffs — consistent with their trial strategy — will seek to divert attention toward evidence regarding the supposed mal-intent and ill will of Defendants. As will be shown, however, that evidence ought to have been pretermitted pursuant to pretrial motions and never should have been presented to the jury. The trial was a very different thing than legally it ought to have been.

A. The Parties Are All Correctional Peace Officers Or Organizations Of Such Officers

The parties to this case are either active or retired correctional peace officers or member organizations containing such officers.

CUSA is a non-profit mutual benefit corporation under the laws of the State of California, whose purpose is representing the common concerns among publicly employed correctional officers nationwide. (Plaintiffs' Ex. 256 [4 ER 38]; Defendants' Ex. 23M [4 ER 56]; 2 RT 137 [5 ER 79.) California Correctional Peace Officers Association (CCPOA) is the largest organizational member of CUSA. (3 RT 451-452, 453 [5 ER 69, pp. 1151, 1152.) All of the individual parties (Plaintiffs and Defendants) are, or were, officers or directors of CUSA. Plaintiff Dawe was CUSA's executive director and treasurer, Plaintiff Loud was its president, and Plaintiff Harkins was its recording secretary. All three were Board members. (2 RT 137-138 [5 ER 68, pp. 1122-1123.) Effectively, Dawe and Loud were responsible for the operating CUSA before they were discharged prior to this litigation.

Within the year before these disputes began, Dawe and his wife created Plaintiff Flat Iron Mountain Associates (FIMA). (2 RT 198-199, 200 [5 ER 68, pp. 1137, 1138.) They owned the company and they and their daughter performed its functions. Whereas Dawe (personally) had been CUSA's executive director, He apparently decided to substitute his new company in that role, so the July 1, 2006

contract for services that Dawe presented to Loud for approval named Dawe's company, FIMA, to that role. (Defendants' Ex. 1Z [4 ER 45] and 2I [4 ER 46].) That three-year service contract is one of the subjects of this litigation.

B. Defendants Learn Of Facts Raising Suspicions That Plaintiffs — Officers And Board Members Of Defendant CUSA — May Have Mismanaged CUSA

In 2006, CUSA's Board of Directors became concerned over various practices of Dawe and Loud, and began to suspect that they may have been engaging in self-interested transactions and may have misused and/or misappropriated CUSA assets. To investigate, CUSA Board members began requesting that Dawe and Loud turn over CUSA's financial books and records. (Defendants' Ex. 7O and 7Z [4 ER 47, 48].) Dawe and Loud resisted. (Defendants' Ex. 13J [4 ER 52]; 22 RT 3577-3578 [5 ER 80, pp. 1207-1208].)

On August 2, 2006, CUSA, CCPOA, and Michael Jimenez (CUSA's Incorporator and one of CUSA's directors), through their counsel, wrote to CUSA's counsel formally seeking the inspection of records, indicating that failure to provide them would result in litigation. (Defendants' Ex. 13J at Ex. A [4 ER 52].) Dawe and Loud

continued to resist producing the records. (Defendants' Ex. 13J [4 ER 52].)

On August 11, 2006, CUSA's Board voted to suspend Dawe and Loud from their officer positions without pay pending further investigation. (Defendants' Ex. 8Y and 8Z [4 ER 49, 50]; 2 RT 138-140 [5 ER 68, pp. 1123-1125].)

On August 17, 2006, CUSA sent both Dawe and Loud a letter informing them that the CUSA Board had unanimously voted to cancel all of their contracts, effective immediately. (2 RT 140-141 [5 ER 68, pp. 1125-1126].)

C. Acrimony Erupts And The Two Sides Prepare For Litigation

Plaintiffs disagreed with Defendants' conclusions and actions and made accusations of their own. Not surprisingly, substantial acrimony developed and the parties "lawyered up."

On August 30, 2006, for example, Loud informed CUSA that he had been in contact with a California employment attorney concerning his suspension by CUSA, noting that he and Dawe could pursue litigation against all of those who voted to suspend them. (Defendants' Ex. 10F [4 ER 51].)

On September 7, 2006, Harkins informed CUSA's board that Dawe had just informed him that he was going to initiate legal proceedings against the CUSA board. (Plaintiffs' Ex. 589 [4 ER 39, p. 5].)

Four days later, on September 11, 2006, Dawe's lawyer asked the California Attorney General to investigate the claims and allegations (Plaintiffs' Ex. 250 [4 ER 36a]) contained in a lengthy letter authored by Dawe (Plaintiffs' Ex. 251 [4 ER 37]) complaining of Defendants' actions.

On September 29, 2006, Jimenez, on behalf of CUSA, filed a petition for a writ of mandamus against Dawe, Loud, and Harkins seeking the inspection of CUSA's books and records. (CUSA had been provided only a portion of the records sought in response to its counsel's August 2 letter.) (Defendants' Ex. 13J [4 ER 52].)

On October 14, 2006, Dawe, Loud and Harkins were formally removed from office and from the CUSA board. (Defendants' Ex. 15H [4 ER 54].)

And on January 7, 2007, Plaintiffs initiated this lawsuit. (1 ER 9, p. 149.)

D. Defendants Communicate With The Members Of Their Organizations, Explaining What The Dispute Is About

As the acrimony developed among the parties and they and their lawyers were hurling accusations, and continuing after litigation commenced, Defendants sent emails to the individual members of CUSA and CCPOA (including the other organizations that were members of CUSA), to inform them of legal actions being taken both by and against the Plaintiffs and summarizing the reasons underlying the actions being taken by CUSA and CCPOA. Plaintiffs sent like emails. (E.g., Defendants' Ex. 13L [4 ER 53].) Defendants' communications that were claimed to be defamatory are discussed at length *post*, pp. 21-30.

V. PROCEDURAL STATEMENT

This action began on January 5, 2007, when Plaintiff Dawe, individually and d/b/a Flat Iron Mountain Associates, filed suit in Wyoming state court charging Defendants with various tort and contract violations, primarily having to do with asserted acts of "defamation." (1 ER 9, p. 149.) In February, the matter was removed to the U.S. District Court for the District of Wyoming. (1 ER 9, p.

149.) CUSA answered, asserting counterclaims under California law. (1 ER 9, p. 149.)⁵

Meanwhile, on January 25, 2007, CUSA and Mike Jimenez sued Dawe and others in Sacramento County Superior Court. Dawe removed that suit to the U.S. District Court for the Eastern District of California. (1 ER 9, p. 149.)

In July, 2007, the parties to the Wyoming action stipulated to transfer it to the Eastern District of California. (1 ER 9, p. 150.) After transfer, the two federal matters were consolidated (1 ER 9, p. 151.) The upshot of a lengthy order was that the district court would apply California law. (1 ER 9, pp. 156, 158, 160.)

After a lengthy and contentious trial, the jury returned a verdict of \$2,591,409 in compensatory damages in favor of Dawe, FIMA, and Harkins and against CUSA, CCPOA, Baumann, and Baiardi (the latter were both CUSA officers). (1 ER 5.) Reconvening for a trial of punitive damages, the jury awarded an additional \$10,085,000 in punitive damages against CUSA and CCPOA. (1 ER 4.) The grand total was \$12,676,409.

⁵ Earlier, in September 2006, Jimenez, on behalf of CUSA, filed a petition for writ of mandamus against Dawe, Loud, and Harkins, seeking return of CUSA's papers and property. (1 ER 9, pp. 149-150.)

Responding to Defendants' post-trial motions, the district court held the punitive awards Constitutionally infirm and reduced the total punitive award to \$2,368,406. (1 ER 2.) Otherwise, the post-trial motions were denied. (1 ER 2, p. 5.)

This timely appeal followed. (5 ER 65.)

VI. SUMMARY OF ARGUMENT

- California Civil Code §47 provides absolute immunity for statements that might otherwise be defamatory, as long as the statements have “some relation” (*Kashian*, 98 Cal.App.4th at 913), i.e., are “not . . . extraneous” (*Silberg v. Adamson*, 50 Cal.3d 205, 220 [1990]) to litigation — existing or anticipated (*Rubin v. Green*, 4 Cal.4th 1187, 1195 [1993]). All the statements forming the basis of the judgment fell into this category.

- The defamation claim never should have gone to trial. It should have been eliminated pursuant to either the Defendants' motion to dismiss, their motion for summary judgment, or their motion in limine.

- Once tried, the defamation verdict should have been rejected by the court either before or after entry of judgment by

granting Defendants' motion for judgment as a matter of law (either the original or the renewed version).

- There are at least three other infirmities in the defamation award. *First*, Harkins' claim was barred by the statute of limitations. *Second*, Dawe's claim was unfairly expanded when the district court, toward the end of the trial, reversed its earlier ruling that Dawe was a limited purpose public figure (requiring him to satisfy a higher burden of proof) and held that he was not. *Third*, the jury duplicated some of the award, awarding the same contract-related damages multiple times for different claims.

- The claims for interference with contract and for interference with economic advantage also were barred by Civil Code §47. In any event, the jury improperly awarded duplicate compensation for the same claimed contract amount.

VII. ARGUMENT

A. California Civil Code §47 Immunizes All Purportedly "Defamatory" Statements

Civil Code §47 creates immunity from tort liability for:

"any communications (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to

achieve the objects of the litigation; and (4) that have some logical relation to the action.” (*Silberg*, 50 Cal.3d at 212.)

The district court held that the privilege did not apply here. (1 ER 2, p. 5; 1 ER 8, p. 134.) That is wrong as a matter of law. That pivotal error — repeated by denying three different motions before trial⁶ — radically and prejudicially changed the nature of the trial and the evidence presented to the jury. The four communications upon which Plaintiffs based their defamation claim all should have been excluded from evidence pursuant to Civil Code §47.

1. The Statute Creates An Absolute Privilege

Civil Code §47 has been referred to as “the backbone to an effective and smoothly operating judicial system.” (*McClatchy Newspapers, Inc. v. Superior Court*, 189 Cal.App.3d 961, 970 [1987].) The purpose of the privilege is to allow parties and their attorneys to fully investigate, discuss, organize, and advocate their cause without fear that the things they say in preparation and prosecution of it will result in later having to defend against some imagined tort liability. In the California Supreme Court’s words:

⁶ The motion to dismiss (1 ER 9, p. 179), the motion for summary judgment (1 ER 8, p. 134), and the motion in limine (1 ER 6, p. 52).

“Section 47(2) . . . promotes the effectiveness of judicial proceedings by encouraging open channels of communication and the presentation of evidence in judicial proceedings Such open communication is a fundamental adjunct to the right of access to judicial and quasi-judicial proceedings. Since the external threat of liability is destructive of this fundamental right and inconsistent with the effective administration of justice, courts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings” (*Silberg*, 50 Cal.3d at 213; internal citations and quotation marks omitted.)⁷

The privilege is not wishy-washy; it is absolute. (*Silberg*, 50 Cal.3d at 215-216 [“To effectuate its vital purposes, the litigation privilege is held to be *absolute in nature*”] [emphasis added].) In other words, the presence or absence of malice is irrelevant. The California Supreme Court has expressly rejected the notion that the privilege can be defeated if the defendant had an “improper objective” or the statements in question were contrary to the “interests of justice”:

“We conclude that the well-intentioned addition of the ‘interest of justice’ test must be rejected. [Overruling several Court of Appeal

⁷ In 1990, Civil Code §47 was restructured, with subdivision (2) being re-labeled subdivision (b). Thus, older cases refer to section 47(2), while newer ones cite section 47(b). The substance of the provision remained unchanged.

opinions.] A rule that an otherwise privileged communication is not privileged under section 47(2) unless made for the purpose of promoting the interest of justice is wholly inconsistent with the numerous cases in which fraudulent communications or perjured testimony have nonetheless been held privileged. . . . Finally, endorsement of the ‘interest of justice’ requirement would be tantamount to the exclusion of all tortious publications from the privilege, because tortious conduct is invariably inimical to the ‘interest of justice.’ Thus, the exception would subsume the rule.” (*Silberg*, 50 Cal.3d at 218; emphasis added.)

Thus, whether the statements at issue here were made maliciously has no bearing on the application of the litigation privilege.

2. California’s Litigation Privilege Is Broadly Construed And Applied To Matters Occurring Beyond The Courthouse

There was a time when it might have been said that the statutory description of the privilege applying to statements made “in” litigation provided some restriction. Perhaps. But no longer.

First, the courts have broadly construed and applied that privilege to include even communications made before litigation was instigated, as long as litigation was plainly being contemplated. (E.g., *Rubin*, 4 Cal.4th at 1194.) As one court summarized:

“The result has been to transform the relatively simple statutory privilege for communications made *in* a judicial proceeding into an amorphous immunity encompassing all kinds of communications related to an ‘*anticipated*’ lawsuit. [Citation.]” (*Edwards v. Centex Real Estate Corp.*, 53 Cal.App.4th 15, 31 [1997]; emphasis, the Court’s.)

Second, the privilege is not limited to statements made in court or in court-filed documents. Rather, “[f]or well over a century, communications with ‘*some relation*’ to judicial proceedings have been absolutely immune from tort liability by the privilege codified as section 47(b).” (*Rubin*, 4 Cal.4th at 1194-1195; [emphasis added]; *Silberg*, 50 Cal.3d at 220 [“The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be *connected with*, or have some *logical relation to*, the action, i.e., that it *not be extraneous to the action.*” [emphasis added].)⁸

Third, in light of its “expansive reach” (*Rubin*, 4 Cal.4th at 1194), communications with third parties who are interested in the litigation are also protected. (E.g., *Neville*, 160 Cal.App.4th at 1267-

⁸ See also *Neville v. Chudacoff*, 160 Cal.App.4th 1255, 1268 (2008) (“fairly expansive view of what constitutes litigation-related activities”); *Costa v. Superior Court*, 157 Cal.App.3d 673, 677 (1984) (“some proper connection or relation”).

1268 [letter to existing customers of defendant and potential future customers of plaintiff]; *Healy v. Tuscany Hills Landscape & Recreation Corp.*, 137 Cal.App.4th 1, 5-6 [2006] [letter to members of homeowners' association relating to dispute between association board and one of the members]; *Costa*, 157 Cal.App.3d at 678 [letter to members of subsidiary lodge by officers of parent lodge concerning dispute between parent and subsidiary]; *Rosenthal v. Irell & Manella*, 135 Cal.App.3d 121, 126 [1982] [communication with plaintiffs' insurers regarding settlement]; *Contemporary Services Corp. v. Staff Pro Inc.*, 152 Cal.App.4th 1043, 1055 [2007] [email providing litigation update to "individuals who had some involvement in the parties' litigation"].)

Indeed, many assertedly "defamatory" statements will, by definition, be made to third parties as that is central to the concept of "publishing" such statements, a necessary component of a defamation claim. (See Cal. Civ. Code §§ 45 [libel] and 46 [slander] defining defamation as "a false and unprivileged publication.") The question answered in these cases is whether the recipients were appropriate and, in a variety of circumstances, the California courts have responded that, as long as the recipients are interested in the subject

matter, the communication is privileged under Civ. Code §47.⁹

As discussed in detail below, each of the communications claimed by Plaintiffs to be defamatory was made (1) after litigation was expressly threatened or commenced; (2) to CUSA members, who had an abiding interest in the dispute; and (3) about the subject matter of the dispute.

3. The Communications By Defendants Were All Covered By The Litigation Privilege

Plaintiffs claim the following four communications to be defamatory:

1. Sept. 30, 2006 email from Defendant Donald Joseph Baumann, a CUSA officer and board member, to CUSA members, informing the members that CUSA had “initiated legal action” against Dawe, Harkins and Loud and explaining the allegations against them, namely, financial mismanagement, improper expense reimbursements, self-dealing, concealing information and failure to cooperate with an

⁹ That the petition for writ of mandamus was sent to some members of the press (see 6 RT 969) does not destroy the privilege. Court pleadings and information available in them may be published by the press, so supplying such documents to the press is not a tort, because imposing such liability “would defeat the purpose” of Civil Code §47. (*Abraham v. Lancaster Community Hosp.*, 217 Cal.App.3d 796, 823 [1990].)

internal audit, and other related allegations. (Plaintiffs' Ex. 856 [4 ER 41]; 18 RT 2956 [5 ER 79].)

2. Oct. 3, 2006 email from Jimenez to Harkins, with copies to Bauman, Defendant James Baiardi, and two other CUSA officials, Roy Pinto, another CUSA director, and Nina Salarno, legal counsel for CUSA, referencing the allegations above as to Harkins, and telling Harkins to "talk to the DA." (Plaintiffs' Ex. 863 [4 ER42].)

3. January 3, 2007 email from Baiardi, the CUSA Chairman and a Board member, to CUSA members, providing an "update" to the earlier Baumann email (communication 1 above), providing additional detail of CUSA's allegations against Plaintiffs in this action, and urging them to remain members of CUSA rather than joining the new organization started by Plaintiffs and thereby giving them money "to pay for their own personal legal defense." (Defendants' Ex. 16D [4 ER 55,p. 955].)

4. January 24, 2007 letter from CCPOA to the other organizations that were members of CUSA, similarly referring to this "lawsuit," reiterating the allegations against Plaintiffs, and seeking to deter CUSA members from defecting to Dawe's new, competing,

organization. (Plaintiffs' Ex. 743 [4 ER 40].)¹⁰

As a matter of law, all of these statements fall within Civil Code §47's litigation privilege.

First, all of these communications were made after litigation was either threatened or actually filed.

By the time of the first communication, on September 30, 2006, the following events had already occurred:

- On August 2, 2006, Defendants' counsel wrote counsel for CUSA,¹¹ requesting CUSA records and noting that litigation would follow if they were not produced, stating that failing the timely production, "please be

¹⁰ In opposing Defendants' renewed motion for judgment as a matter of law, Plaintiffs asserted that there were more instances of defamation than these four communications — and referred the trial court vaguely to four days of testimony from six witnesses. (4 ER 59, p. 980.) There is no testimony of "additional acts of defamation" in those four volumes of transcript. Rather, that testimony consists of other correctional officers from various parts of the country testifying as to their opinions about how Plaintiffs Dawe, Loud, and Harkins ran CUSA (e.g., 10 RT [5 ER 74] 1672-1674, 1690, 1686, 1729-1731, 1775; 11 RT [5 ER 75] 1856, 1941; 15 RT [5 ER 77] 2496), the events leading to their removal from CUSA office (e.g., 10 RT [5 ER 74] 1689, 1691, 1777, 1792-1795; 11 RT [5 ER 75] 1854, 1952; 12 RT [5 ER 76] 2077-2080), and the establishment of Plaintiffs' rival organizations (e.g., 10 RT [5 ER 74] 1684, 1802-1805; 11 RT 1859; 15 RT 2498).

¹¹ Dawe and Loud were still in charge of CUSA at that time.

assured that we will proceed to court and seek costs and fees for any refusal or delay.” (Defendants Ex. 13J [4 ER 52].)

- On August 30, 2006, Loud emailed Baiardi that he had contacted an attorney and that he and Dawe could “pursue litigation against those who voted to suspend [them] and ruin [their] reputations” (Defendants’ Ex. 10F [4 ER 51].)¹²

- At the September 7, 2006, CUSA board meeting, Harkins stated that “he had a duty to inform the board that he’d received an email last night from Brian Dawe informing him that Brian Dawe is going to institute legal proceedings against the board.” (Ex. 589 [4 ER 39, p. 894].)

- On September 11, 2006, Dawe’s attorney sent the California Attorney General a letter from Dawe describing his side of the dispute and urging the Attorney General to

¹² On August 11, 2006, Dawe and Loud had been suspended from their CUSA offices without pay pending investigation of CUSA finances. (4 ER 49, 50.)

investigate his claims against various CUSA personnel. (Plaintiffs' Exs. 250, 251 [4 ER 36a, 37].)

- On September 29, 2006, CUSA filed a petition for writ of mandamus in Sacramento Superior Court against Plaintiffs seeking recovery of CUSA property, and alleging that Dawe, Harkins and Loud "have breached their fiduciary duties, committed malfeasance, converted corporate assets, defrauded the corporation, engaged in self-dealing and interested transactions[,] systematically failed to keep proper minutes, accounts, records and books in accordance with Cal. Corp. Code § 1500, et. Seq., and have usurped corporate opportunities." (Defendants' Ex. 13J [4 ER 52, p. 940].) Although this was a separate lawsuit from the subject action, it was part of the same dispute concerning these same allegations against Plaintiffs (which were later alleged again by Defendants in the subject action, which Plaintiffs commenced on January 5, 2007).

Given the foregoing, there is no question that the temporal requirement of Civil Code §47 is satisfied. Indeed, in opposing

Defendants' motion for judgment as a matter of law, Plaintiffs conceded that there was no issue with respect to the timing of the communications. (4 ER 59, p. 980.)

Second, all these communications were made either to other parties to the litigation or to other interested parties.

The October 3, 2006 email was sent by CUSA board member Jimenez to Plaintiff Harkins, with copies only to Defendants Baumann and Baiardi and two other CUSA officials. The email was exclusively amongst parties to the dispute.

The September 30, 2006, January 3, 2007, and January 24, 2007 communications were all sent to the members of CUSA to inform them of the legal actions being taken by and about their organization. The September 30 email began:

“Members of the CUSA Board of Directors (BOD) who represent state organizations have initiated legal action to compel the release of financial and associated records from CUSA President Richard Loud, Treasurer Brian Dawe and Recording Secretary Gary Harkins.” (Plaintiffs' Ex. 856 [4 ER 41].)

The email then continues at length about specific allegations. Likewise, the January 3 email was labeled “Corrections USA Update” (Defendants' Ex. 16D [4 ER 55]), went to the same

recipients as the initial September 30 report, and provided additional details of the allegations against the Plaintiffs. It was filed after CUSA's petition for writ of mandamus against the Plaintiffs and two days before the Plaintiffs filed this suit below. The January 24, 2007 letter was sent from CCPOA (one of the constituent members of CUSA) to other constituent member organizations of CUSA and also detailed the basis of the litigation. CUSA members unquestionably are "interested parties" in a legal dispute concerning CUSA. (Compare *Healy*, 137 Cal.App.4th at 5-6 [letter from homeowners' association board to members about dispute with one of members]; *Costa*, 157 Cal.App.3d at 678 [letter from parent organization to members of subsidiary organization regarding pending dispute between parent and subsidiary].)

Third, all of these communications bore "some relation" to the litigation brought or being prepared by one side or both.

The subject matter of all communications was the same as the pending or planned litigation, i.e., the way that Plaintiffs operated CUSA when they were in charge. (Compare *Rubin*, 4 Cal.4th at 1194-1195; *Kashian*, 98 Cal.App.4th at 913.) Any doubt as to whether a statement is connected to litigation must be resolved in

favor of a finding of privilege. (*Costa*, 157 Cal.App.3d at 678.)

The October 3, 2006 communication was a five-sentence email between the parties to this dispute about the very basis of the dispute; i.e., that the CUSA board believed Harkins had misappropriated CUSA funds and covered it up. This email came a few days after CUSA filed its petition for writ of mandamus alleging the very same misconduct. (Defendants' Ex. 13J [4 ER 52, p. 980] [alleging that Dawe, Harkins and Loud "have breached their fiduciary duties, committed malfeasance, converted corporate assets, defrauded the corporation, engaged in self-dealing and interested transactions [etc.].) Jimenez telling Harkins to "talk to the DA" simply reiterates that this dispute is now being handled through legal channels, particularly in light of Dawe's previous contact with the Attorney General's office, where he requested investigation of his claims. That this email is "connected with" or bears "some relation" to the pending litigation requires no leap of logic.

The remaining three communications either informed the CUSA membership about the dispute, or sought to prevent the loss of CUSA members to Plaintiff's new organization – or both. Both informing interested parties and preventing further damage in the

form of lost customers are legitimate objectives “related to” litigation. (*Healy*, 137 Cal.App.4th at 5-6 [letter from homeowners’ association board to members about dispute with one of members]; *Costa*, 157 Cal.App.3d at 678 [letter from parent organization to members of subsidiary organization regarding pending dispute between parent and subsidiary]; *Contemporary*, 152 Cal.App.4th at 1055 [email providing update to individuals “who had some involvement” in litigation, including at least some customers (152 Cal.App.4th at 1050)]; *Neville*, 160 Cal.App.4th at 1267-1268 [letter to customers of defendant and possible future customers of plaintiff, urging them not to engage plaintiff].)

As detailed above, the September 30, 2006, January 3, 2007, and January 24, 2007 communications all informed CUSA members about the litigation and the allegations therein against Plaintiffs. These are the same kind of informational mailings as the ones found to be privileged in *Costa*, *Healy*, and *Contemporary*. Plaintiffs argued to the trial court that these communications did not specifically reference the “lawsuit” or “litigation” enough to qualify as privileged under Civil Code §47. The privilege, however, has no such formalistic requirement. The September 30 email, for example,

expressly begins by informing the membership that CUSA has “initiated legal action.” It then continues for two pages to detail various complaints and allegations against Dawe, Loud, and Harkins — all of the same allegations made in this action. That this email perhaps did not have a lawyer’s polish or did not continually say “the lawsuit concerns that” before enumerating these charges against the Plaintiffs does not alter the substance or purpose of the email.

Further, the January 3, and January 24, 2007 communications to CUSA members also had the express purpose of preventing CUSA members from defecting to Plaintiffs’ new rival organization. The January 3 email urged members to “stay the course” and cautioned that joining Dawe and Loud’s new organization would provide them with money to support “their own personal legal defense.” The January 24, 2007 letter likewise warned that “[a]ny monies that you send to support ACOIN will be used to defend [Plaintiffs] in the legal actions they have pending.”

Neville, 160 Cal.App.4th at 1267-1268, demonstrates how the district court below failed to apply California law. Where *Neville* immunized a letter to customers urging them not to patronize the plaintiff, the court below refused to immunize the January 24, 2007

letter, denigrating it as “simply an attempt by one organization to stave off competition from another, rival organization.” (1 ER 9, p. 178.) But “stav[ing] off competition” is no different than seeking to prevent defection of members (or customers), and this case is controlled by *Neville*.

At an absolute minimum, these communications were “not . . . extraneous” to the litigation. (*Silberg*, 50 Cal.3d at 220.) Although some of the language might have been more temperate, the passionate portrayal of events cannot detract from the evident fact that all of the communications dealt with the allegations surrounding the discharge of the Plaintiffs and the ensuing litigations filed by both sides as a result. As such, all of the supposedly defamatory communications were protected by the litigation privilege of Civil Code §47.

B. Harkins’ Claim For Defamation Against CCPOA Was Barred By The Statute Of Limitations

All defamation claims, as discussed above, were barred by California Civil Code §47’s absolute litigation immunity. Of the total defamation award, Harkins was given \$315,000 compensatory and an

additional \$315,000 punitive damages against CCPOA.¹³ Harkins' claims were doubly barred: they were not filed within the statutory limitations period.

The statute of limitations is one year. (Code Civ. Proc. §40[c].) The year begins to run upon "publication," i.e., when the defamatory statement is communicated to a person other than the one purportedly being defamed. (*Shively v. Bozanich*, 31 Cal.4th 1230, 1247 [2003].)

Although Harkins filed a Counterclaim for defamation against CUSA on July 9, 2007 (2 ER 13, p. 340) (thereby signifying his awareness of the concept in this context), he did not make a defamation claim against CCPOA until he amended his responsive pleading on June 29, 2009 (2 ER 14, p. 471), nearly two years later.

The only possible "defamation" asserted by Harkins was the October 3, 2006 email from CCPOA President Jimenez to Harkins himself with copies to defendants Baumann and Baiardi and two other CUSA officials. (Plaintiffs' Ex. 863 [4 ER 42].) As the statute of limitations began to run on that date, a claim filed almost three years

¹³ The jury's award of \$1,000,000 in punitive damages against CCPOA was reduced by the district court to \$315,000. (1 ER 2, p. 12.)

later is plainly not allowed.¹⁴

When Defendants raised this issue below, the only issue was whether CCPOA's defense was preserved in the Pretrial Conference Order. (1 ER 7.) It was.

At the time the Pretrial Conference Order was entered, CCPOA had pending an *in limine* motion that dealt specifically with this statute of limitations issue: "This motion is made on the grounds that the California one-year statute of limitations for defamation bars all claims by Harkins against CCPOA, and that the pleading of the defamation claim against CCPOA in Harkins' Fifth Counterclaim on June 29, 2009, does not relate back in time to the date of the filing of Harkins' counterclaims in 2007. . . ." (4 ER 28, pp. 787-788.)

The district court expressly ordered that "the court will amend the pretrial order to reflect that defendants have answered Harkins' fifth counterclaim and requested attorneys fees, and the court substitutes the list of defendants' motions in limine for defendants' disputed evidentiary issues." (1 ER 7a, p. 111b.)

Thus, CCPOA's statute of limitations defense was raised both

¹⁴ The other documents charged against Defendants were also outside the limitations period, as the latest of them was published January 24, 2007.

in its Answer (2 ER 11a, p. 278e) and in its motion in limine 13, which was incorporated by the district court into the Pretrial Conference Order. CCPOA properly maintained its defense and there was no waiver. The statute of limitations was properly raised below.

Harkins did not present any evidence of defamation by CCPOA after June 29, 2008, and any alleged defamation prior to that date is barred by the statute of limitations.

If more is needed beyond Civil Code §47 to eliminate Harkins' defamation claim, the statute of limitations does so.

C. The District Court's Changed Ruling Near The End Of Trial (Deciding Belatedly That Plaintiff Dawe Was *Not* A Public Figure Even For A Limited Purpose) Prejudiced Defendants' Case And Caused The Jury To Be Wrongly Instructed On His Defamation Claim

A limited purpose public figure is one who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” (*Gertz v. Robert Welch*, 418 U.S. 323, 351 [1974].) “It is sufficient that he ‘attempt to thrust himself into the public eye’ or to influence a public decision.” (*Gilbert v. Sykes*, 147 Cal.App.4th 13, 25 [2007].)

On February 4, 2010, the district court held that:

“defendants have met their initial burden as to Dawe being at least a limited public figure in that he has spoken at numerous events and was a well-known expert or advocate with respect to issues affecting correctional officers.” (1 ER 8, p. 137.)

That holding was correct and abundantly supported by the evidence (including Dawe’s own description of himself as a “leading expert on private prisons in the nation” and a “very big figure in the corrections arena.” (4 ER 31, pp. 838, 843.) Defendants prepared for trial accordingly. The importance of the district court’s ruling was that, as a public figure — even for a “limited” purpose — Dawe would have to establish actual malice by clear and convincing evidence in order to prevail on his defamation claim. (*New York Times v. Sullivan*, 376 U.S. 254 [1964].) The jury should have been so instructed. But it was not.

Instead, six weeks into the trial, on September 21, 2010, the district court stated that Dawe had “deprecated his role” as a public figure in the corrections field (see 21 RT 3536-3537), thereby requiring that the court reconsider its prior ruling. The district court then reversed course and held that Dawe was *not* a public figure.

The upshot was that defendants were blind-sided two-thirds of the way through the trial, and the jury was instructed using an

ordinary burden of proof (4 ER 57), rather than the heightened burden required by *New York Times*. Dawe was awarded millions in damages for defamation: \$1,639,405 compensatory and \$3,000,000 punitive against CCPOA,¹⁵ \$100,000 compensatory and \$25,000 punitive against CUSA, and another \$25,000 compensatory damages against Baiardi. (1 ER 4, 5.)

The district court's about-face was prejudicial error. Regardless of any self-serving attempts to minimize his prominence in the corrections world, Dawe's testimony still established facts well exceeding those necessary to hold him a limited public figure. Dawe testified with evident pride about how he had spoken throughout the country about issues affecting correctional peace officers, particularly regarding working conditions, safety, and prison privatization. (2 RT 143-147, 154-155 [5 ER 68, pp. 1127-1133].) These issues directly affect hundreds of thousands of correctional officers and are a topic of interest to anyone concerned with the criminal justice system. Dawe testified that advocacy regarding these issues was a primary professional mission and motivated the formation of CUSA. (2 RT

¹⁵ The district court later reduced the punitive award against CCPOA to match the actual damages found, i.e., \$1,639,405. (1 ER 2.)

143-147, 155, 166-167, 278 [5 ER 68, pp. 1127-1136, 1139].) In pursuing the goals of “educat[ing] the public” and “shar[ing] our common concerns and voic[ing] and address[ing] them,” Dawe was front and center as a public speaker, activist, and leading expert. (2 RT 143-144, 147, 155, 166-167, 278-279, 330-336, 350 [5 ER 68, pp. 1127-1136, 1139-1148].) In his words:

“. . . I spoke before the state legislator[s] in Wyoming, the judiciary panel there. I spoke before the Minnesota School of Law. I spoke before the Denver legislature [sic] on a privatization issue. I spoke before the Yale School of Law on privatization. I spoke before the Canadian parliament on privatization. . . . [¶] Ira Robbins from American University would use me frequently on some of the research we had done.” (2 RT 278-279 [5 ER 68, pp. 1139-1140].)

“I think if you look at any advocacy organization, there has to be some type of figurehead that runs the show I did a lot of motivational speaking as a union official, and I’ve had the ability to get people excited about my profession and what we do. I bring a lot of passion to what we do. [¶] And I think that was critical to my role as the executive director” (2 RT 166-167 [5 ER 68, pp. 1134-1135].)

“And I was very loud and vocal about [correctional officer issues], and I think that was one of the biggest assets I brought to the organization is my ability to rally people

together, to make them — let’s charge into this together And I think that was one of my biggest assets.” (2 RT 167 [5 ER 68, p. 1135].)

“I was brought in specifically for my communication skills and the fact that I was in touch with exactly what was going on. That’s why they brought me in. [¶] That’s why they bring me into protests. That’s why they bring me in to speak before state legislatures. That’s why they utilize my skills. That’s what I did.” (2 RT 166-67, 278 [5 ER 68, p. 1139].)

Dawe later augmented that testimony, specifically noting his appearances before the Colorado Legislature, the New Hampshire Legislature, and the Washington, D.C. City Council, as well as protests in New Jersey and Washington, D.C. (2 RT 334 [5 ER 68, p. 1145].) In fact, he attended such protests as CUSA’s executive director “whenever there was one around the country of one of our organizations.” (2 RT 336 [5 ER 68, p. 1147].) He did this to such an extent that he spent approximately half of each year travelling around the country, meeting with correctional officers and speaking at prisons, seminars, conferences, and rallies, in addition to the protests noted above. (2 RT 143-144, 147, 155, 336 [5 ER 68, pp. 1127-1128, 1131, 1133, 1147].) He put on press conferences, was quoted in newspapers and other publications (including *Business Week*), spoke

on the radio and published numerous articles and newsletters. (2 RT 335-336, 350 [5 ER 68, pp. 1146-1147]; 7 RT 1157 [5 ER 72, p. 1159]; 4 ER 31, p. 850.)

Indeed, he touts in his own biography that “[h]e is considered to be one of the leading experts on private prisons in the nation,” and “[h]e is a featured speaker at rallies, protests and conventions throughout the country supporting correctional officers everywhere.” (4 ER 31, p. 829.)

Plaintiffs who have done far less in the public eye have been held to be limited purpose public figures for purposes of defamation. (See, e.g., *Copp v. Paxton*, 45 Cal.App.4th 829, 845 [1996] [earthquake safety expert passed out flyers and script of his video, spoke before local emergency services council and organized disaster mitigation conference]; *Gilbert*, 147 Cal.App.4th at 25 [plastic surgeon wrote articles and appeared on local television concerning the virtues of plastic surgery]; *Nadel v. University of Cal.*, 28 Cal.App.4th 1251, 1269 [1994] [protesters spoke at demonstrations and city council meetings].) It is not possible to reconcile these cases with the district court’s ruling here.

The allegedly defamatory statements accused Dawe of acting

unethically in his position at the helm of a national correctional officers' association and called into question his fitness to represent corrections officers in similar positions. They related specifically to his conduct in the industry in which he held himself out as an expert and, as such, are "relevant to the public's decision whether to listen to him" or trust him. (*Waldbaum v. Fairchild Pubs., Inc.*, 627 F.2d 1287, 1298 [D.C. Cir. 1980].) The district court erred by reversing its initial holding that Dawe was a limited public figure. The error is clear and its prejudice is manifest. Reversal of Dawe's defamation judgment is therefore warranted on this ground, in addition to the Civil Code §47 basis.

D. The Claims For Interference With Contractual Relations And Interference With Prospective Economic Advantage Were Barred By California Civil Code §47 And Unsupported By The Evidence

The jury awarded FIMA \$333,000 actual damages and \$3,000,000 (reduced by the district court to \$333,000) punitive damages for interference with contractual relations against CCPOA. (1 ER 5, p. 32; 1 ER 4, p. 20.) The jury then awarded FIMA \$1 actual damages and \$25,000 punitive damages for the same tort against CUSA. (1 ER 5, p. 34; 1 ER 4, p. 19.) The jury added \$1 actual

damages for interference with prospective economic advantage in favor of FIMA and against CUSA, CCPOA, and Baiardi. (1 ER 5, pp. 34-35.) To this, the jury added \$3,000,000 punitive damages against CCPOA. (1 ER 4, p. 21.) The district court reduced the latter award to \$1. (1 ER 2, p. 12.) Although the latter series of awards for interference with prospective economic advantage is relatively inconsequential in terms of dollars, we expect that Plaintiffs will appeal the reduction of the punitive award. However, none of this kind of injury can be recovered as a matter of law — whether it is interference with contractual relations or interference with prospective economic advantage.

Again, Civil Code §47 applies to bar those claims. The law was summarized by the California Supreme Court:

“[S]ection 47(2) has been held to immunize defendants from tort liability based on theories of abuse of process, intentional infliction of emotional distress, *intentional inducement of breach of contract*, *intentional interference with prospective economic advantage*, negligent misrepresentation, invasion of privacy, negligence, and fraud.” (*Silberg*, 50 Cal.3d at 215-216; emphasis added; voluminous internal case citation omitted.)

The extensive discussion of the litigation privilege above applies equally here. The privilege is absolute. The alleged

interfering conduct is the same four communications discussed above; they are directly related to the events leading to litigation and part of the litigation. Thus, they cannot form the basis of any interference claims.

Beyond that, the evidence clearly shows that there is no support for a finding that Defendants interfered with FIMA's contract.

First, in order for the tort of interference with contract to exist, there must (1) actually be a contract which (2) the defendant acted to interfere with, which (3) resulted in breach of the contract. (E.g., *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 [1990].)

The FIMA/CUSA contract was effective July 1, 2006 (4 ER 930) and terminated on August 17, 2006, just over a month into the contract (4 ER 54). Dawe (the FIMA owner/employee who actually performed the job) had been suspended without pay a week earlier, on August 11, 2006. (4 ER 49.) Thus, any "interference" with that contract would necessarily have to have occurred during that narrow, five or six week, window when the contract existed.

Second, there was no "interference" during that brief period of the contract's existence, and nothing that would call forth hundreds of

thousands — much less millions — of dollars worth of damages for interference. All of the acts complained about occurred *after* the CUSA Board voided the CUSA/FIMA contract on August 17, 2006 or, occurring before that contract was formed, could not have been done with any reference to it.

The interference awards cannot be sustained, as a matter of law or fact.

E. The Judgment Erroneously Awarded Multiple Recovery For The Same Injury In The Guise Of Compensating For Both Breach Of Contract And Interference With Contractual Relations And Then Improperly Increased That Amount By Including The Same Contract Damages As Part Of Dawe's Defamation Award

The jury awarded FIMA \$111,000 for breach of contract against CUSA and then awarded FIMA another \$333,000 for interference with contractual relations against CCPOA.

At least \$111,000 of that award is duplicative. No more than simple math is required. FIMA's contract provided that if CUSA terminated it FIMA would receive \$111,000 (i.e., one year's payment). (4 ER 46.) When the jury awarded another \$333,000 for interference with contractual relations, that simply involved taking the one-year \$111,000 payment and multiplying it by the three years of

the contract. (4 ER46.) But the first year's worth had already been awarded for the breach of contract claim. No legal precept justifies doubling that amount.

There is no question about what happened. The double recovery is precisely what Plaintiffs' counsel urged the jury to award. In fact, counsel asked for more than double: he sought recovery of the \$111,000 against CUSA for one year's pay (30 RT 4916) and then asked *another* \$333,000 (including the already claimed \$111,000) against CCPOA for interference with contractual relations (30 RT 4917).¹⁶ The same evidence cannot support damages for *breach* of contract and then simultaneously for tortious *interference* with the *same contract*, which is what happened below. Whether it be called "breach" or "interference," it is the *same* item of damage:

"That DuBarry based his case on two separate causes of action does not necessarily mean that he was entitled to receive a separate damage award for each. If a given state of facts entitles one to recover damages upon the theory of tort, *and the same state of facts* entitles him to recover upon the theory of contract, it would seem plain that recovery could not be twice had simply because the facts would support

¹⁶ Plaintiffs' counsel also asked for the same \$333,000 (including the same \$111,000) for Plaintiffs' breach of implied covenant claim. (30 RT 4917.)

recovery upon either theory.” (*DuBarry Int’l, Inc. v. SW Forest Indus., Inc.*, 231 Cal.App.3d 552, 563 [1991]; emphasis added; internal citations and quotation marks omitted.)

Although *multiple theories of liability* are permissible (e.g., *Smart v. City of Los Angeles*, 112 Cal.App.3d 232, 239 [1980]), a plaintiff is “of course entitled to *only one recovery . . .*” (*Id.*; emphasis added), even though the same “state of facts entitles one to recover damages upon the theory of tort, and the same state of facts entitles him to recover upon the theory of contract” (*Dubarry*, 231 Cal.App.3d at 563.) The California Supreme Court was blunt:

“Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited.” (*Tavaglione v. Billings*, 4 Cal.4th 1150, 1158-1159 [1993].)

It is the same damage item here. The jury gave both one year’s worth and then three year’s worth of the contract amount, but that provides one year too many. Not content with that, the jury added punitive damages of \$3,000,000 against CCPOA (reduced by the district court to \$333,000). Counsel asked the jurors to run away with

these numbers, and they complied. If the jury thought there was a problem here that warranted compensation, one award sufficed. Reversal of the multiple recoveries (and their associated punitive damages) is warranted.

But there is more double-counting. When the jurors awarded Dawe \$1,789,405 as actual damages for defamation — the precise total testified to by Plaintiffs’ expert Mark Cohen (Plaintiffs’ Ex. 1045 [4ER 44]) — they duplicated the contract damages, as Plaintiffs’ expert clearly testified.

Cohen’s damage number was a total of *all* damages. As he put it, “But the calculations I’ve made were with respect to *the defamation as well as the contract.*” (22 RT 3657 [5 ER 80, p. 1209]; emphasis added.) “I have one calculation because *one subsumes the other.*” (22 RT 3657 [5 ER 80, p. 1209]; emphasis added.) “I assume that but for the actions of Corrections USA, Brian Dawe and Flat Iron Mountain Associates could have expected to earn revenues based on the contract signed 6/16/2006” (Plaintiffs’ Ex. 1045, p. 2 [4 ER 44, p. 910].) Thus, the jury’s defamation award necessarily included all of the “damages” also awarded for breach of contract and interference with contract. Although multiple theories were put forth to collect the same

damage item, it was error to allow *multiple recovery* on those theories.

As the court put it in *Walker v. Signal Cos.*, 84 Cal.App.3d 982, 995-996 (1978), “When we search the record for some factual basis for the judgment based on fraud, we are unable to find any item not otherwise included within the compensatory award for breach of contract.” That is the same situation here. The Plaintiffs’ expert testified to a consolidated damage amount for a single set of facts. The jury improperly awarded the same damage item more than once.

Plaintiffs thus asked the jury to take the same evidence and the same element of damage and award it multiple times by changing the label on the verdict sheet. The jury took the bait.¹⁷ The result was an

¹⁷ The jury’s overreaching also was enabled by the district court’s continual criticisms of Defendants’ counsel — on the record before the jury. The trial record is replete with the district court’s hostile remarks directed at Defendants’ trial counsel, which prejudicially undermined Defendants’ credibility. (See, e.g., 23 RT 3846 [5 ER 81, p. 1211] [referring to a question as containing “all that BS”]; 4 RT 661 [5 ER 70, p. 1154] [referring to questioning as “bizarre”]; 4 RT 686 [5 ER 70, p. 1155] [asking counsel to come to sidebar while saying in open court that he didn’t want the jury to hear him “making potentially disparaging remarks”]; likewise 7 RT 1171 [5 RT 72, p. 1160]; 8 RT 1517 [5 ER 73, p. 1162]; the list could go on.

Yet, when CCPOA sought to substitute trial counsel, the district court refused (11 RT 2034), and later even denied Defendants’ request to allow associate counsel to examine just two witnesses (15 RT 2680 [5 ER 77, p. 1200]; 16 RT 2684 [5 ER 78, p. 1203]). The district

erroneously bloated judgment which this Court should reverse.

F. The Award Against CUSA Is Unconstitutionally Large In Light Of CUSA's Financial Status

The district court understood that the jury had simply gone wild with the punitive damage awards, giving the Plaintiffs \$10,085,000 on top of what the jury determined to be compensatory damages. (1 ER 2.) The district court remitted the total punitive damages to \$2,368,406. (1 ER 1.) Of that total, \$81,000 was awarded against CUSA.

In light of the evidence of CUSA's financial condition, that award was unconstitutionally high. To begin with, the compensatory damage award of \$247,001 was nearly three times the amount of CUSA's net worth; with the punitive damages added on, the damages are nearly four times CUSA's net worth. Moreover, the damage

court refused, not because of any concern about delay or prejudice. Indeed, Plaintiffs' counsel admitted he could not "in good conscience jump up and down and say there's a bunch of prejudice. I can't do that." (15 RT 2681 [5 ER 77, p. 1201].) Instead, Defendants' requests were denied because Defendants' proposed counsel was not present at the final pretrial conference. But Defendants' counsel could not have been there, as he was on active duty with the U.S. Army in Afghanistan at that time (15 RT 2680 [5 ER 77, p. 1200]) — a legitimate reason for not being in a Sacramento courthouse if ever there was one.

awards exceed the total of all of CUSA's monetary assets plus all of its projected revenue for the next year, less only remaining salaries (following several layoffs) and insurance.¹⁸

VIII. CONCLUSION

The district court prejudicially erred by allowing the defamation claims to go to trial. The jury then compounded that error by awarding millions of dollars in damages for claims that cannot be sustained as a matter of settled California law.

Defendants pray that the judgment be reversed.

¹⁸ At the time of the hearing on punitive damages, CUSA was in the process of shutting down its headquarters in Sacramento and had laid off a number of employees. (33 RT 5233, 5234.) It had approximately \$103,000 in CDs and \$20,000 to \$21,000 in a checking account, and had approximately \$35,000 in outstanding obligations. (33 RT 5243, 5258.) CUSA's revenue (dues from individual members and organizations) was projected to be from \$474,000 to \$546,000 over the next year. (33 RT 5214, 5222, 5227.) Its remaining salary expenses (following the layoffs) and insurance premiums total \$365,400 for a year. (33 RT 5240, 5244, 5245.)

Dated: October 25, 2011

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of the Federal Rule of Appellate Procedure 32(a)(7)(B) and contains **9,920** words, exclusive of the corporate disclosure statement, the table of contents, the table of authorities, as counted by the 2003 Microsoft Word word-processing program used to generate this brief.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 2003 Microsoft Word word-processing program with a 14-point Times New Roman font.

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

Dated: October 25, 2011

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Nos. 11-16284 & 11-16416

**FIRST BRIEF ON CROSS-APPEAL: APPELLANTS'
OPENING BRIEF**

I hereby certify that on October 25, 2011 I **electronically filed FIRST BRIEF ON CROSS-APPEAL: APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

EXCERPTS OF RECORD

I further certify that on October 25, 2011 I filed by **Overnight Delivery EXCERPTS OF RECORD, 5 VOLUMES** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit. I certify that service of same will be accomplished by **U.S. Mail** to all participants in the case, listed below.

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