

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

SUTTER HEALTH et al.,

Plaintiffs and Appellants,

v.

UNITE HERE,

Defendant and Appellant.

C054400

(Super.Ct.No.
SCV17938)

APPEAL from a judgment of the Superior Court of Placer County, Charles D. Wachob, Judge. Reversed.

Altshuler Berzon, Michael Rubin, Scott A. Kronland and Stacey Leyton for Defendant and Appellant.

Levy, Ram & Olson, Karl Olson, Erica L. Craven; Thomas W. Newton; Stephen J. Burns; Karlene W. Goller; Jonathan R. Donnellan, Kristina E. Findikyan; Judith L. Fanshaw; and Margaret C. Crosby for California Newspaper Publishers

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II through V.

Association, McClatchy Newspapers, Inc., McClatchy Company, Los Angeles Times Communications LLC, Hearst Corporation, The Associated Press, Copley Press, Inc., American Civil Liberties Union of Northern California and California First Amendment Coalition, as Amici Curiae on behalf of Defendant and Appellant.

O'Melveny & Myers, Robert C. Welsh, Sarah A. Stofferahn; Jones Day, F. Curt Kirschner, Jr. and Christopher T. Scanlan for Plaintiffs and Appellants.

In an effort to force a nationwide laundry company to employ only union members and to improve their working conditions, a labor union commenced a campaign utilizing a variation of a technique known as secondary picketing. The campaign was directed at a group of hospitals that used the services of the laundry company. The union mailed postcards to prospective clients of the hospitals, warning them that the hospitals had their laundry cleaned by a company that did not ensure the cleaned linens would be free of blood, feces, and other harmful pathogens. The postcards were intended to (1) dissuade people from using the hospitals because of the laundry company's shortcomings, thus (2) put pressure on the hospitals to stop using the laundry company's services, which would (3) persuade the laundry company to agree to the union's demands in order to avoid the loss of the hospitals' business.

The hospitals fought back. Armed with evidence that their inspection control and linen handling policies ensured the delivery of hygienically clean laundry to all their patients, but that the union's postcard campaign had caused fewer patients to use the hospitals, the hospitals sued the union for defamation, trade libel, and intentional interference with prospective economic relations.

The union appeals from the \$17 million judgment entered after a jury found in favor of the hospitals.

We agree with the union that the court committed harmful error by refusing to instruct the jury that the hospitals had the burden of proving by clear and convincing evidence that the union made the defamatory publication with actual malice, i.e., with knowledge of its falsity or with reckless disregard of whether it was true or false.

As we will explain, binding federal law holds that this actual malice burden of proof applies to plaintiffs who seek state remedies for defamatory labor dispute publications, and that such publications include those directed at "secondary targets," i.e., companies using the services of a company that is engaged in a labor dispute with an employee union. The postcard publication in this case was such a labor dispute communication because the union used it to advance the union's primary dispute with the laundry company by exerting pressure on the hospitals to stop using the laundry's services if the labor dispute was not resolved. Instead of giving the required actual malice instruction, the trial court told the jury that the union could be liable if it failed to use reasonable care to determine the truth or falsity of the publication. This was harmful error because the instruction omitted a vital element of the case and misinformed the jury regarding the hospital's burden of proof.

Accordingly, we shall reverse the judgment. In the unpublished parts of this opinion, we will address some of the union's other claims of error for guidance to the trial court on remand.

FACTS

This case has its genesis in a labor dispute between UNITE HERE and Angelica Textile Services, Inc. (Angelica). UNITE HERE, a labor union, is the collective bargaining representative for about 450,000 workers employed in the garment industry, industrial laundries, and food service establishments across North America. Angelica is the largest healthcare laundry company in the United States, with approximately 31 laundry facilities nationwide.

By early 2005, UNITE HERE represented over 2,500 workers at approximately 21 Angelica facilities, including workers at the laundry facilities used by Sutter Health hospitals (collectively Sutter Health).

UNITE HERE had begun a nationwide campaign in 2003 to organize the workers at all of Angelica's commercial laundry facilities. Healthcare laundries were a big priority because, according to UNITE HERE, such workers face some of the worst and most hazardous working conditions. The "Angelica campaign" was designed to improve the working conditions and strengthen the union in the shops where UNITE HERE represented workers employed by Angelica, and to bring those protections to workers in unorganized shops.

UNITE HERE began investigating Angelica's physical facilities and their compliance with health and safety regulations. The union had received complaints from workers that, because of unsanitary conditions and inadequate separation between "clean" and "soiled" areas of the laundry, clean linens were being exposed to blood, feces, human tissue, and other hazards. According to the union, Angelica was not regularly disinfecting work areas and was not

providing hepatitis B vaccines and training on blood-borne pathogens to workers in the laundry area. UNITE HERE members visited a number of Angelica shops to see if such unsanitary conditions were unique to a few shops or part of a larger pattern. Similar conditions were observed at all of the shops. Indeed, the Occupational Safety and Health Administration (OSHA) cited Angelica for putting clean linen in dirty carts, not providing workers with protective equipment, and having working conditions that caused workers to step in blood and feces.

UNITE HERE wrote to Angelica to complain about the company's noncompliance with OSHA's blood-borne pathogen standards, urging it to remedy the sanitation and housekeeping problems in its soiled linen departments. Angelica did not respond.

Sutter Health used laundry facilities owned and operated by Golden State Services, Inc.--facilities which Angelica acquired in December 2004. The laundry workers had a bargaining agreement with UNITE HERE that remained in effect until December 2006.

In May 2004, UNITE HERE prepared a report, "Compromising on Quality," which presented evidence that Angelica's failure to maintain a sanitary workplace "leads to the delivery of soiled, smeared, and smelly linens" to hospitals. The report (1) summarized the results of UNITE HERE's "systematic investigation of the working conditions and quality control throughout Angelica's nation-wide system of healthcare laundries," and (2) incorporated the results of interviews with hundreds of Angelica workers across the country, people from each stage of the production process, and hospital materials management personnel. For example, an employee reported

receiving "clean" linens with clots of blood or feces. Hospitals reported that, with varying degrees of frequency, Angelica delivered linens that were "smeared, stained, tattered, damp, foul-smelling, and torn." A materials management employee at an Angelica client hospital reported that linen delivered by Angelica smelled "like urine and BM." The report stated that Angelica's practices violated OSHA's requirements, as well as those of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO).

UNITE HERE sent its "Compromising on Quality" report to many of Angelica's customers, including Sutter Health. The union also wrote to Sutter Health's vice president for procurement about Angelica's problems; advised Sutter Health of the labor dispute; warned that, if it continued to do business with Angelica, Sutter Health could face service interruptions; and suggested that Sutter Health meet with representatives of UNITE HERE.

A few months after Angelica acquired the laundry facilities used by Sutter Health, UNITE HERE began escalating its campaign to organize all of the Angelica workers nationwide. According to UNITE HERE, Angelica had not been responsive to the union's health and safety concerns, and the hospitals had not contacted UNITE HERE. The only response from one medical center was to ask the union to stop leafleting in front of its hospital. UNITE HERE, which had hoped to avoid a strike, began planning one for May 2005 at Angelica facilities in New York, Kansas, Texas, North Carolina, Florida, and some facilities in southern California.

Meanwhile, around late March 2005, UNITE HERE mailed numerous postcards (1) warning that Angelica, the laundry service used by

Sutter Health did not ensure its linens were free of harmful pathogens, and (2) urging potential Sutter Health patients to protect their newborns because Sutter Health may not be taking sufficient precautions against potential infections.

One side of the postcard stated: "EXPECTING? [¶] You may be bringing home more than your baby if you deliver at a Sutter birthing center." The other side said: "You will do *anything* to protect your vulnerable newborn from infection--but your Sutter birthing center may not be taking the same precautions. Reports have surfaced that Angelica, the laundry service utilized by Sutter, does not ensure that 'clean' linens are free of blood, feces, and harmful pathogens. [¶] *Protect your newborn.* [¶] Choose your birthing center wisely. [¶] www.thedirtylaundry.org [¶] UNITE HERE is engaged in a labor dispute with Angelica Textile Services."

The website noted on the postcard contained information about the working conditions at Angelica facilities and included a copy of the "Compromising on Quality" report.

The text of the postcard was the collaborative effort of UNITE HERE's research coordinator, Connie Raza, UNITE HERE's director of communications, Anastasia Ordonez, and another UNITE HERE employee, Cristina Gallo.

Raza devised the "Sutter Escalation Plan," which involved mailing the postcard to prospective clients of birthing centers at Sutter Health hospitals. The target audience was "wealthier women between 25 and 40 who are registered to vote." The focus of the campaign was on Sutter Health because the creators of the postcard were trying to think "critically" about Angelica's large corporate

customers, and Sutter Health had become a significant customer a few months earlier. The purpose was to dissuade individuals from doing business with Sutter Health's affiliates unless Sutter Health stopped doing business with Angelica. Angelica had refused to listen to the union's complaints, and UNITE HERE thought that, if the union reached people whose interests were also affected by the conditions in these workplaces, then the workers' voices might be heard by Angelica.

In June 2005, a few months after the postcard was mailed, UNITE HERE and Angelica entered into an organizing rights agreement under which UNITE HERE obtained the right to organize all of the remaining Angelica workers.

Meanwhile, in April 2005, Sutter Health sued UNITE HERE for defamation, trade libel, and intentional interference with prospective economic relations (IIPER), based on the publication of the postcard.¹

¹ UNITE HERE's methodology might be construed as an unlawful labor practice, but Sutter Health chose not to pursue recourse on this ground. (See 29 U.S.C. §§ 158(b), 187(a); *Intercity Maintenance Co. v. Local 254* (1st Cir. 2001) 241 F.3d 82, 87 [indirect efforts to pressure a secondary employer are unfair labor practices].) This was pointed out by the United States District Court when it rejected UNITE HERE's attempt to remove the action to federal court. The district court observed that Sutter Health likely could have raised a federal question by alleging an unfair labor practice claim, but it chose not to avail itself of that remedy--instead pursuing state law remedies in its quarrel with UNITE HERE, which the federal district court referred to as a labor dispute. (*Sutter Health v. UNITE HERE* (E.D. Cal. Aug. 10, 2005, No. 2:05-CV-1081 MCEPAN) 2005 WL 1925910 [nonpub. opn.].)

Sutter Health presented evidence that it experienced negative effects from UNITE HERE's campaign. For example, public opinion surveys conducted by Sutter Health on a regular basis revealed that the percentage of women aged 25 to 39 who disagreed with the statement that Sutter Health offers high-quality healthcare doubled after the postcard was mailed. Other evidence indicated that fewer women chose Sutter Health facilities as a birthing option. A field survey of the postcard recipients on UNITE HERE's mailing list, which survey replicated the postcard but used a fictitious "XYZ" hospital name in place of Sutter Health, indicated the message on the postcard negatively affected the recipients' willingness to use or recommend the fictitious hospital.

Sutter Health also presented testimony from a representative group of its infection control practitioners, nurses, and linen managers who described their infection control practices and testified those practices ensured that Sutter Health provided patients with clean, safe linen. In addition, Dr. William Rutala, an expert in infection control and healthcare practices, reviewed Sutter Health's written infection control and linen handling policies and the inspection reports documenting Sutter Health's inspections of the three laundry facilities it uses. Dr. Rutala testified Sutter Health hospitals take reasonable and appropriate precautions to ensure that hygienically clean linen is delivered to all patients; indeed, Sutter Health voluntarily created and implemented practices for linen sanitation that included several extra and redundant layers of protection going above and beyond what is required by California law and infection control guidelines.

UNITE HERE representatives were not aware or did not know if anyone had ever acquired an infection from linen laundered by Angelica and used by Sutter Health. And the union knew nothing about Sutter Health's infection control procedures. However, Raza, the union's research coordinator, testified that in early March 2005, she had a series of meetings with Sutter Health employees who told her about Sutter Health's linen quality and infection control problems. According to Raza, at least one woman from Sutter Health's environmental services department told her the linen received from Angelica "was really gross" and "c[a]me[] with stains and materials on it that is like human excrement and things like that."

David Unger, an organizer in UNITE HERE's healthcare laundry division, testified he met with Angelica workers at many facilities, including those used by Sutter Health, and he observed many health and safety problems. He passed the information on to Raza and Gallo.

Belinda Thielen, the senior health and safety officer for UNITE HERE, testified she honestly believed that Angelica did not ensure its linens were free of pathogens. This belief was based on her research, what she learned at various Angelica facilities, and what her coworkers assigned to other Angelica facilities observed about unsanitary working conditions. Thielen interviewed workers from six California facilities, plus facilities in four other states, and she inspected several facilities in California. She observed many unsafe practices, including a lack of protective equipment for workers, a lack of soap and hot water in the bathrooms, workers

standing on what appeared to be smears of blood and feces on flooring that could not be decontaminated easily, traffic patterns between the soiled linen areas and clean linen areas that did not appear to be properly controlled, and carts that appeared to have soil on them from hospital linen. Thielen learned that workers assigned to the clean side of the plant were finding contaminants such as blood and feces they felt presented a hazard to them. However, these reported incidents did not involve Angelica facilities that laundered Sutter Health's linens.

Thielen further testified she consulted with Dr. John Rosenberg, a public health physician, to determine whether linen that appeared to have been improperly cleaned at Angelica facilities could present a risk to people receiving the linen. Dr. Rosenberg explained there could be a problem for people with suppressed immune systems. Thielen believed that this would apply to babies because they have undeveloped immune systems. Thielen also conducted a search of medical literature and found that microbes can survive and grow on linens, that linens can be recontaminated after cleaning, and that there is documentation linking illness or infection with exposure to contaminated linens.

According to Thielen, she had no reason to doubt, and she was confident in, the information upon which she relied for the postcard. She knew that Angelica as a corporation had consistent practices throughout all of the plants with which UNITE HERE was familiar.

Sutter Health argued UNITE HERE's postcard was defamatory and damaged Sutter Health's prospective economic prospects because it falsely indicated that Sutter Health did not use clean sheets or

adequately care for the safety of infants born at Sutter Health hospitals.

The jury found UNITE HERE liable to 12 of the 14 Sutter Health plaintiffs on the defamation and IIPER causes of action, and awarded them between \$81,825 and \$2,618,000 in damages for defamation, plus identical amounts for IIPER. The jury found that another plaintiff was entitled to defamation damages but not IIPER damages. The jury did not award the Sutter Health plaintiffs any damages for trade libel. The jury found the defamation and IIPER torts were committed with malice, fraud, or oppression but did not award any punitive damages. The total award plus costs exceeded \$17 million.

DISCUSSION

I

UNITE HERE contends the trial court erred in refusing to give a proposed instruction that would have told jurors that, in order to find UNITE HERE liable for defamation, the Sutter Health plaintiffs "must prove by clear and convincing evidence that UNITE HERE knew the statements were false or had serious doubts about the truth of the statements."²

² When UNITE HERE's counsel asked if the rejection of the proposed instruction was a ruling "that this is not a labor dispute," the court replied: "I made a ruling that your proposed jury instruction is not applicable to the facts given the law." Instead, as to the cause of action for defamation, the court instructed, in pertinent part, that to establish this claim, Sutter Health must prove "UNITE HERE failed to use reasonable care to determine the truth or falsity of the statement(s)." As to the cause of action for trade libel, the court instructed, in pertinent part, that Sutter Health must prove "UNITE HERE published the statement with malice, express or implied." The court then told the jurors this malice requirement is satisfied

The proposed instruction was based on *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [11 L.Ed.2d 686] (hereafter *New York Times*), which held that a public official or public figure plaintiff seeking damages for defamatory statements must prove by clear and convincing evidence that the defendant acted with actual malice, i.e., the defendant made the defamatory statement with knowledge of its falsity or with reckless disregard of whether it was true or false. (*Id.* at pp. 279-280 [11 L.Ed.2d at pp. 706-707]; see also, *Gertz v. Welch* (1974) 418 U.S. 323, 342-343 [41 L.Ed.2d 789, 807].) Such reckless disregard is a subjective standard that is measured by whether "the defendant in fact entertained serious doubts as to the truth of [its] publication," not by whether a reasonably prudent person would have published the statement or would have investigated before publishing it. (*Harte-Hanks, Inc. v. Connaughton* (1989) 491 U.S. 657, 688 [105 L.Ed.2d 562, 589]; *St. Amant v. Thompson* (1968) 390 U.S. 727, 731 [20 L.Ed.2d 262, 267].)

UNITE HERE claims that Sutter Health is a public figure, thus the *New York Times* actual malice standard applies. Alternatively, the union contends that, even if Sutter Health is not a public

if they find "any one of the following to be true: [¶] 1. That UNITE HERE's state of mind was characterized by actual hatred, spite, or ill will; [¶] 2. That UNITE HERE published a false statement despite lacking reasonable grounds to believe it to be true or displayed a reckless disregard for the truth or falsity of the statement; or [¶] 3. That malice may be implied from UNITE HERE's wrongful activities. For example, if you conclude that UNITE HERE knew that the statement was false at the time it published it, th[at] UNITE HERE made the statement with the intent to deceive, or that other facts and circumstances demonstrate a malicious state of mind, no further evidence of malice is necessary."

figure, the actual malice standard applies because UNITE HERE's publication was made during a labor dispute.

For reasons that follow, we conclude the requested actual malice instructions should have been given because the publication was a labor dispute communication. Therefore, we need not decide whether Sutter Health is a public figure.

A

"Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." (*Linn v. United Plant Guard Workers* (1966) 383 U.S. 53, 58 [15 L.Ed.2d 582, 587] (hereafter *Linn*).)

Thus, in *Linn*, the United States Supreme Court found it was "necessary to determine whether libel actions in such circumstances might interfere with the national labor policy" contained in the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et. seq.). (*Linn, supra*, 383 U.S. at p. 58 [15 L.Ed.2d at p. 587].) The "resolution [of that question] entails accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State to protect its citizens against defamatory attacks." (*Id.* at p. 57-58 [15 L.Ed.2d at p. 587].)

The court "acknowledge[d] that the enactment of § 8(c) [of the NLRA] manifests a congressional intent to encourage free debate on issues dividing labor and management" (*Linn, supra*, 383 U.S. at p. 62 [15 L.Ed.2d at p. 589]) and that the National Labor Relations Board leaves "'to opposing parties the task of correcting inaccurate and untruthful statements.'" [Citation.]" (*Id.* at p. 60 [15 L.Ed.2d at p. 588].) The court noted, however, that, while "tolerat[ing] intemperate, abusive and inaccurate statements made by [a] union during attempts to organize employees," the National Labor Relations Board "does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false." (*Id.* at p. 61 [15 L.Ed.2d at p. 589].)

Accordingly, the Supreme Court held the exercise of state jurisdiction over defamatory statements in labor disputes is not inconsistent with the NLRA "provided [that state jurisdiction] is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false." (*Linn, supra*, 383 U.S. at p. 61 [15 L.Ed.2d at p. 589].) Stated another way, "the availability of state remedies for libel" in labor disputes is limited "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." (*Id.* at pp. 64-65 [15 L.Ed.2d at p. 591].)

Consequently, in the context of labor disputes, the court held that, to trigger the "actual malice" requirements of *New York Times*, the plaintiff need not be a public figure. (*Linn, supra*, 383 U.S. at pp. 64-65 [15 L.Ed.2d at p. 591].)

Moreover, "any publication made during the course of union organizing efforts, which is arguably relevant to that organizational activity, is entitled to the protection of *Linn*," even if it is not made during a representation election campaign, and regardless of whether the publication concerns efforts leading to recognition or post-recognition organizing activity. (*Letter Carriers v. Austin* (1974) 418 U.S. 264, 279 [41 L.Ed.2d 745, 759 (hereafter *Austin*).)

Thus, libel and slander actions in state court may be brought within the context of a labor dispute only if the defamatory publication is shown by clear and convincing evidence to have been made with knowledge of its falsity, or with reckless disregard of whether it was true or not. (*Austin, supra*, 418 U.S. at p. 281 [41 L.Ed.2d at p. 760]; *Ruzicka Elec. v. International Broth.* (8th Cir. 2005) 427 F.3d 511, 523.)

B

UNITE HERE asserts that its postcard publication was a labor dispute communication because it was made during union organizing efforts and was a means to cause Sutter Health to pressure Angelica to improve unsanitary workplace conditions and to organize all of its laundry establishments. (See, e.g., *Metropolitan Opera Ass'n, Inc. v. Local 100* (2d Cir. 2001) 239 F.3d 172, 173-174, 177 [union's actions of seeking to assert social pressure on opera association in connection with labor dispute between union and association's food service provider, by warning of "repercussions" against those who did not join its boycott of opera association, including such repercussions as leafleting condemning an association donor for refusing to join, constituted protected speech under First Amendment

notwithstanding that actions might have been harassing, upsetting, or coercive].)

Controlling federal law supports UNITE HERE's contention.

Whether a labor dispute exists within the meaning of the NLRA is a question of law. (*Hasbrouck v. Sheet Metal Workers Local 232* (9th Cir. 1978) 586 F.2d 691, 694.) The NLRA defines a "labor dispute" as "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." (29 U.S.C. § 152(9).)

"As the statutory definition clearly states, the existence of a labor dispute does not depend upon the existence of an employer-employee relationship. As long as the union acts for some job-related reason in order to exert economic pressure, the conflict constitutes a labor dispute. 'Rarely have courts found concerted union activities to fall outside this broad definition. Where the union acts for some arguably job-related reason, and not out of pure social or political concerns, a "labor dispute" exists.' [Citations.]" (*Beverly Hills Foodland v. United Food Workers* (E.D.Mo. 1993) 840 F.Supp. 697, 702 (hereafter *Beverly Hills Foodland*)).

Thus, the partial preemption of state libel remedies "cannot depend on some abstract notion of what constitutes a 'labor dispute' . . . [but] must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to

protection for freedom of speech are significantly implicated.”
(*Austin, supra*, 418 U.S. at p. 279 [41 L.Ed.2d at pp. 758-759].)
“Unions have a legitimate and substantial interest in continuing organizational efforts after recognition. Whether the goal is merely to strengthen or preserve the union’s majority, or is to achieve 100% employee membership . . . these organizing efforts are equally entitled to the protection of [the NLRA].” (*Id.* at p. 279 [41 L.Ed.2d at p. 759], fn. omitted.) Indeed, courts have routinely found that, within the context of the NLRA, a “labor dispute” “exists in situations which do not involve any organizing activities by a union.” (*Beverly Hills Foodland, supra*, 840 F.Supp. at p. 702.)

Accordingly, it does not matter that UNITE HERE’s primary labor dispute was with Angelica and only secondarily with Sutter Health. (*Overstreet v. United Broth. of Carpenters* (9th Cir. 2005) 409 F.3d 1199 (hereafter *Overstreet*).)

Overstreet explains: “Disputes, labor and otherwise, commonly spill over to affect secondary institutions, as individuals with strong opinions concerning the dispute seek to convince those with some prospect of influencing the outcome of the dispute to do so. Clothing manufacturers allegedly operate sweatshops, and activists protest institutions that buy clothing from those manufacturers. [Citation.] A nation takes controversial political or military actions, and activists pressure universities and other institutions to divest endowment or other funds from businesses supporting those actions. [Citation.] [¶] Whatever one might think about the merits of these disputes, all parties involved understand that a dispute does exist between activists and the ‘secondary’ institutions.

There is likely to be disagreement, true, over whether the secondary is contributing to the primary's actions in any significant way, or whether the primary's actions are objectionable at all. But any such disagreement does not affect whether, in common parlance, a 'dispute' exists concerning maintaining ties with an individual or institution taking controversial action. And, when the specific dispute is whether the secondary institution should sever ties with another company so that the secondary institution does not undermine regional labor standards, 'labor dispute' is a perfectly apt description." (*Overstreet, supra*, 409 F.3d at pp. 1216-1217; see also *Burlington Northern v. Maintenance Employees* (1987) 481 U.S. 429 [95 L.Ed.2d 381] [refused to exclude secondary picketing activity from the Norris-LaGuardia Act definition of a labor dispute (29 U.S.C. § 113(c)), which is virtually identical to the NLRA definition of a labor dispute (29 U.S.C. § 152(9))].)

Here, UNITE HERE sought to advance its primary dispute with Angelica by exerting pressure on Sutter Health. It intended the postcard to cause potential patients to question Sutter Health's use of Angelica and to raise the specter that the patients would boycott using Sutter Health for the birth of their children. In this manner, UNITE HERE hoped to cause Sutter Health to pressure Angelica to improve the working conditions of its employees and to unionize all of Angelica's facilities.³

³ Hence, when UNITE HERE unsuccessfully sought to remove the action to federal court, the district judge observed that the matter could "technically be called a labor dispute." (See fn. 1, *ante*.)

The postcard communication was thus part of a labor dispute, just as was the publication in *San Antonio Hosp. v. So. Cal. Council of Carpenters* (9th Cir. 1997) 125 F.3d 1230 (hereafter *San Antonio Hosp.*), in which a carpenters' union engaged in a labor dispute with a construction subcontractor hired by the hospital displayed a banner stating, "THIS MEDICAL FACILITY IS FULL OF RATS." (*Id.* at pp. 1232-1233.)⁴

Consequently, Sutter Health had to meet the standard "commonly known as the *New York Times* 'actual malice' standard." (*San Antonio Hosp.*, *supra*, 125 F.3d at p. 1235.) In other words, Sutter Health was required to prove by clear and convincing evidence that UNITE HERE published the offending statement in the postcard with actual malice, i.e., with knowledge of its falsity, or with reckless disregard of whether it was true or false.

Because the trial court declined to give UNITE HERE's proposed actual malice jury instruction, Sutter Health was not put to its burden of proof on that element. This was error.

⁴ Applying the decisions in *Austin*, *supra*, 418 U.S. 264 [41 L.Ed.2d 745], *Lynn*, *supra*, 383 U.S. 53 [15 L.Ed.2d 582], and *New York Times*, *supra*, 376 U.S. 254 [11 L.Ed.2d 686], *San Antonio Hosp.* found there was "a reasonable probability" that the hospital could prove "actual malice" at trial because the "full of rats" statement could be found to have been fraudulent because it indicated that the hospital had a rodent problem, and a layperson would not understand that the reference was a pejorative reference to the subcontractor. (*San Antonio Hosp.*, *supra*, 125 F.3d at pp. 1236-1237.)

Sutter Heath's efforts to distinguish *San Antonio Hosp.* are not persuasive.

Sutter Health contends that UNITE HERE's statements were not protected by federal labor law because they did not refer to labor grievances about employees' wages, hours, or conditions of employment. (Citing *National L.R.B. v. Local Union No. 1229* (1953) 346 U.S. 464 [98 L.Ed. 195], *St. Lukes Episcopal-Presbyterian Hosp. v. N.L.R.B.* (8th Cir. 2001) 268 F.3d 575, 579, and *Five Star Transp., Inc.* (2007) 349 NLRB 42.)

However, the decisions upon which Sutter Health relies for the aforesaid proposition are inapposite because they were not actions for defamation and thus did not address whether defamatory statements were made during a labor dispute, such that the *Linn* actual malice standard applies. Rather, they concerned when an employer can discharge an employee for disloyal statements, and when it cannot because the statements are considered protected activity. (29 U.S.C. §§ 157, 158.)

The decisions simply held an *employee's* disparaging comments about an employer, which are unrelated to employment conditions, are not a protected activity under section 7 of the NLRA, and the employer's termination of the employee for making such comments is not an unfair labor practice under section 8 of the NLRA. They do not support Sutter Health's suggestion that similarly disparaging comments by a *union* concerning a secondary employer during the course of a labor dispute are not subject to the *Linn* actual malice standard if the comments do not explicitly address wages, hours, or working conditions.

As demonstrated by the decision in *San Antonio Hosp. v. So. Cal. Council of Carpenters*, *supra*, 125 F.3d 1230, the actual malice standard applies to communications in furtherance of a labor dispute, even if the communications do not refer to wages, hours, or working conditions.

D

Having determined that the trial court erred in refusing to give the requested actual malice instruction, we must decide whether the error was prejudicial.

"The standard of actual malice is a daunting one" (*McFarlane v. Esquire Magazine* (D.C. Cir. 1996) 74 F.3d 1296, 1308) that focuses solely on the defendant's subjective state of mind at the time of publication. (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 512 [80 L.Ed.2d 502, 524].) The plaintiff must prove that the defendant was actually aware the contested publication was false or that the defendant made the publication with reckless disregard of whether it was true or false. (*Linn, supra*, 383 U.S. at p. 61 [15 L.Ed.2d at p. 589]; *New York Times, supra*, 376 U.S. at p. 279-280 [11 L.Ed.2d at p. 706].) Such reckless disregard means the defendant entertained serious doubts as to the truth of the publication, i.e., that the defendant had "a 'high degree of awareness'" of its "'probable falsity.'" (*Harte-Hanks, Inc. v. Connaughton, supra*, 491 U.S. at p. 688 [105 L.Ed.2d at p. 589]; *St. Amant v. Thompson, supra*, 390 U.S. at p. 731 [20 L.Ed.2d at p. 267].) It is not measured by what a reasonably prudent person would have published, or would have investigated before publishing. (*Harte-Hanks, Inc. v. Connaughton, supra*, 491 U.S. at p. 688 [105

L.Ed.2d at p. 589]; *St. Amant v. Thompson*, *supra*, 390 U.S. at p. 731 [20 L.Ed.2d at p. 267].) The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice. (*St. Amant v. Thompson*, *supra*, 390 U.S. at p. 733 [20 L.Ed.2d at p. 268].) "Mere negligence does not suffice" (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510 [115 L.Ed.2d 447, 468]), nor does "gross or even extreme negligence." (*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860.)

Furthermore, the plaintiff must prove actual malice by "clear and convincing" evidence--a standard of proof that imposes a "'heavy burden', [citation], far in excess of the preponderance sufficient for most civil litigation." (*Eastwood v. National Enquirer, Inc.* (9th Cir. 1997) 123 F.3d 1249, 1252.) This standard requires the evidence of actual knowledge of the falsity of the statement, or reckless disregard for its falsity, must be of such a character "as to command the unhesitating assent of every reasonable mind." (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 274.)

Rather than give an actual malice instruction, the court told the jurors they could find UNITE HERE liable if Sutter Health proved by a preponderance of the evidence that the union failed to use reasonable care to determine the truth or falsity of the publication. This instruction omitted a vital element of the case and misinformed the jurors regarding Sutter Health's burden of proof.

Surely, "'it seems probable'" that such a significant error "'prejudicially affected the verdict.'" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580; accord, *Green v. State of California* (2007) 42 Cal.4th 254, 266.)

Sutter Health disagrees, arguing the error is harmless because its attorney argued to the jury that UNITE HERE knew the publication was false; there is substantial evidence that UNITE HERE fabricated the publication about Sutter Health; and the jury's verdict on punitive damages--which required a finding of malice, fraud, or oppression (Civ. Code § 3294; CACI No. 3946)--demonstrates that the jury necessarily found UNITE HERE acted with actual malice. We are not persuaded.

The instructions given by the court said Sutter Health could establish defamation by proving "UNITE HERE failed to use reasonable care to determine the truth or falsity of the statement(s)." Thus, Sutter Health counsel's argument that UNITE HERE knew the publication was false did not cure the instructional error that in effect told the jurors they could find the union liable for defamation even if UNITE HERE did not know the publication was false or did not have serious doubts about its truth.

Even if Sutter Health is correct in asserting that there is substantial evidence that UNITE HERE fabricated the implication regarding Sutter Health's poor sanitary conditions, this does not make the instructional error harmless. Whether UNITE HERE can be considered to have purposely avoided the truth and fabricated the publication, or whether it merely made a good faith reasonable inference based on the investigation it made and the scientific evidence available to it, is a question of fact for jury; and we cannot say, as a matter of law, that UNITE HERE fabricated the publication.

The jury's verdict that UNITE HERE acted with "malice, fraud, or oppression" with respect to the issue of punitive damages is not the equivalent of a finding of "actual malice" necessary for a union to be liable for a defamatory publication made as part of a labor dispute. The court instructed the jury that "malice" as used in the phrase "malice, fraud, or oppression" for purposes of punitive damages, "means that UNITE HERE acted with intent to cause injury or that UNITE HERE's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences." Based on this instruction, the jury may have found that UNITE HERE's conduct satisfied the definition of malice simply because the statements in the postcard were made with the intent to injure Sutter Heath--which is not the same as acting with knowledge that the statements were false or with deliberate disregard for whether they were true or false.⁵

⁵ If the jury found that UNITE HERE acted with "oppression" or "fraud," neither finding is the equivalent to a finding of "actual malice" with respect to a defamatory publication made as part of a labor dispute. The trial court told the jury that "[o]ppression means that UNITE HERE's conduct was despicable and subjected [Sutter Health hospitals] to cruel and unjust hardship in knowing disregard of their rights. [¶] Despicable conduct is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people." If jurors were offended by UNITE HERE drawing Sutter Health into the union's labor dispute with Angelica, the jury might have believed UNITE HERE's conduct was oppressive within the meaning of the court's definition of oppression, even if the union did know that the statements were false and did not act with deliberate disregard for whether they

For the reasons stated above, Sutter Health has failed to show that the instructional error was harmless.

E

UNITE HERE argues that it is entitled to entry of judgment in its favor, as a matter of law, because Sutter Health cannot meet the burden of proof necessary to establish liability. We disagree.

Whether there is sufficient evidence to permit a finding of actual malice is a question of law. (*Bose Corp. v. Consumers Union of U.S., Inc.*, *supra*, 466 U.S. at pp. 510-511 [80 L.Ed.2d at p. 523].) The evidence could be interpreted as showing that, based on their research and investigation, UNITE HERE's employees had a good faith belief that the three main statements conveyed by the postcard were true: (1) reports surfaced that Angelica was not ensuring its laundered linens were free of harmful pathogens; (2) Sutter Health used Angelica's linens; and (3) this meant Sutter *may* not be doing everything it could to protect vulnerable newborns from infections, since UNITE HERE's research indicated that persons with compromised immune systems could be harmed by pathogens on improperly laundered sheets. On the other hand, Sutter Health presented evidence that (1) its infection control and linen handling policies and practices included extra and redundant layers of protection beyond what is required by California law and infection control guidelines; (2)

were true or false. "Fraud," the jury was told, "means that UNITE HERE intentionally misrepresented or concealed a material fact and did so intending to harm [Sutter Health]." We do not know whether the jury found UNITE HERE engaged in fraud as defined by the court; but, even if it did, the jury might have so believed, even if the union did not act with actual malice.

its policies and practices ensured that hygienically clean and safe linen was delivered to all patients in Sutter Heath hospitals; and (3) UNITE HERE representatives had no evidence that any Sutter Health patient had ever been harmed by linens laundered by Angelica and used by Sutter Health. Based on this evidence, a jury could conclude that UNITE HERE's knowledge of Angelica's laundry facilities' problems in other parts of the country, and the union's extrapolation to what this meant concerning Sutter Health's sanitary precautions, was an unjustified fabrication based on purposeful avoidance of the truth, rather than on a mere negligent and inadequate investigation. Thus, whether UNITE HERE acted with actual malice is a question for the jury to resolve, and the matter must be remanded for a new trial.

II*

UNITE HERE contends the court compounded the actual malice instructional error because it instructed the jury that UNITE HERE bore the burden of proving the truth of the defamatory publication.

Ordinarily, falsity is not an element of a prima facie case for libel; instead, truth is an affirmative defense that must be proved by the defendant. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 560, pp. 816-817.) However, UNITE HERE contends that a plaintiff must prove the falsity of a defamatory statement when the *New York Times* actual malice standard applies (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775 [89 L.Ed.2d 783, 792]) or when the disputed statements involve matters of public concern (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1355-1356, 1366). It claims that both exceptions apply here because the safety of hospital linens is a matter of public concern.

Sutter Health does not dispute the correctness of UNITE HERE's position. It simply asserts the error is harmless because the jury received an instruction that Sutter Health had the burden of proving the statement was false in connection with Sutter Health's trade libel cause of action, and the jury found the statement was false. We take this as a concession by Sutter Health that the substance of UNITE HERE's claim of instructional error concerning the burden of proof has merit.

Accordingly, unless on remand Sutter Health presents authority to the contrary, the trial court should instruct the jury that Sutter Health has the burden of proving, by a preponderance of the evidence rather than the clear and convincing evidence standard required for proving actual malice (*Rattray v. City of National City* (9th Cir. 1994) 36 F.3d 1480, 1487), that the defamatory publication is false.

III*

Sutter Health's cause of action for IIPER fails with its defamation action. The court properly instructed the jury that to find UNITE HERE liable for IIPER, the jury must find the union engaged in wrongful conduct through defamation (CACI No. 2202). "[A] plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.' [Citation.]" (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, fn. omitted.) Thus, because the defamation verdict

must be reversed and the matter remanded for retrial, so must the IIPER verdict.

UNITE HERE contends the trial court erred by not dismissing Sutter Health's IIPER claim as preempted by section 303 of the Labor Management Relations Act (LMRA) (29 U.S.C. § 187). If UNITE HERE is correct, the IIPER claim may not be relitigated in state court. However, UNITE HERE fails to meet its appellate burden of establishing error.

It is incumbent on an appellant to not only present factual analysis and legal authority on each point made, but to support any argument with appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239-1240; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) It is also the appellant's responsibility to support claims of error with citation and authority; we are not obligated to perform that function on the appellant's behalf. (*Estate of Hoffman* (1963) 213 Cal.App.2d 635, 639; *Metzenbaum v. Metzenbaum* (1950) 96 Cal.App.2d 197, 199; see also *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113.)

In addition, an appellate court ordinarily will not address challenges to procedural defects or erroneous rulings if the matter was not raised in the trial court. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, p. 458.) Points not urged at trial may not be raised for the first time on appeal. (*Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422; *Damiani v. Albert* (1957) 48 Cal.2d 15, 18.) Even matters of constitutional import must be raised at the trial

level to preserve the issue on appeal. (*In re Marriage of Fuller* (1985) 163 Cal.App.3d 1070, 1076.)

UNITE HERE does not demonstrate by citation to the record that, on the ground of preemption, it sought dismissal of the IIPER cause of action. Its approximately two-page argument in its opening brief lacks any reference to a motion to dismiss or to the court's ruling and grounds therefor. We decline to scour the 14,565-page clerk's transcript, 2,690-page supplemental clerk's transcript, and 2,469-page reporter's transcript to discover whether the point was raised in the trial court. Thus, UNITE HERE fails to establish that the trial court erred by not dismissing the IIPER claim on the ground of preemption.

UNITE HERE also has forfeited the claim of error because the question of preemption is far more complex than presented by UNITE HERE's cursory argument. However, UNITE HERE can pursue its theory of preemption in the trial court on remand if Sutter Health chooses to relitigate the IIPER cause of action. (Cf. *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 644.)

IV*

Next, UNITE HERE raises three evidentiary claims: the court erred (1) in excluding evidence that newborns and other patients at Sutter Health were diagnosed with nosocomial (hospital-acquired) infections, (2) in excluding a printout of pages from a website concerning Angelica's improper health and safety practices, and (3) in submitting an incomplete list of the trial exhibits to the jury in response to a jury request.

We need not address the last error concerning the incomplete list of trial exhibits because it was an oversight that is unlikely to recur. As for the remaining two alleged errors, UNITE HERE fails to meet its appellate burden of establishing error.

A

UNITE HERE asserts the trial court erred in prohibiting it from presenting evidence obtained in discovery that newborns and other patients at Sutter Health hospitals were diagnosed with hospital-acquired infections of unknown origin. UNITE HERE contends the court erred in granting Sutter Health's motion to exclude the evidence of such nosocomial infections under Evidence Code sections 1156 and 352.

Evidence Code section 1156 states: "(a) In-hospital medical or medical-dental staff committees of a licensed hospital may engage in research and medical or dental study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. Except as provided in subdivision (b), the written records of interviews, reports, statements, or memoranda of such in-hospital medical or medical-dental staff committees relating to such medical or dental studies are subject to Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency, or person. [¶] (b) The disclosure, with or without the consent of the patient, of information concerning him to such in-hospital medical or medical-dental staff committee does not make unprivileged any information that would otherwise be

privileged under Section 994 or 1014; but, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure. [¶] (c) This section does not affect the admissibility in evidence of the original medical or dental records of any patient. [¶] (d) This section does not exclude evidence which is relevant evidence in a criminal action."

UNITE HERE claims it "did not seek [to] introduce any 'written records . . . of' a staff committee, but simply evidence that some hospital patients had been diagnosed with nosocomial infections -- as [Sutter Health's] own discovery responses acknowledged." According to UNITE HERE, Evidence Code section 1156 "does not bar the admission of medical diagnoses simply because they may have been reported to a staff committee; it only excludes the written work 'of' the staff committee itself. . . . [I]t 'does not affect the admissibility in evidence of the original medical . . . records of any patient,' thereby making explicit that underlying patient diagnoses are not excluded from evidence." Thus, the union contends, "the trial court erred by expanding [Evidence Code section] 1156 to cover diagnoses and complaints that existed long before any staff committee reviewed them," and the error was prejudicial as it "left the jury with the false impression that links between Angelica's linens and unexplained hospital infections had been definitively disproven."

UNITE HERE fails to meet its burden of establishing error. The trial court's judgment is presumed to be correct, and it is the

union's burden to affirmatively demonstrate otherwise. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Marriage of Gray* (2002) 103 Cal.App.4th 974, 977-978.) UNITE HERE must show error by presenting pertinent legal analysis connected to the evidence in the case, supported by citations to evidence in the appellate record. (*Duarte v. Chino Community Hospital, supra*, 72 Cal.App.4th at p. 856; *People v. Sangani* (1994) 22 Cal.App.4th 1120, 1135-1136.) It may not simply incorporate by reference arguments made in papers filed in the trial court, rather than brief the arguments on appeal. (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334.)

An appellant, like UNITE HERE, that alleges evidentiary error must demonstrate that, based on its offer of proof and arguments in the trial court, the court abused its discretion in allowing the introduction of evidence or in excluding it. An offer of proof not only gives the trial court an opportunity to change or clarify its ruling, it gives the reviewing court the means of determining error and assessing prejudice. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) To accomplish these purposes, an offer of proof must be specific and set forth the actual evidence to be produced, not merely the facts or issues to be addressed and argued. (*Ibid.*)

UNITE HERE does not point us to any specific item of evidence that it sought to introduce, and demonstrate that this evidence was not taken from the inadmissible written reports and does not otherwise fall within the exclusionary dictate of Evidence Code section 1156. UNITE HERE does not show that the court prevented it from introducing specific patient records with the patient's

consent. It does not establish that it had patients or hospital employees willing to testify about hospital-acquired infections, and that this evidence was not merely a verbal reiteration of the verboten written records. UNITE HERE simply makes a generalized argument that the unidentified evidence it sought to introduce was not inadmissible under the statute. This is insufficient to preserve the issue for appellate review.

Even more important, UNITE HERE does not establish that the existence of nosocomial of *unknown origins* is competent evidence that the infections were caused by linens provided to Sutter Health by Angelica. Only relevant evidence is admissible. (Evid. Code, §§ 210, 350.) Absent evidence that it was likely that some of the nosocomial infections were caused by the linens, the existence of hospital-acquired infections of unknown origin was irrelevant.

Because UNITE HERE fails to establish otherwise, we conclude the trial court did not err in excluding the evidence.

B

UNITE HERE argues the trial court abused its discretion by refusing to allow the union to provide the jury with a printout of over 225 pages from its www.thedirtylaundry.org website as the website existed when the union mailed the postcard. According to UNITE HERE, the website included negative information about Angelica, including OSHA citations for improper health and safety practices, and would have made clear that UNITE HERE was engaged in a broader campaign against the linen company and its practices; and exclusion of the evidence was prejudicial because it prevented

UNITE HERE from proving that Angelica did not ensure that clean linens are free from blood, feces, and harmful pathogens.

Again, UNITE HERE fails to meet its burden on appeal. In its slightly more than one-page argument, UNITE HERE does not refer us to the specific portion of the clerk's or reporter's transcript that contains UNITE HERE's offer of proof, or Sutter Health's objections or opposition to the evidence. UNITE HERE does not even explicitly set forth the trial court's ruling. It merely hints the evidence was excluded on hearsay grounds, but does not adequately explain why the evidence was not hearsay or relevant for a nonhearsay purpose. And UNITE HERE does not provide any legal authority in support of its position. We reiterate, it is an appellant's responsibility to support claims of error with citation and authority; we are not obligated to perform that function on appellant's behalf. (*Estate of Hoffman, supra*, 213 Cal.App.2d at p. 639; *Metzenbaum v. Metzenbaum, supra*, 96 Cal.App.2d at p. 199; see also *Lewis v. County of Sacramento, supra*, 93 Cal.App.4th at p. 113.)

As Sutter Health points out in its brief, UNITE HERE also fails to address the trial court's alternate grounds for excluding the evidence based on Evidence Code section 352 and a lack of foundation or authentication.

Because UNITE HERE fails to demonstrate that the trial court's alternate grounds were wrong, we conclude the court did not err in excluding the evidence.

v*

Lastly, UNITE HERE presents three claims requiring reversal of the award of damages: (1) the trial court erred in allowing the

introduction of unsubstantiated and speculative expert testimony regarding the amount of Sutter Health's damages; (2) the damages are excessive; and (3) the damages are duplicative. We need address only the first claim for the guidance of the trial court on remand.

UNITE HERE contends the court erred in denying its motion in limine to preclude Sutter Health's expert, William Ackerman, from testifying that the postcard caused tens of millions of dollars in lost patient revenues. UNITE HERE asserts Ackerman's opinion lacks foundation and is unreliable because it is premised on speculation, conjecture, and assumptions that are not supported by the record. We disagree.

The trial court has broad discretion to admit or exclude expert testimony, and its decision will not be disturbed absent a manifest abuse of discretion. (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1083.) No such abuse of discretion is demonstrated in the present case.

Ackerman is a forensic accountant who had worked for 15 years at a consulting firm that "almost exclusively quantif[ies] damages." Ackerman's opinion rested in large part on a survey conducted by Dr. Deborah Jay, the president and chief executive officer of Field Research Corporation, who had designed more than 500 surveys, many of which related to false or misleading advertising and whether it affected consumer purchasing decisions. Jay's pollsters contacted 351 of the 11,138 women who were on the mailing list for UNITE HERE's original postcard. A mock postcard was sent to each woman who agreed to participate in the survey, and each was paid \$5 for participating. The postcard was identical to UNITE HERE's postcard, except Sutter

Health's name was replaced by XYZ hospital. The name substitution was used so as not to republish any negative comments about Sutter Health. After the women received the postcard by overnight delivery, the pollsters asked each participant a series of questions about whether, having read the postcard, she would use or recommend the fictional hospital. UNITE HERE's own expert conceded that the survey upon which Ackerman relied measured the extent to which a woman would be less willing to use the hospital to which the postcard referred.

Ackerman reviewed the poll responses and then calculated lost revenues based on a threshold premise that, because 13.4 percent of the participants said they would never use the fictional hospital, this percentage applied to all of the original postcard recipients since the number of women in the survey were a representative sample. Because 41 percent of the poll participants expressed negative opinions about the fictional hospital, that same percentage would likely communicate negative information about the hospital to their family and friends. Based on this information and on various other studies and calculations, Ackerman opined the postcard would cause Sutter Health to lose tens of millions of dollars in net patient revenues.

Evidence Code section 801 provides that an expert's opinion testimony is admissible if it is "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an

expert is precluded by law from using such matter as a basis for his opinion."

Mr. Ackerman's training, experience, and education established that he had sufficient knowledge to provide expert opinion on Sutter Health's future lost profits. The degree of his knowledge and the reliability of his opinion go to the weight of the evidence rather than the admissibility of his opinion testimony. Unless his opinion is wholly and entirely based on incompetent material, the weight to be given such opinion is a question for the trier of fact. (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322; *People v. Rice* (1960) 185 Cal.App.2d 207, 213.)

UNITE HERE contends Ackerman's opinion about lost revenues is based on unsupported premises because (1) the poll participants were never asked whether they received the union's postcard, (2) the poll postcard was sent by overnight delivery, which drew attention to it in a way that would not apply to the UNITE HERE's postcard sent by ordinary mail, and (3) the women polled were not asked whether the poll postcard would have an impact on their decision to use *Sutter Health* hospitals, but rather on a decision to use the fictional hospital that did not have Sutter Health's pre-existing reputation.

This is insufficient to show that Ackerman's opinion should be excluded at trial. None of these complaints showed the methodology is invalid or Ackerman's opinion was premised on incompetent matter. UNITE HERE fails to recognize that a wrongdoer cannot complain if its conduct created a situation requiring that damages be estimated rather than computed with certainty. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 908.) The question then is whether

Ackerman used a reasonable method to compute the damages, even if they are only an approximation. (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873-874.) He did given (1) the complexity of determining whether Sutter Health lost patients who would have used its facilities but for the postcard, and (2) limitations presented by the need not to republish Sutter Health's name in connection with the allegedly defamatory comments.

UNITE HERE's opposition to Ackerman's expert opinion goes simply to the weight of the evidence, not its admissibility. The union has not established that Ackerman's opinion should be excluded on retrial.

DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

SCOTLAND, P. J.

We concur:

BLEASE, J.

RAYE, J.