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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIAN DAWE; FLAT IRON  
MOUNTAIN ASSOCIATES, LLC,  
formerly known as FLAT  
IRON MOUNTAIN ASSOCIATES,  
a Partnership,

NO. CIV. S-07-1790 LKK/EFB

Plaintiffs,

v.

O R D E R

CORRECTIONS USA, a California  
Corporation; CALIFORNIA  
CORRECTIONAL PEACE OFFICERS'  
ASSOCIATION, a California  
Corporation; JAMES BAIARDI,  
an individual; DONALD JOSEPH  
BAUMANN, an individual,

Defendants.

\_\_\_\_\_  
AND CONSOLIDATED ACTIONS &  
RELATED COUNTERCLAIMS  
\_\_\_\_\_

This case concerns plaintiffs'<sup>1</sup> relationship to defendant

<sup>1</sup> Gary Harkins is a third party defendant to the consolidated actions at issue in this motion. Harkins brings counterclaims against defendants, which are at issue in this motion. Further, Harkins is represented by the same counsel as plaintiffs Brian Dawe and Flat Iron Mountain Associates, LLC. Throughout the briefs in this case, all parties conflate Harkins's arguments with those of

1 Corrections USA and the termination of that relationship.  
2 Plaintiffs bring claims concerning breach of contract and  
3 defamation arising out of their removal from service with  
4 Corrections USA. Defendants have moved for summary judgment on all  
5 claims. Additionally, with their reply, defendants filed a "motion  
6 for relief from mistake, oversight and omissions re: inadvertent  
7 failure to attach copies of deposition testimony transcripts,  
8 excerpts and full copies of an exhibit." All parties also filed  
9 motions to strike evidence. For the reasons described below, all  
10 motions are denied.

#### 11 **I. BACKGROUND**

12 Defendants moved for summary judgment on December 14, 2009.  
13 Plaintiffs filed an opposition on January 11, 2010. Along with  
14 their opposition, plaintiffs filed a motion to strike  
15 defendants' evidence. Defendants filed a reply brief in support  
16 of summary judgment on January 18, 2010. Along with their reply,  
17 defendants filed a motion for relief from mistake, oversight and  
18 omissions concerning their failure to properly attach exhibits  
19 to their summary judgment motion and a motion to strike  
20 plaintiffs' evidence. Plaintiffs filed objections to these  
21 motions and moved to strike evidence submitted with defendants'  
22 reply.

23 This order addresses the most recent dispute between these  
24 \_\_\_\_\_  
25 the actual plaintiffs. Thus, to avoid confusion in this order, the  
26 court will refer to Harkins as a co-plaintiff, while nonetheless  
acknowledging that his status is actually that of a third-party  
defendant.

1 parties in this protracted litigation. Currently, defendants  
2 moved for summary judgment largely on inadmissible or  
3 unsupported "facts." The court has exerted significant time and  
4 energy to review these so-called facts in order to issue a  
5 ruling on defendants' motion.

6 The defects in defendants' presentation of facts are multi-  
7 faceted. As an initial matter, defendants submitted two banker's  
8 boxes of documents with its motion. Only a few of these  
9 documents were actual exhibits to their motion. Defendants also  
10 included full copies of some deposition transcripts with their  
11 exhibits. Such submissions turned out to be beneficial in that  
12 defendants excerpts of deposition testimony attached as exhibits  
13 to the motion were far from complete. A week before the hearing,  
14 defendant submitted more deposition transcripts to the court.<sup>2</sup>  
15 Further, defendants attached numerous documents produced in  
16 discovery as exhibits "authenticated" by defendants' counsel.  
17 Such authentication is clearly improper because defendant's  
18 counsel has failed to demonstrate any personal knowledge as to

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19  
20 <sup>2</sup> Defendants moved with their reply for relief from mistake,  
21 oversight, and omissions concerning their inadvertent failure to  
22 attach copies of deposition testimony transcripts, excerpts and  
23 full copies of an exhibit pursuant to Fed. R. Civ. P. 60. Section  
24 A of rule 60 applies to "a mistake arising from oversight or  
25 omission whenever one is found in a judgment, order, or other part  
26 of the record." Id. Section b, as relied upon by defendants, only  
applies to relief from a final judgment, order or proceeding. Id.  
Defendants are not entitled to relief under either of these  
sections. Moreover, defendants have provided no explanation as to  
why they waited a week after learning they failed to properly  
attach documents to their motion to provide the court with the  
corrected exhibits. For these reasons, the motion for relief from  
mistake, oversight, and omissions is denied.

1 the authenticity of these documents,<sup>3</sup> and therefore the court  
2 has not considered them in this motion. See Fed. R. Civ. P.  
3 56(e) (2) ("A supporting or opposing affidavit must be made on  
4 personal knowledge, set out facts that would be admissible in  
5 evidence, and show that the affiant is competent to testify on  
6 the matters stated."); Fed. R. Evid. 901 ("The requirement of  
7 authentication or identification as a condition precedent to  
8 admissibility is satisfied by evidence sufficient to support a  
9 finding that the matter in question is what its proponent  
10 claims.").

11 Of the few documents which could actually be considered on  
12 summary judgment, the court faced the time consuming difficulty  
13 of separating fact from assertion or supposition. Most of  
14 defendants' so-called undisputed facts, where they were complete  
15 sentences, were based on evidence that is completely inapposite.  
16 For example, defendants' evidentiary basis for the "fact" that  
17 plaintiff Brian Dawe ("Dawe") refused to turn over Corrections  
18 USA ("CUSA") property to CUSA after his removal from CUSA was  
19 Dawe's testimony that he did not refuse to turn over any  
20 property to CUSA. Such misrepresentations of evidence pervade  
21 defendants' motion. See Fed. R. Civ. P. 11(b) ("By presenting to  
22 the court . . . a . . . written motion . . . an attorney . . .  
23 is certifying that to the best of the person's knowledge,  
24 information, and belief, formed after an inquiry reasonable

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25  
26 <sup>3</sup> The fact that they were produced in discovery hardly demonstrates that they are authentic.

1 under the circumstances . . . the . . . factual contentions have  
2 evidentiary support . . . .") Even more common, defendants would  
3 cite evidence wholly irrelevant to its "facts."

4 After the time-consuming review of defendants' facts  
5 presented as support to defendants' motion for summary judgment,  
6 only a few actual facts remain. Below, the court has listed all  
7 the facts which have some evidentiary basis. Where relevant, the  
8 court has included plaintiffs' evidence of factual disputes in  
9 footnotes. Accordingly, only the facts included in the statement  
10 below can be considered to determine whether defendants have met  
11 their initial burden under summary judgment. Due to the flaws in  
12 defendants' presentation of evidence, often these facts are  
13 disjointed and lack logical connections. Because these facts are  
14 limited, and because most of defendants' arguments for summary  
15 judgment rely on claims for which defendant bears the burden of  
16 proof, defendants failed to meet their initial burden under Fed.  
17 R. Civ. P. 56 as a moving party for most of their arguments. For  
18 the few arguments where plaintiffs bear the burden of proof,  
19 plaintiffs have established material factual disputes, which  
20 preclude summary judgment.

21 **A. Introduction of Parties and Organizational Structure**

22 **1. CUSA/CCPOA**

23 Defendant Corrections USA ("CUSA") is a California  
24 non-profit mutual benefit corporation representing, advocating,  
25 and lobbying for the interests of publicly employed correctional  
26 officers in California and across the nation. It has individual

1 members and organizational members nationwide. Defendant  
2 California Correctional Peace Officers Association (CCPOA) is  
3 one of its organizational members. CCPOA is a California public  
4 correctional officers union and a California non-profit  
5 corporation.

6 Richard Loud ("Loud") was the former president, consultant,  
7 and former member of the board of directors of CUSA. Plaintiff  
8 Gary Harkins ("Harkins") was the former recording secretary,  
9 former member of the board of directors, and former  
10 privatization committee chairman of CUSA. Defendant Joseph  
11 Baumann ("Baumann") is the recording secretary and a member of  
12 the board of directors of CUSA, and is also an employee and  
13 board member of CCPOA. Defendant James Baiardi ("Baiardi") is  
14 the current chairman of CUSA, board of directors member of CUSA,  
15 and the president of the Florida Police Benevolent Association,  
16 Florida State Correctional Officers Chapter.

17 Plaintiff Brian Dawe ("Dawe") was a member of the CUSA  
18 board of directors from 1998 until July 20, 2006. Dawe was not  
19 an employee of CUSA. There is no employment contract pursuant to  
20 Exhibit A to the first amended complaint. Harkins was also not  
21 an employee. They have both admitted that they were not  
22 employees.<sup>4</sup> CUSA paid Richard Loud \$5,500.00 per month while he

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23  
24 <sup>4</sup> Plaintiffs have presented evidence to dispute the contention  
25 of defendants that plaintiffs were not employees. See Varisco v.  
26 Gateway Engineers, Inc., 116 Cal. App. 4th 1099, 1103-04 (2008).  
Specifically, plaintiffs have demonstrated that a reasonable jury  
could find that they were employees given that CUSA treated  
plaintiffs as if they were employed by CUSA. For example, both were

1 served as CEO.

2 The contract upon which Dawe bases his claims for breach of  
3 contract was not discussed by the board of directors of CUSA.<sup>5</sup>  
4 Dawe's contracts with CUSA were for three years with no  
5 guarantee of renewal. Accordingly, Dawe was not guaranteed a job  
6 until he was seventy years old. Further, the contract contained  
7 explicit language that it was not an employment contract. Dawe  
8 received 1099 miscellaneous tax forms from CUSA, and never  
9 received any W-2s income tax forms from CUSA.

10 Dawe lacked authority to enter contracts on behalf of CUSA.  
11 Dawe's responsibilities included recruiting for CUSA and  
12 educating the public and politicians. He would involve the media  
13 on occasion. This involvement included frequent interviews by  
14 organizations and newspapers concerning corrections issues. On  
15 at least two occasions Dawe was contacted from abroad. Dawe  
16 would speak at conventions, rallies, and protests. Dawe has also  
17 spoken at the University of Minnesota law school and Yale  
18 University. Dawe admits to having been a leading expert on  
19 private prisons both domestically and internationally. Harkins  
20 attended many of these events, but was rarely, if ever, a  
21 speaker.

22 \_\_\_\_\_  
23 suspended without pay.

24 <sup>5</sup> Plaintiffs have presented evidence that indicates that a  
25 contract need not be discussed by the board to be approved. Rather,  
26 there is evidence that Loud's signature was all that was necessary  
to bind the board. Additionally, plaintiffs have presented evidence  
that indicates that the only reason the board did not discuss this  
contract was because no CUSA board meeting took place.

1                                   **2.     ACO/ACOAI/ACOIN**

2             Plaintiff Brian Dawe ("Dawe") was the executive director of  
3 American Correction Officers' Intelligence Network ("ACOIN") and  
4 American Correction Officers ("ACO")<sup>6</sup> ACO is the same  
5 organization as the American Correctional Officers Association  
6 Inc. ("ACOAI"). Harkins was the secretary of ACO. Vito Dagnello  
7 ("Dagnello") was one of the initial directors of ACOAI. As  
8 Executive Director, Dawe runs the day-to-day operations of ACO,  
9 ACOIN, ACOAI, and ACO/ACOIN. Defendant has tendered evidence  
10 that there is no difference between ACOIN and ACO.<sup>7</sup> ACO, ACOIN,  
11 and ACOAI receive mail at a post office box in Thayne, WY and  
12 Dawe conducts business for ACO out of his home in Thayne, WY.<sup>8</sup>

13             ACO was founded on January 16, 2007 at the founding meeting  
14 of ACO in Long Island, NY. Harkins was involved in the  
15 development of ACO. Harkins was also the recording secretary and  
16 initial director of ACOAI. ACO was incorporated in New York as a  
17 not-for-profit corporation on July 24, 2009. Dagnello testified  
18 that ACOIN is an arm of ACO.<sup>9</sup> Dagnello also testified that

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19  
20             <sup>6</sup> Plaintiffs have demonstrated a dispute as to whether ACO and  
21 ACOIN are the same organization. Specifically, plaintiffs contend  
22 they are separate organizations, and defendants contend that they  
23 are the same organization.

24             <sup>7</sup> Again, plaintiff's have demonstrated a dispute as to whether  
25 ACO and ACOIN are the same organization.

26             <sup>8</sup> Plaintiffs have presented evidence that ACO/ACOAI also has  
an address in Port Jefferson Station, NY.

<sup>9</sup> Plaintiffs have presented evidence that ACO and ACOIN were  
separate entities.



1 Dawe's signature on correspondence "Brian Dawe, Executive  
2 Director, ACO/ACOIN" indicates the position he holds for both  
3 organizations. Dawe recruits for ACO.

### 4 **3. FIMA**

5 Plaintiff Flat Iron Mountain Associates, LLC ("FIMA")  
6 became an LLC in October 2006, and Dawe makes decisions for  
7 FIMA. FIMA does not hold formal meetings, and has no by-laws.  
8 ACOIN is a doing business name for FIMA. FIMA is a partnership  
9 owned and controlled by Brian Dawe, his wife, Marilyn Dawe, and  
10 his daughter, Alyson Dawe. ACOIN is an arm of FIMA and does work  
11 for ACO.

### 12 **B. Alleged Bad Acts by Plaintiffs**

#### 13 **1. Letter/Proposal**

14 Dawe, Harkins, and Loud discussed a proposal "to take  
15 control of Corrections USA" and "keep the monies flowing from  
16 California."<sup>10</sup> Dawe, Harkins, and Loud met on August 10, 2006 at  
17 a hotel in Sacramento, CA, to discuss this proposal, and took  
18 several actions in furtherance of the proposal. One of Dawe's  
19 goals was to prevent an individual from seizing control of CUSA.  
20 He sought to achieve this goal by creating a more democratic  
21 process. He pursued this goal, in part, out of concern for his  
22 own livelihood.

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23  
24 <sup>10</sup> Plaintiffs have demonstrated a dispute concerning this  
25 statement. Specifically, they have presented evidence that Dawe  
26 clarified his quoted testimony to indicate that he was not trying  
to seize control, but rather to maintain control or prevent control  
from being seized. Dawe Dep. 346:15-21.

1 Dawe testified that he drafted a letter concerning a "plan  
2 to take over control of Corrections USA."<sup>11</sup> Dawe also testified  
3 that he discussed whether Corrections USA should pull out of  
4 California. Defendants have not presented evidence as to who was  
5 involved in these various discussions.

## 6 **2. Bank Account**

7 Dawe planned to have Dagnello move to replace Robert Dean  
8 ("Dean") and Mr. Martin as signatories on a West America bank  
9 account. Dawe's and Loud's names were added to the account in  
10 March 2006. Dean's and Martin's names were removed from the  
11 account in June 2006. Loud was subsequently replaced by Mr.  
12 Corcoran. Dawe intended to change the names on the account and  
13 actually did change the names.

14 Additionally, two signatures were required for CUSA checks  
15 over \$1,000. On occasion, Dawe would sign a check for over  
16 \$1,000 and then use a signature stamp for Loud's signature.

## 17 **3. CUSA Logo**

18 Dawe and Loud asked Harkins to trademark CUSA's name.  
19 CUSA's board was not informed of the actions to trademark CUSA's  
20 name.<sup>12</sup> On September 7, 2006, Harkins told CUSA's board that he  
21 owned the trademark of CUSA's name, even though he knew he did  
22

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23 <sup>11</sup> There is a dispute, as discussed above, as to whether  
24 plaintiffs sought to take control or simply to maintain control of  
CUSA.

25 <sup>12</sup> Plaintiffs have presented evidence that Dawe and Loud asked  
26 Harkins to trademark the CUSA because it should have been  
trademarked in 1998 and was not.

1 not really own the trademark. Dawe also told Harkins and Dean  
2 that Harkins owned the CUSA logo. Dawe mistakenly indicated on  
3 an email to Harkins that Harkins owned the CUSA name.

#### 4 **4. Timeshare**

5 Dawe told Loud he could purchase a timeshare with CUSA's  
6 credit card. The purchase of the timeshare was not disclosed to  
7 the Board. Loud paid back the timeshare loan over 5 months, but  
8 did not pay interest for the timeshare loan, including, the  
9 interest charged to CUSA on the credit card used to purchase the  
10 timeshare.<sup>13</sup>

#### 11 **5. Van/SUV**

12 CUSA's Board authorized Dawe and Loud to purchase a van for  
13 "about \$24,000.00." However, Dawe and Loud bought an SUV and  
14 trailer for more than the amount the Board approved.<sup>14</sup>

#### 15 **6. Laptops**

16 Dawe had a laptop, which was purchased by CUSA. Dawe  
17 testified that he was aware that the laptop was only to be used  
18 for CUSA purposes.<sup>15</sup>

19 Dawe also reimbursed Harkins with CUSA money for the  
20

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21 <sup>13</sup> Plaintiffs have presented evidence that the charge on the  
22 CUSA credit card was an advance on Loud's salary, and not a loan.

23 <sup>14</sup> Plaintiffs argue that there is no evidence that the board  
24 did not eventually approve the expense to purchase the SUV and  
25 trailer, but rather only that the expense of the SUV and trailer  
26 was greater than the amount the board initially approved.

<sup>15</sup> Plaintiffs have presented evidence that there is a dispute  
as to whether Dawe was prohibited from using the laptop for non-  
CUSA purposes.

1 purchase of a laptop and of a fax machine. Harkins told the CUSA  
2 board that he would ship the laptop back to CUSA via FedEx after  
3 his termination from CUSA.

#### 4 **7. Casino**

5 Dawe made cash withdrawals from casino cash machines.<sup>16</sup>

#### 6 **C. Collection of Dues Owed to CUSA by CCPOA**

7 In 2006, Dawe wrote an email to Loud requesting that Loud  
8 press CCPOA to pay CUSA dues that were owed to CUSA. CCPOA  
9 contested the amount of dues owed to CUSA. Specifically, Dean  
10 testified that Dawe and Loud sought \$33,000 in dues, but Dean  
11 had determined that CCPOA had already sent CUSA about half of  
12 that amount.

#### 13 **D. Audit of CUSA Financial Records**

14 CUSA board of directors member, Mike Jimenez, requested  
15 CUSA financial records from Dawe. On August 11, 2006, Board  
16 Member Dagnello gave Dawe a letter stating: "Per the resolution  
17 of the board of directors of CUSA dated August 11, 2006, you are  
18 hereby directed to immediately deliver all financial books,  
19 records, property and assets, specifically but not limited to,  
20 membership lists, credit card, and inventory of property  
21 belonging to CUSA. The board of directors directs that these  
22 items be delivered to the law office of Nina Salarno-Ashford at  
23 1400 Atwood Road, Auburn, California, 95603, no later than the  
24

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25 <sup>16</sup> Plaintiffs have presented evidence that these withdrawals  
26 were to pay for incidentals related to CUSA meetings held in or  
near casinos.

1 close of business on August 30th, 2006. In the alternative you  
2 are authorized to make arrangements for Gary Harkins to deliver  
3 the documents.”

4 Dean testified that he began requesting documents from Dawe  
5 and Loud around January 2006.<sup>17</sup> Dean also indicated that Dawe and  
6 Loud stalled in their response to these requests. Further, Dean  
7 testified that when Dawe and Loud provided responses to his  
8 requests, they failed to completely answer his questions. On  
9 July 19, 2006, Dean received an email from Dawe, which indicated  
10 that Dawe was aware of Dean’s demand concerning CUSA bills.

11 Harkins was sent by CUSA to Wyoming to collect documents in  
12 Dawe’s possession for a financial audit. He was to bring these  
13 documents to California for the audit. He returned to California  
14 with some records, but did not immediately turn them over to  
15 CUSA because they needed to be photocopied. Harkins brought the  
16 records to Oregon, where they were photocopied. CUSA Board  
17 Member Robert Dean and Nina Salarno-Ashford met with Harkins in  
18 California after Harkins had picked up CUSA records from Dawe.

19 Prior to the submission of financial records from Dawe to  
20 CUSA, Dawe sought to have the Lincoln County Sheriff seize the  
21 records until CUSA appointed an independent auditor to conduct  
22 the audit. Attorney Barry Peak responded to inquiries by Jimenez  
23 requesting CUSA’s financial records.

24 On September 29, 2006, CUSA and its Board of Directors

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25  
26 <sup>17</sup> Plaintiffs have presented testimony from Dawe that these requests were first made in late June or early July 2006.

1 filed a Petition for Writ of Mandamus against Dawe, Harkins, and  
2 Loud, in Sacramento County Superior Court, Case No. 06CS01418,  
3 to compel the inspection and return of CUSA business records,  
4 accounting records, and for the return of all other CUSA  
5 corporate property. On January 3, 2007, CUSA sent an email to  
6 its members which stated, "Brian Dawe and Richard Loud . . .  
7 desperately need your money to pay for their own personal legal  
8 defense . . . ." Dawe solicited donations to fight the mandamus,  
9 yet no donations were made for that purpose.<sup>18</sup>

10 **E. Emails Sent by Dawe to CUSA Members**

11 Dawe has numerous email lists on his AOL email account,  
12 which include over 6,000 email addresses of correctional  
13 officers. Dawe sent Todd Delong a list of emails with which  
14 Delong created a mail distribution list. Dawe claims that the  
15 email contacts he acquired while working for CUSA since 1998  
16 belong to him, and that he let CUSA use them.

17 Dawe sent a mass email to members of CUSA in California to  
18 inform them the CCPOA committed some form of malfeasance. Dawe  
19 emailed approximately 1500 people. Dawe sent out emails in  
20 September 2006, before ACO existed, to CUSA members.

21 Dawe sent an email to everyone on his email list  
22 challenging CUSA officials to take a polygraph test. Dawe also  
23 sent a "'we the undersigned' document" to everyone on the list  
24 sometime after September 30, 2006. CUSA's accountant, Bob

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25  
26 <sup>18</sup> Plaintiffs note that there is no testimony as to who Dawe  
solicited for donations.

1 Underwood, sent a letter to members of CUSA's board of directors  
2 after Dawe explained to Underwood what had happened around the  
3 time of the audit. Dawe also sent a letter to Buffie McFayden.

4 **F. Separation of Dawe from CUSA**

5 Also on August 11, 2006, Dawe and Loud were suspended at a  
6 CUSA meeting by the CUSA board of directors. Harkins  
7 investigated the contract between Dawe and CUSA. Harkins thought  
8 that CUSA may be liable under the severance clause of this  
9 contract and advocated that CUSA pay Dawe the money indicated in  
10 the severance clause.

11 **G. Separation of Harkins from CUSA**

12 On August 11, 2006, the CUSA Board of Directors voted that  
13 Harkins was the chair of the restructure committee. At around  
14 the same time, Harkins sent Nina Salarno-Ashford an email  
15 indicating that she was the interim administrator.<sup>19</sup> Harkins was  
16 "appointed" as a temporary interim administrator by the CUSA  
17 Board, and he served at the pleasure of the Board of Directors.  
18 Harkins was also appointed to the temporary interim  
19 administrator position on August 11, 2006. He never received a  
20 W-2 Tax Form from CUSA. Harkins testified that his arrangement  
21  
22

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23  
24 <sup>19</sup> Plaintiffs have presented evidence that demonstrates a  
25 dispute as to who was the interim administrator as of August 11,  
26 2006. Specifically, Harkins testified that he was the interim  
administrator, and that he only sent Salarno-Ashford the email  
indicating that she was the interim administrator because she  
mistakenly believed that she was the interim administrator.

1 with CUSA was to sit on his butt and not do any work.<sup>20</sup> Harkins  
2 did not disclose an email from Dawe concerning protecting Dawe's  
3 livelihood to the CUSA board.

4 Harkins seconded a motion to remove himself as chairman of  
5 the CUSA restructuring committee after Dawe and Loud were  
6 suspended.<sup>21</sup>

#### 7 **H. Post-Separation Facts**

8 Harkins was not physically restrained by people affiliated  
9 with CUSA who were searching his bags for CUSA property at a  
10 hotel.<sup>22</sup> He was not touched. He was in a public lobby of a hotel.

11 Dawe consulted an attorney after he was suspended  
12 concerning whether he could challenge the CUSA board of  
13 directors under CUSA's by-laws and California corporate law.

14 After his termination, Harkins did not utilize any  
15 procedures of CUSA, if such procedures exist, to challenge his  
16 termination internally. Dawe similarly did not utilize any  
17 internal administrative procedures to challenge his

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18  
19  
20 <sup>20</sup> Plaintiffs have presented evidence that these circumstances  
21 with CUSA only followed his indication that Dawe should be paid  
under the severance clause of his contract with CUSA.

22 <sup>21</sup> Plaintiffs have presented evidence that Harkins was not  
23 paid for his service as interim administrator.

24 <sup>22</sup> Plaintiffs have presented evidence that Harkins was  
25 confronted by two Sergeants-at-Arms who insisted on searching his  
26 luggage. Harkins testified that they stood "directly in [his] face,  
and that when [he] backed up a little bit, they came forward and  
closed that space up." Harkins also testified that he felt he could  
not go anywhere.



1 termination.<sup>23</sup> Harkins and Dawe also did not file any claims with  
2 a government agency concerning their terminations.

3 Since his separation with CUSA, Dawe has not sought  
4 employment with another organization. Rather, Dawe has worked to  
5 create his own businesses, including ACOIN and FIMA.

## 6 II. STANDARDS

### 7 A. Fed. R. Civ. P. 56 Motion for Summary Judgment

8 Summary judgment is appropriate when there exists no  
9 genuine issue as to any material fact. Such circumstances  
10 entitle the moving party to judgment as a matter of law. Fed. R.  
11 Civ. P. 56(c); see also Adickes v. S.H. Kress & Co., 398 U.S.  
12 144, 157 (1970); Secor Ltd. v. Cetus Corp., 51 F.3d 848, 853  
13 (9th Cir. 1995). Under summary judgment practice, the moving  
14 party

15 always bears the initial responsibility of informing  
16 the district court of the basis for its motion, and  
17 identifying those portions of "the pleadings,  
18 depositions, answers to interrogatories, and  
admissions on file, together with the affidavits, if  
any," which it believes demonstrate the absence of a  
genuine issue of material fact.

19 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed.  
20 R. Civ. P. 56(c)).

21 If the moving party meets its initial responsibility, the  
22 burden then shifts to the opposing party to establish the  
23

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24 <sup>23</sup> Plaintiffs have presented evidence that both Harkins and  
25 Dawe did not believe such procedures existed. Defendants have not  
26 provided any admissible evidence from which the court can ascertain  
whether CUSA had complaint procedures through which Harkins and  
Dawe could have challenged their terminations.

1 existence of a genuine issue of material fact. Matsushita Elec.  
2 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986);  
3 see also First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S.  
4 253, 288-89 (1968); Secor Ltd., 51 F.3d at 853. In doing so, the  
5 opposing party may not rely upon the denials of its pleadings,  
6 but must tender evidence of specific facts in the form of  
7 affidavits and/or other admissible materials in support of its  
8 contention that the dispute exists. Fed. R. Civ. P. 56(e); see  
9 also First Nat'l Bank, 391 U.S. at 289. In evaluating the  
10 evidence, the court draws all reasonable inferences from the  
11 facts before it in favor of the opposing party. Matsushita, 475  
12 U.S. at 587-88 (citing United States v. Diebold, Inc., 369 U.S.  
13 654, 655 (1962) (per curiam)); County of Tuolumme v. Sonora  
14 Cnty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001). Nevertheless,  
15 it is the opposing party's obligation to produce a factual  
16 predicate as a basis for such inferences. See Richards v.  
17 Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). The  
18 opposing party "must do more than simply show that there is some  
19 metaphysical doubt as to the material facts . . . . Where the  
20 record taken as a whole could not lead a rational trier of fact  
21 to find for the nonmoving party, there is no 'genuine issue for  
22 trial.'" Matsushita, 475 U.S. at 586-87 (citations omitted).

23 **B. Fed. R. Civ. P. 12(f) Motion to Strike**

24 Rule 12(f) authorizes the court to order stricken from any  
25 pleading "any redundant, immaterial, impertinent, or scandalous  
26 matter." A party may bring on a motion to strike within 20 days

1 after the filing of the pleading under attack. The court, however,  
2 may make appropriate orders to strike under the rule at any time  
3 on its own initiative. Thus, the court may consider and grant an  
4 untimely motion to strike where it seems proper to do so. See 5A  
5 Wright and Miller, Federal Practice and Procedure: Civil 2d § 1380.

6 Motions to strike are generally viewed with disfavor, and will  
7 usually be denied unless the allegations in the pleading have no  
8 possible relation to the controversy, and may cause prejudice to  
9 one of the parties. See 5A C. Wright & A. Miller, Federal Practice  
10 and Procedure: Civil 2d § 1380; See also Hanna v. Lane, 610 F.  
11 Supp. 32, 34 (N.D. Ill. 1985). If the court is in doubt as to  
12 whether the challenged matter may raise an issue of fact or law,  
13 the motion to strike should be denied, leaving an assessment of the  
14 sufficiency of the allegations for adjudication on the merits.  
15 See 5A Wright & Miller, supra, at § 1380.

### 16 **III. ANALYSIS**<sup>24</sup>

#### 17 **A. Claims for Which Defendants Bear the Burden of Proof**<sup>25</sup>

##### 18 **1. Whether Plaintiffs Have Unclean Hands**

19 The affirmative defense of unclean hands "demands that a  
20 plaintiff act fairly in the matter for which he seeks a remedy."  
21 Kendall-Jackson Winery, Ltd. v. Superior Court, 76 Cal. App. 4th  
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23 <sup>24</sup> On May 20, 2009, this court held that California law  
24 applies to plaintiffs' complaint. Doc. No. 183.

25 <sup>25</sup> Defendants move for summary judgment on sexual harassment  
26 and/or sex discrimination. However, no such claims are in  
plaintiffs' verified first amended complaint. As such, the court  
disregards this argument.

1 970, 978 (1999). This defense applies "in legal as well as  
2 equitable actions." Id. Of particular importance in considering  
3 a motion is that whether "the doctrine of unclean hands applies  
4 is a question of fact." Id. In order to prove unclean hands, a  
5 defendant must show that plaintiff engaged in misconduct that  
6 directly relates to the claim(s) brought by plaintiff. Id. at  
7 979.

8 Defendants argue that plaintiffs have unclean hands because  
9 of their involvement in a "plan" to take over CUSA and for  
10 various actions which demonstrate misuse of CUSA tangible and  
11 intellectual property. However, defendants have not met their  
12 initial burden of establishing undisputed evidence that  
13 plaintiffs engaged in any misconduct directly related to their  
14 claims. Specifically, they have not presented any evidence that  
15 any of the actions taken by plaintiffs was wrongful. For this  
16 reason, defendants' motion for summary judgment is denied as to  
17 all claims relying on the defense of unclean hands.

18 **2. Whether Plaintiffs Dawe and FIMA's Contract With**  
19 **Defendants is Illegal**

20 A number of defendants' arguments for summary judgment  
21 concern Dawe and FIMA's contract with defendants, that is  
22 attached to their first amended complaint as Exhibit A. This  
23 contract is related to Dawe's work for CUSA. Plaintiffs allege  
24 that this contracts was breached when defendants removed  
25 plaintiff Dawe from his roles within CUSA and/or failed to pay  
26 him for work performed. Defendants challenge that they cannot be

1 held liable under this contracts because the contract was  
2 unenforceable by virtue of violations involving corporate law  
3 and explicit or implied conflicts of interest. Specifically,  
4 defendants argue that the contract is unenforceable because it  
5 involved an ultra vires interested transaction. "[U]nder general  
6 contract rules, the burden of establishing a particular contract  
7 is illegal is on the party claiming the illegality." In re  
8 Marriage of Iverson, 11 Cal. App. 4th 1495, 1502 (1992) (citing  
9 Fellom v. Adams, 274 Cal. App. 2d 855, 863 (1969); other  
10 citation omitted). Defendants, however, have not presented any  
11 admissible evidence demonstrating this defense. Accordingly,  
12 defendants' motion for summary judgment of plaintiffs' breach of  
13 contract claims is denied. Because defendants argument for  
14 summary judgment on plaintiffs' claims for breach of the implied  
15 covenant of good faith and fair dealing also only concern the  
16 purported illegality of the contract, defendants's motion is  
17 also denied as to these claims.

18 **3. Whether Plaintiffs Claims for Defamation<sup>26</sup> are**  
19 **Barred by California Privileges and Immunities**

20 Dawe and Harkins both bring defamation claims based upon an  
21 email sent by defendants to CUSA membership indicating that they

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22 <sup>26</sup> Defendants also seem to make some arguments under Fed. R.  
23 Civ. P. 12(b)(6) in that plaintiffs did not comply with Bell  
24 Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) in failing to  
25 identify all the alleged defamatory statements in their complaints.  
26 As an initial matter, these arguments are improper on a motion to  
dismiss under Fed. R. Civ. P. 56. Further, defamation is not a  
claim subject to heightened pleading standards under Fed. R. Civ.  
P. 9. Accordingly, even if the court were to address this  
procedurally improper argument, it would fail.

1 committed illegal and unethical acts. Defendants make several  
2 arguments concerning these causes of action. Here, defendants  
3 seek to assert privileges to all "supposedly defamatory  
4 statements, including Exhibit E to the FAC and/or otherwise  
5 alleged" by plaintiffs. However, defendants have only provided  
6 evidence or analysis as to two statements: (1) an email dated  
7 January 3, 2007, which was attached as Exhibit E to Dawe's and  
8 FIMA's first amended complaint and (2) an email dated October 3,  
9 2006, which was quoted in Harkins' amended crossclaim.  
10 Plaintiffs have provided evidence of numerous other allegedly  
11 defamatory statements made by defendants. However, because  
12 defendants have only presented arguments as to these two emails,  
13 the court construes defendants's motion for summary judgment on  
14 plaintiffs' defamation claims to be limited to their claims  
15 insofar as they rise out of these two emails.

16 First, defendants argue that the email is protected by the  
17 absolute litigation privilege. The privilege "applies to any  
18 publication required or permitted by law in the course of a  
19 judicial proceeding to achieve the objects of the litigation,  
20 even [if] the publication is made outside the courtroom and no  
21 function of the court or its officers is involved." Rusheen v.  
22 Cohen, 37 Cal. 4th 1048, 1057 (2006) (internal quotation  
23 omitted). Specifically, "the privilege applies to any  
24 communication (1) made [concerning] judicial or quasi-judicial  
25 proceedings; (2) by litigants or other participants authorized  
26 by law; (3) to achieve the objects of the litigation; and (4)

1 that have some connection or logical relation to the action.”

2 Id. Accordingly, communications that bear some relation to  
3 judicial proceedings are absolutely immune to liability in tort.

4 Id. (internal quotations omitted).

5 Defendants contend that these emails are covered by the  
6 absolute litigation privilege because they had filed a petition  
7 for a writ of mandamus to compel plaintiffs to turn over CUSA  
8 records and property on September 29, 2006. The January 3, 2007  
9 email made numerous accusations about plaintiffs’ misuse of CUSA  
10 funds while in office as well as insinuations about Dawe being  
11 an alcoholic. At the end of the email, CUSA stated that Dawe and  
12 Loud “desperately need your money to pay for their own legal  
13 defense.” Apparently, defendants contend that this language  
14 indicates that the email was sent to achieve the objects of the  
15 litigation. This court has previously held that this “email does  
16 not reference, even obliquely or inferentially, the writ of  
17 mandamus action.” May 20, 2009 Order, Doc. 183, p. 37 n. 14. The  
18 court continued to state that other than having been sent  
19 several months after the filing of the mandamus action, the  
20 email otherwise appears to have no relationship to that action.  
21 Id. Based on this reasoning, the court held that the email was  
22 not protected under the Anti-SLAPP statute as it was not related  
23 to “defendants’ right to petition the courts.” Id. Defendants  
24 have not presented any evidence beyond the email that was  
25 considered in this court’s previous order as to the relationship  
26 between the email and the mandamus action. Nor have defendants

1 presented any arguments as to why this court should reconsider  
2 its analysis of the email in its previous email. As an email  
3 which has no apparent relationship to the mandamus action, it  
4 does not appear to have been sent to achieve the objects of the  
5 mandamus action, defendants have not met their initial burden as  
6 to showing that they are entitled to the absolute litigation  
7 privilege with respect to this email.

8       The October 3, 2006 email was also sent to CUSA members. It  
9 is addressed to Harkins, and states that "You are a documented  
10 liar and thief. Your opinions of any act or decision of the  
11 Board of Directors or the Interim Administrator are irrelevant.  
12 You stole CUSA property and lied in the process. [¶] You have  
13 forfeited any and all rights or responsibilities you ever held  
14 in CUSA. Talk to the DA." This email bears even less of a  
15 connection to the mandamus action. The final line, "Talk to the  
16 DA," appears to concern litigation, but does not concern  
17 defendants' petition for a writ of mandamus actions - district  
18 attorneys are not involved in such actions. Accordingly,  
19 defendants have also not met their initial burden as to showing  
20 that they are entitled to the absolute litigation privilege in  
21 this email.

22       Second, defendants argue that the emails are protected by  
23 common interest privilege. This privilege applies where a  
24 communication is "made without malice, to a person interested  
25 therein, . . . by one who is also interested." Mamou v.  
26 Trendwest Resorts, Inc., 165 Cal App. 4th 686, 729 (2008)



1 (internal quotations omitted). Defendant bears the burden of  
2 proof as to both elements of this privilege. Id. Specifically,  
3 “the defendant bears the burden of showing in the first instance  
4 that there is no triable issue of fact as to either issue—that  
5 the statement was made on a privileged occasion, and that it was  
6 made ‘without malice.’” Id. Malice is “a state of mind arising  
7 from hatred or ill will, evidencing a willingness to vex, annoy  
8 or injure another person.” Id. (internal citation omitted). This  
9 “privilege is lost if the publication is motivated by hatred or  
10 ill will toward plaintiff . . . , or by any cause other than the  
11 desire to protect the interest for the protection of which the  
12 privilege is given . . . .” Id. quoting Agarwal v. Johnson 25  
13 Cal. 3d 932, 944-945 (1979), abrogated on other grounds White v.  
14 Ultramar, Inc. 21 Cal. 4th 563, 574 n.4 (1999). While defendants  
15 likely have met their burden that the CUSA board shares a common  
16 interest with CUSA members as to misuse of CUSA funds,  
17 defendants have not provided sufficient evidence that these  
18 statements were not motivated by malice. For example, in the  
19 letter discussed above, defendants stated that Dawe was “falling  
20 off the wagon and padding his pocket” without providing any  
21 evidence as to Dawe abusing alcohol or narcotics. Specifically,  
22 in a statement that appears on its face to be malicious,  
23 defendants have not provided any evidence that such a statement  
24 was made without malice, including, but not limited to,  
25 testimony of the persons who made the allegedly defamatory  
26 statements. Moreover, even if defendants had met their burden to

1 evidence the absence of malice, malice raises a subjective  
2 issue, which is not properly decided on summary judgment.  
3 Accordingly, defendants have not met their burden as to this  
4 defense.

5 Third, defendants argue that plaintiffs are public figures  
6 or limited public figures, and therefore must prove  
7 constitutional malice. Defendants "bear[] the burden of proving  
8 the plaintiff's public figure status." Carr v. Forbes, Inc., 259  
9 F.3d 273, 278 (4th Cir. 2001). There are two type of public  
10 figures. "The first is the all purpose public figure who has  
11 achiev[ed] such pervasive fame or notoriety that he becomes a  
12 public figure for all purposes and in all contexts. The second .  
13 . . is that of the limited purpose . . . public figure, an  
14 individual who voluntarily injects himself or is drawn into a  
15 particular public controversy and thereby becomes a public  
16 figure for a limited range of issues." McGarry v. Univ. of San  
17 Diego, 154 Cal. App. 4th 97, 113 (2007) (quoting Gertz v. Robert  
18 Welch, Inc. 418 U.S. 323, 351, (1974)).

19 Here, defendants have presented no evidence that Harkins is  
20 a public figure or a limited public figure. Rather, all they  
21 have shown is that Harkins attended events on corrections  
22 issues. However, defendants have met their initial burden as to  
23 Dawe being at least a limited public figure in that he has  
24 spoken at numerous events and was well-known expert or advocate  
25 with respect to issues affecting correctional officers.  
26 Nonetheless, while plaintiff bears the burden at trial to prove

1 constitutional malice, on summary judgment, defendants must  
2 first show that there is no triable issue as to whether they  
3 exhibited such malice in publishing allegedly defamatory  
4 statements about Dawe. Specifically, defendants must show that  
5 there is no triable fact as to whether they knew the statements  
6 they made about Dawe were false or that they acted with reckless  
7 disregard as to the truth of these statements. Id. at 114  
8 (internal quotation omitted). "The test is a subjective test,  
9 under which the defendant's actual belief concerning the  
10 truthfulness of the publication is the crucial issue." Id.  
11 (internal quotation omitted). Defendants, however, have  
12 presented no evidence as to their subjective beliefs as to the  
13 truthfulness of the publications they made. Thus, defendants  
14 have not met their burden as moving party as to this argument as  
15 well.

16 Fourth, defendants argue that the statements made were  
17 true. However, as demonstrated above, defendants have not  
18 provided evidence to support their claim that the statements  
19 made were true. In particular, defendants have not provided  
20 admissible evidence as to any undisputed facts of the content of  
21 any of the statements plaintiffs allege were defamatory.

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1                   **B. Claims for Which Plaintiffs Bear the Burden of**  
2                   **Proof**

3                   **1. Whether There is a Triable Fact as to**  
4                   **Plaintiffs' Statuses as Employees of CUSA**

5                   Plaintiffs have demonstrated a triable question of fact as  
6                   to whether they were employees of CUSA. While the contracts at  
7                   issue indicate that they were not employees, CUSA's treatment of  
8                   plaintiffs as if they were employees by, *inter alia*, suspending  
9                   plaintiffs without pay, is sufficient evidence of a triable  
10                  question of fact. See Varisco v. Gateway Science & Engineering,  
11                  Inc., 116 Cal. App. 4th 1099, 1103-04 (2008). Thus, defendants'  
12                  motion for summary judgment on this ground is denied.

13                   **2. Whether Harkins was Falsely Imprisoned**

14                  "The elements of a tortious claim of false imprisonment  
15                  are: (1) the nonconsensual, intentional confinement of a person,  
16                  (2) without lawful privilege, and (3) for an appreciable period  
17                  of time, however brief." Lyons v. Fire Ins. Exchange, 161 Cal.  
18                  App. 4th 880, 888 (2008) (internal quotation omitted). "A person  
19                  is falsely imprisoned if he is wrongfully deprived of his  
20                  freedom to leave a particular place by the conduct of another"  
21                  regardless of whether the person is physically restrained.  
22                  Schanafelt v. Seaboard Finance Co., 108 Cal. App. 2d 420, 422-23  
23                  (1951). In Schanafelt, the court held that defendant's parking a  
24                  car such that plaintiffs' driveway was blocked, and they were  
25                  unable to leave their home, may constitute the tort of false  
26                  imprisonment depending on defendant's state of mind. Id. at 423.  
                  Here, the undisputed evidence is that Harkins was not physically

1 restrained by people affiliated with CUSA who were searching his  
2 bags for CUSA property at a hotel. Specifically, Harkins was not  
3 touched when approached in the lobby of a hotel. Plaintiffs have  
4 provided the testimony of Harkins, where he stated that, after a  
5 CUSA meeting, he was confronted by two Sergeants-at-Arms who  
6 insisted on searching his luggage. They stood "directly in [his]  
7 face, and that when [he] backed up a little bit, they came  
8 forward and closed that space up." Harkins continued to say  
9 that, "there really wasn't anywhere [he] could go unless [he]  
10 wanted to go running through the lobby and leave [his] luggage  
11 behind." While Harkins's testimony appears to indicate that he  
12 was free to leave, and thereby would defeat a claim for false  
13 imprisonment, Harkins argues that the statement about running  
14 through the lobby was made sarcastically. Based on this  
15 evidence, a reasonable jury could find that the actions of the  
16 Sergeants-in-Arms were sufficient to confine Harkins without his  
17 consent. Particularly, a jury could find that as a realistic  
18 matter Harkins was not free to leave the area in the hotel  
19 lobby. For this reason, defendants' motion for summary judgment  
20 on this claim is also denied.

21 **3. Whether Plaintiffs Have Demonstrated a Triable**  
22 **Issue as to Their Claims for Interference of**  
23 **Contract**

23 Defendants raised two arguments as to plaintiffs'  
24 interference of contract claims. The first depends upon the  
25 court granting summary judgment as to plaintiffs' defamation  
26 claims. However, as discussed above, the court does not grant

1 summary judgment on those claims. The second argument is that  
2 there cannot be an interference of contract claim against a  
3 party to contract. While plaintiffs bear the burden of proof as  
4 to this claim, it need not be addressed because defendants'  
5 argument misconstrues plaintiffs' claims. Plaintiffs claims do  
6 not concern a contract to which they entered with defendants but  
7 rather contracts plaintiffs sought to enter with third parties.  
8 As defendants have not raised an argument relevant to  
9 plaintiffs' actual claims, their motion for summary judgment is  
10 denied as to plaintiffs' interference of contract claim.

#### 11 **C. Motions to Strike**

12 Plaintiffs have filed a motion to strike and a supplemental  
13 motion to strike sections of the declarations and exhibits  
14 submitted in support of defendants' motion for summary judgment.  
15 Defendants also moved to strike evidence submitted by plaintiffs  
16 in opposition to their motion. The court need not address these  
17 claim in detail. It is suffice to say the only facts necessary  
18 or proper for consideration of defendants' motion are those  
19 discussed in the opinion, and those need not be stricken.

#### 20 **IV. CONCLUSION**

21 For the foregoing reasons, defendants' motion for summary  
22 judgment, Doc. No. 254, plaintiffs' motion to strike, Doc. No.  
23 267, and defendants' motion for relief from mistake, Doc. No.  
24 274, and defendants motion to strike, Doc. No. 279, and

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1 plaintiffs' supplemental motion to strike, Doc. No. 281, are all  
2 DENIED.

3 IT IS SO ORDERED.

4 DATED: February 24, 2010.

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LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT