

1 ROSNER, BARRY & BABBITT, LLP
Hallen D. Rosner, SBN: 109740
2 Christopher T. Smith, SBN: 281599
10085 Carroll Canyon Road, Suite 100
3 San Diego, CA 92131
TEL: (858) 348-1005
4 FAX: (858) 348-1150

5 LAW OFFICE OF JAMES J. MONEER
James J. Moneer, SBN 176965
6 1901 First Avenue, First Floor
San Diego, CA 92101
7 TEL: (619) 723-7030

8 Attorneys for Plaintiff and Cross-Defendant
MICHAEL SHAMES

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

08/19/2013 at 03:19:00 PM
Clerk of the Superior Court
By Sandra Villanueva, Deputy Clerk

11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION
13

14 MICHAEL SHAMES, an individual,
15 Plaintiff,

16 v.

17 UTILITY CONSUMERS' ACTION
NETWORK, DAVID PEFFER, MICHAEL
18 AGUIRRE, AND DOES 1 TO 50.

19 Defendants.

20 UTILITY CONSUMERS' ACTION
21 NETWORK, DAVID PEFFER, MICHAEL
AGUIRRE; and DOES 1 to 50,

22 Cross-Complainants,

23 v.

24 MICHAEL SHAMES, an individual, and
25 DOES 51-100, inclusive,

26 Cross-Defendants.
27
28

Case No. 37-2013-00036966-CU-DF-CTL

PLAINTIFF AND CROSS-DEFENDANT
MICHAEL SHAMES' OPPOSITION TO
UTILITY CONSUMERS' ACTION
NETWORK'S SPECIAL MOTION TO
STRIKE PLAINTIFF'S COMPLAINT
[PURSUANT TO CODE CIV. PROC.
SECTION 426.16

"IMAGED FILE"

Date: August 30, 2013
Time: 10:00 a.m.
Judge: Hon. Ronald S. Prager
Dept: C-71

Complaint Filed: February 28, 2013
Trial Date: None Set

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

TABLE OF CONTENTS

I. INTRODUCTION/FACTS 1

II. EACH STATEMENT OF FACT ABOUT SHAMES FITS SQUARELY
WITHIN THE COMMERCIAL SPEECH EXEMPTION OF
CCP § 425.17, SUBD. (c) AS THEY WERE MADE BY A COMPETITOR
ABOUT SHAMES' BUSINESS PRACTICES 2

III. PLAINTIFF WILL PREVAIL ON EACH TARGETED CLAIM 4

IV. DAMAGES 14

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

TABLE OF AUTHORITIES

STATE CASES:

Hawran v. Hixon
(2012) 209 Cal.App.4th 256 4, 13

Kibler v. Northern Inyo County Hospital
(2006) 39 Cal.4th 192 5

Nguyen-Lam v. Cao
(2009) 171 Cal.App.4th 858 14

Rothman v. Jackson
(1996) 49 Cal.App.4th 1134 5, 11

Simpson Strong-Tie Co v. Gore
(2010) 49 Cal.4th 12 4

Taheri Law Group v. Evans
(2008) 160 Cal.App.4th 482 4

STATE STATUTES:

California Code of Civil Procedure §337 11

California Code of Civil Procedure §425.16 2

California Code of Civil Procedure §425.17 2

1 **I. INTRODUCTION/FACTS**

2 As the facts will show below, UCAN employees and a Board member sought to prevent
3 Plaintiff from competing with his former employer. The relevant facts in this case are not refuted by
4 either Defendant. Plaintiff, Michael Shames, represented customers of SDG&E before the Public
5 Utilities Commission through an organization he helped create in 1983 called Utility Consumers'
6 Action Network (UCAN). For over 27 years, he was San Diego's voice, before regulators, the
7 legislature and in the media, serving as an informed and expert counterforce to SDG&E. (Shames'
8 Dec, para 3.)

9 In June 2012, Plaintiff left UCAN and created a competing advocacy organization called San
10 Diego Consumers' Action Network (SDCAN). (Shames' Dec, para 25.) Plaintiff had not signed a
11 non-compete contract so UCAN had no protection from Plaintiff's continued advocacy at the CPUC.
12 (Shames' Dec, para 26.) Plaintiff maintains that Defendant UCAN management ratified a coordinated
13 attack in the San Diego media upon Plaintiff's professional reputation in order to reduce his
14 effectiveness at the regulatory and legislative arenas. Plaintiff has chosen not to attempt to litigate
15 this matter in the media. Instead, he has amassed a voluminous body of documentary proof and
16 declarations from credible witnesses to prove that Defendant UCAN commenced a systematic attack
17 upon Plaintiff's professional reputation, directly contradicting UCAN's prior public positions.

18 As will be detailed below, Plaintiff's complaint is exempt from SLAPP on the basis of the
19 commercial speech exemption. Additionally, Plaintiff will defeat the privilege defenses raised by
20 Defendants on the basis that the publications in question were to the general public via press releases,
21 internet posts, private communications to Plaintiff's ex-spouse and targeted media leaks. Most
22 importantly, Plaintiff will demonstrate a probability of prevailing on each targeted claim with
23 competent admissible evidence.

24 In this case, Plaintiff offers the declaration of Robert Ames, a reputable and experienced
25 attorney – a former partner in Gray, Cary, Ames - was brought in to assist with UCAN's operations
26 at the beginning of the Aguirre-UCAN conflict in May 2011. He is an objective and disinterested
27 declarant in this case. His knowledge and insights are of particular value to this Court because he
28 witnessed first-hand many of the conflicts between Plaintiff and Defendants which gives him first-

1 hand knowledge of the facts about the truthfulness and malice the Defendants held towards Mr.
2 Shames.

3 Liability is *not* predicated upon any statement made to the California Public Utilities
4 Commission (CPUC) or before any other official body that might be subject to litigation privilege.
5 Each of the five causes of action targeted by Defendants UCAN's anti-SLAPP motion base liability
6 primarily upon each Defendant's republication or direct statements of false and unprivileged
7 defamatory statements to the media and private individuals about Michael Shames' nonprofit
8 management.

9 **II. EACH STATEMENT OF FACT ABOUT SHAMES FITS SQUARELY WITHIN THE**
10 **COMMERCIAL SPEECH EXEMPTION OF CCP § 425.17, SUBD. (c) AS THEY**
11 **WERE MADE BY A COMPETITOR ABOUT SHAMES' BUSINESS PRACTICES**

12 Plaintiff will not contest whether speech was protected, but does assert that it UCAN's speech
13 is exempt from SLAPP pursuant to CCP § 425.17(c)^{1/}. Three UCAN employees admit that they
14 directly compete with Plaintiff for ratepayer advocacy before the California Public Utilities
Commission (CPUC). The following are undisputed facts:

- 15 • That each named Defendant competes with Shames and SDCAN for ratepayer cases,
16 experts, and compensation for services rendered in those cases.
- 17 • That both UCAN and SDCAN were primarily engaged in the business of representing
18 San Diego utility rate payers as intervenors before the CPUC at the time Defendants
republished the challenged statements to the media.

19 ///

20 ///

21 ///

22
23 ^{1/} "CCP § 425.16 does not apply to any cause of action brought against a person *`primarily engaged*
24 *in the business selling or leasing goods or services'*... arising from any statement or conduct by that
person if both of the following conditions exist:

25 (1) The statement or conduct consists of representations of fact about that person's or a
26 business competitor's business operations, goods or services, that is made for the purpose of
obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the
27 person's goods or services *or the statement or conduct was made in the course of delivering the*
person's goods or services; and

28 (2) The intended audience is an actual or potential buyer or customer, or a person likely to
repeat the statement to, or otherwise influence, an actual or prospective buyer or customer...

1 Defendant UCAN's representatives have so admitted: UCAN employee Defendant Pepper
2 admits this competitive relationship with Plaintiff's advocacy group (SDCAN) in his declaration filed
3 on behalf of Defendant Aguirre:

4 "In the summer of 2012 I learned that Mr. Shames was no longer employed at UCAN.
5 Soon thereafter, I learned that Mr. Shames had organized a competing consumer group
6 called the San Diego Consumers' Action Network ("SDCAN"). ... On June 26, 2012,
7 Mr. Shames representing SDCAN, filed a motion with the California Public Utilities
8 Commission claiming that SDCAN was UCAN's successor and attempting to claim
9 UCAN's interest in the SDGE General Rate case - Phase 2. UCAN's interest included
10 a large investment of attorney time, attorney work product, and expert testimony.
11 (Peffer Dec paras. 20-21, NOL, Exhibit 7).

12 Another UCAN manager/employee Charles Langley echoes the competitive nature of the
13 Defendant's relationship with Shames:

14 "I also learned that Mr. Shames had filed paperwork to award his new San Diego
15 Consumers' Action Network a key stake in a rate-hike case pending before the
16 ...CPUC. At the time, I consulted with my attorney, Michael Aguirre, about these
17 matters and what could be done to stop Mr. Shames from taking away UCAN's case
18 before the CPUC." (Langley Dec, para 19, NOL, Exhibit 8)^{2/}

19 Additionally, UCAN formally took actions to prevent Mr. Shames from participating in the
20 large and complex \$1 billion SDG&E Rate Case that he originated with UCAN. (Shames Dec, paras
21 93-95.) And it opposed Mr. Shames' efforts to intervene in another case in which UCAN was
22 involved. (Shames Dec, para 29, NOL Exhibit 5.)

23 Finally, Plaintiff's successor at UCAN, Kim Malcolm, (and a declarant on behalf of UCAN)
24 was quoted in the media stating:

25 "Apparently he was laying the groundwork for an organization that is apparently
26 UCAN's mirror image — but without all of the liabilities that have been left to UCAN
27 — while he (was) paid as its executive director and an officer." (Complaint, para 97;
28 Shames Dec, para 31.)

Each of the alleged defamatory statements consists of representations of fact about Shames'
business operations, goods, or services at the CPUC. Advocacy at that body is influenced by an
Intervenor Compensation program that allows for intervenors to be reimbursed for work in
proceedings where that intervenor has made a substantial contribution. Being recognized as an
intervenor is not an easy task; the Commission has rejected intervenor applicants and has reduced

^{2/} The "rate hike case" to which the two declarants refer are an application by SDG&E for a \$1 billion rate increase for its customers from 2012-2015.

1 compensation for advocates who duplicate the efforts of others. Moreover, reputation for
2 professionalism and fair dealing has a direct impact upon the effectiveness of advocates at the CPUC.
3 (Id.) UCAN brought its smear campaign to the CPUC through a number of media outlets.. (Shames
4 Dec, para 34.) Pursuant to the holdings of *Simpson v. Gore*, *Hawran v. Hixson* and *Taheri Law*
5 *Group v. Evans*,^{3/} Defendant UCAN actively caused false statements of fact about Shames business
6 operations and services to be republished in the media to San Diego ratepayers and the CPUC in
7 attempt to influence SDCAN's eligibility and compensation from the CPUC.

8 **III. PLAINTIFF WILL PREVAIL ON EACH TARGETED CLAIM**

9 Defendants Aguirre and Pepper made a number of allegations in 2011 to the UCAN Board
10 which consequently spent over \$700,000 to investigate all of these claims. In response to these
11 allegations, on February 28, 2012, UCAN issued a public statement on its website in regards to the
12 numerous allegations that had been made by Defendants Aguirre and Pepper throughout 2011-2012:

13 Among the allegations lodged against UCAN's senior management by such third
14 parties included (a) embezzlement of UCAN funds, directly, through kickbacks or via
15 other routes, (b) private bank accounts in which assets were being siphoned, (c) failure
16 to comply with state audit requirements, (d) engaging in unlicensed legal activities,
17 and (e) entering into illegal contracts. *However, no evidence confirming such*
18 *allegations was provided by those lodging allegations, nor discovered by any of the*
19 *professionals retained by UCAN's board.* The UCAN board engaged several San
20 Diego County firms to assist it in evaluating multiple allegations leveled against
21 UCAN by third parties. Those assisting the UCAN board include law firms: Dostart
22 Clapp & Coveney LLP; Iredale and Yoo APC; among others. In addition, AKT LLP
23 was retained by the UCAN board for forensic accounting, business consulting and
24 auditing services. (*Emphasis added - See Shames' Dec, Exhibit A, para 17.*)

25 Notwithstanding UCAN's official public vindication of Plaintiff, within a few months after
26 Plaintiff left UCAN, the organization began issuing defamatory statements that declared personal
27 benefit from class action lawsuits, misappropriation of UCAN documents, compensation
28 overpayment, misuse and misdirection of UCAN funds, and withholding material information from
the Board. Each of the defamatory statements is a provably false and malicious factual assertion.

Nor is UCAN entitled to a litigation privilege defense. The Courts have consistently declined
to apply the privilege to press conferences or press releases, explaining that the "connection or

^{3/} *Simpson Strong-Tie Co v. Gore* (2010) 49 Cal.4th 12, 30, *Hawran v. Hixon* (2012) 209
Cal.App.4th 256, 271-273, *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 485-487,
490-492.

logical relation' which a communication must bear to litigation in order for the privilege to apply, is a *functional* connection, i.e. the communication must function as a necessary or useful step in the litigation process and must serve its purposes." (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, at 1146). Moreover, the publications were not even related to legitimate "litigation" as communication must, at minimum, be made before or be related to an issue under review in an official governmental proceeding that is (1) authorized by law; and (2) reviewable by writ of mandate. *Kibler v. Northern Inyo County Hospital* (2006) 39 Cal.4th 192.

As described in Plaintiff's declarations, each of the six defamatory publications by UCAN which are false and contradict the findings of UCAN's own independent consultants as well as its own public statements.

MISUSE OF UCAN ASSETS IN CLASS ACTION CASES

PUBLISHED LIES	PUBLISHER	TRUTH
Shames gained personal benefit from class action cases.	Anonymous UCAN sources (NOL, Exhibits 13-14.)	Plaintiff received no personal or indirect remuneration for his work in class action cases as an individual or through UCAN. (Shames' Dec, para 47.)
Shames withheld information from employees and staff about class action cases.	"UCAN employees and directors" (NOL, Exhibit 12.)	All class action cases were disclosed to the Board in quarterly Board materials. (Shames' Dec, para 46.)
UCAN was a "lawsuit generating machine for Shames" in which there were "tit for tat" arrangements.	Charles Langley via SD Reader (NOL, Exhibit 13.)	Class action cases were only a fraction of UCAN's activities and there is absolutely no proof or truth to the assertion of reciprocal arrangements with class action attorneys. (Shames' Dec, para 35.)
Shames gave away UCAN's "assets" for no remuneration.	Kim Malcolm (Shames' Dec, para 49.)	Malcolm's assertion is unethical, possibly illegal and highly inappropriate. Nor were assets "given away". (Shames' Dec, paras 49-52.)

Despite UCAN's public finding that it found no "embezzlement of UCAN funds, directly, through kickbacks or via other routes" news articles began beginning in late 2012 suggesting that Plaintiff had improperly used private class action lawsuits as a source of personal income. (Complaint, para 33.) UCAN representatives were cited. Amongst these articles was one published

on July 11, 2013 stating that UCAN filed:

“class action suits against various companies for consumer fraud and won big settlements.....“Was there a tit for tat?” with anybody at UCAN, asks one skeptic who is near the top of the watchdog’s hierarchy. That’s just one question surfacing now.” (Shames Dec, para 41, NOL Exhibit 13.)

Similarly, the *UTSanDiego* printed a series of articles about Plaintiff’s involvement in class actions. On March 30, 2013, it printed:

“The employees have also raised questions about consumer complaints that turned into class-action lawsuits, generating huge legal fees and settlements. Several UCAN employees and directors said they were not told about the lawsuits, some of which resulted in significant monetary awards to the nonprofit.” (See Shames Dec, para 40, NOL, Exhibit 12.)

As set forth in the Declaration of Robert Ames, there is no basis to any of the allegations and UCAN has never found any improprieties. (Ames Dec, paras 35-36.) As set forth in the Declarations of David S. Casey, Alan Mansfield and Jeffrey R. Krinsk, there was no unethical or illegal arrangement in any UCAN-related or Shames-related class actions.

Perhaps the most malicious element of this secretive campaign by UCAN operatives to impugn Plaintiff’s reputation was that, because UCAN had no proof that Mr. Shames had personally profited from the class action cases, Defendant UCAN switched gears and states in its SLAPP motion that Plaintiff improperly “gave away” UCAN’s assets to plaintiff attorneys. (Shames’ Dec., para 49.) There was no connection of this issue to any litigation or regulatory actions and thus a litigation privilege defense is not applicable to these lies.

ALLEGATION OF MISSING FILES

PUBLISHED LIES	PUBLISHER	TRUTH
Shames was in possession of UCAN files, including those necessary to respond to a state audit.	Kendall Squires via media and letter. (NOL, Exh. 18.)	Previously, UCAN had demanded in writing that Shames return all files and keep none. He complied, as memorialized by this attorney. (Shames' Dec, para 54.)
Shames was custodian of UCAN’s records and thus responsible for their whereabouts.	Kendall Squires via media and letter. (NOL, Exh. 18.)	Shames formally relinquished control of UCAN records (except for payroll) in May 2011, pursuant to direction by Mr. Squires. In fact, Mr. Ames removed important UCAN records from the UCAN offices and stored them at his home.

		(Shames' Dec, para 57, Ames' Dec, para 28.)
UCAN was not in possession of the files necessary to respond to an audit by the State Auditor without the files.	Kendall Squires via media and letter. (NOL, Exh. 18.)	Not only had Shames provided all necessary files to UCAN (along with backups) but most all of the needed documents were in the public domain. Subsequently the State Auditor found no problem with UCAN's books and records. (Shames' Dec, paras 60,63.)
Shames was in possession of employee timesheets.	Kendall Squires via media and letter. (NOL, Exh. 18.)	Squires knew the Shames did not require employees to keep timesheets. In 2011, he directed Robert Ames to begin the process of keeping employee timesheets. (Shames' Dec, para 61, Ames Dec, para 31.)
Shames was responsible for missing files.	Kendall Squires via media and letter. (NOL, Exh. 18.)	Squires knew that UCAN's paper files had been pilfered by UCAN employees and Ms. Malcolm had been so informed by Mr. Shames. Squires also knew that electronic backups existed for most all financial records. (Shames' Dec, para 63, Ames Dec, para 27.)
Shames was in possession of all files pertaining to incentive payments paid by UCAN to Shames	Kendall Squires, verbally to attny. Richard Ravreby (NOL, Exh. 21.)	When Ravreby sought information from incentive payments paid to Shames, Squires told him that Shames had the files. (Shames' Dec, para 64.)
That payroll records were in Shames' possession on or after September 5, 2012	UCAN SLAPP motion, p. 14	Shames informed UCAN on September 26 th that two binders of payroll information had been surreptitiously delivered to his house. UCAN did not pick up the files until six months later. (Shames' Dec, para 65.)

On September 5, 2012 Plaintiff received a call from an UTSanDiego reporter indicating that Kendall Squires had sent Plaintiff (and others) a letter stating that UCAN files were missing and demanding that Plaintiff return said files. Plaintiff had not yet received the letter. The letter (dated August 29) asserted a number of false facts:

1. UCAN was unable to locate agency files necessary to respond to State Auditor review of the UCAN files;
2. From 2006 until his departure in 2012, Plaintiff was the custodian of records for the organization;
3. That Shames was in possession of employee timesheets;
4. That Shames must return all of the files listed in the letter.

///

1 Due to the republication of the allegations, the following assertions were published:

2 “Investigation into business practices at [UCAN] has sparked an audit of the state
3 program that pays millions of dollars to groups that fight rate hikes...” (*UTSanDiego*,
August 17, 2012.) (NOL, Exhibit 20, Shames’ Dec, para 58.)

4 “[UCAN] is missing years of payroll records, contracts and other critical documents,
5 making it all but impossible to audit the nonprofit or answer looming questions from
6 state officials..... The near-complete lack of documentation is the subject of a letter
UCAN Chairman Kendall Squires sent to former Executive Director Michael Shames
last week.” (*UTSanDiego*, September 12, 2012.) These and other newspaper articles
are found in Shames Dec, paras 65, NOL, Exh. 22.)

7
8 “Shames’ email to The Watchdog saying that everything was in order when he was
9 responsible for the records rings hollow.....And we hope that state officials trying to
10 get to the bottom of the mess at UCAN are able to sort it all out despite the missing
records. Consumer groups can play an important role.....but only if those groups
and their leaders are themselves credible and not guilty of self-dealing or malfeasance.
(UT Editorial, September 13, 2012, NOL, Exhibit 45.)

11 The media was viciously condemnatory about a non-issue: the missing records were not
12 missing, they had no impact upon the State Auditor’s examination of UCAN’s records and UCAN
13 was not found to have any deficiencies. (NOL, Exhibit 19; Shames’ Dec, para 60.) The accusations
14 also served as a veiled message to the CPUC regulators that Plaintiff had not properly documented
15 past compensation requests. And it was designed to lead these same regulators to view compensation
16 requests by Plaintiff on behalf of SDCAN in a different light. By asking the “return” of such
17 documents, UCAN was also alleging theft.

18 Mr. Squires made the same defamatory lie to the attorney of Plaintiff’s ex-spouse, which
19 formed the basis of a civil action that she brought against Plaintiff. This attorney republished the lie
20 in the San Diego Reader, (NOL, Exhibit 21) only to learn that UCAN had previously demanded
21 Plaintiff to return all files and destroy all electronic copies and that Plaintiff had complied.
22 [Declarations of Michael Shames, para 64), Richard Ravreby and Katherine Wolf]. As is discussed
23 in great depth by each of the attached declarations, each of the facts asserted by Defendants was false
24 and malicious, to wit:

- 25 • There were no files missing relating to the State Audit – most all of the files were
26 provided in electronic format to UCAN. Moreover, copies of them were public
27 documents available on the Internet. (Shames’ Dec, para 63.) The state audit of
UCAN’s records found no problems with UCAN’s substantiation (Shames’ Dec, para
60.)
- 28 • Plaintiff was not custodian of records after May 2011; (Ames’ Dec, paras 25,28.)

- 1 • UCAN made no effort to contact Plaintiff or Mr. Ames to determine the presence of the records prior to sending the letter; (Shames' Dec. para 55 and Ames' Dec, para 29.)
- 2 • UCAN had demanded in July 2011 and had received assurances from Plaintiff's then-counsel that all UCAN files had been returned to UCAN and that Plaintiff was not in possession of any such records; (Shames' Dec, para 54, NOL Exh. 17.)
- 3 • Plaintiff wasn't and couldn't have been in possession of other employee timesheets as UCAN did not require employees to keep timesheets until after Mr. Ames took over employee oversight. (Ames Dec, para 31.)
- 4 • That UCAN was fully aware of pilfering and insecurity of UCAN files, so much so that Squires directly Robert Ames to store important files at Ames' house rather than leave them at UCAN's offices. (Shames' Dec, para 63, Ames Dec, para 27.)

8 The allegations made by Squires were not only false, but constituted an accusation that
 9 Plaintiff, a licensed attorney, stole and/or misappropriated of UCAN property without a shred of
 10 evidence to counter the July representations made by Mr. Shames and his attorney. This malice is
 11 magnified by three key facts:

- 12 1. Squires knew that UCAN files had been pilfered and were highly insecure.
- 13 2. Squires and the UCAN Board expressly forbid Robert Ames from stating to the media that Ames was the custodian of records from May 2011 onwards. (Ames' Dec, para 28.)
- 14 3. UCAN has sufficient files that allowed it to submit fully-documented compensation requests to the CPUC for Plaintiff's work in previous cases and currently has almost \$2 million in pending requests before that agency. (Shames' Dec, para 97.)

16 The litigation privilege defense is not applicable. Republication in the media (*Rothman v. Jackson*) of a letter that should have been directed to the State Auditor's office but, instead was sent
 17 to the agency at which Mr. Shames made his living both eliminate any legitimate claim of privilege.
 18 Squires' letter was not intended to do anything other than inflict maximum damage on Plaintiff's
 19 reputation by publishing the letter in the media and sending copies to state agencies not directly
 20 involved in the audit process.

22 **ALLEGATION OF UNAUTHORIZED INCENTIVE PAYMENTS**

23 PUBLISHED LIES	PUBLISHER	TRUTH
24 Bonuses from 2005-2011 were "unauthorized and improper".	Kendall Squires via media and letter. (NOL, Exhibit 26.)	Squires knew that the incentive payments were legal and so assured Mr. Shames in a November 2011 email sent to Shames and two other Board members. (Shames' Dec, para 71.) Additionally the Board was fully aware of the incentive program and approved, on an annual basis, the full amount of bonuses to be paid annually. (Shames' Dec, paras 68-71.)

1 2 3	The matter was reviewed by the state Attorney General's office.	Kendall Squires via media and letter. (NOL, Exhibit 26.)	UCAN declined to provide the documents that it gave to the AG's office. The AG declined to act to pursue repayment of the bonuses, even though requested by whistleblowers. (Shames' Dec, para 75.)
4 5 6 7	The Board undertook a compensation review evaluation and found that the base salary paid to Mr. Shames was competitive.	Kendall Squires via media and letter. (NOL, Exhibit 26.)	UCAN declined to provide a copy of that compensation review. It started a compensation review in late 2011, pursuant to the direction of its independent counsel but discontinued it when presented with information by Mr. Shames for a comparable position in Los Angeles. (Shames' Dec, para 70.)
8 9 10 11 12			UCAN had been informed by its independent counsel in June 2011 that the payment of the incentives may have been technically deficient that could be cured by a compensation review. (Shames' Dec, para 70; Ames' Dec, paras 23-24.)

13 In an October 2012 letter, Squires made the following factual allegations:

- 14 1. The bonuses paid to Shames from 2005-2011 were "unauthorized and improper".
- 15 2. UCAN addressed the matter of executive bonuses with the state AG's office;
- 16 3. The Board undertook a compensation review evaluation and found that the base salary paid to Mr. Shames was competitive.

17 These allegations were reported to the media immediately and spawned a large number of
18 articles repeating these allegations. (Shames Dec, para 74; NOL, Exhibits 27-28.)

19 The allegations were false and malicious because In a 2011 email to Plaintiff, Mr. Squires
20 admitted that there was nothing improper about the bonuses, he just thought it prudent to conduct a
21 compensation review – which he abandoned in 2011 and has declined to disclose to the court the
22 alleged review he conducted after Plaintiff left UCAN; (Shames Dec, para 71; NOL, Exhibit 25.).

23 Moreover, Defendant acted maliciously because:

- 24 • The Board authorized these bonuses repeatedly and had been aware of them since 2005, if not before; (Shames' Dec, para 67-68.);
- 25 • Paul Dostart had been retained in May 2011 to inquire into the legitimacy of the bonuses and found that they were not "unauthorized and improper". Dostart advised the board that there may have been a technical violation that could be cured if the Board were to conduct an executive compensation review. (NOL, Exhibit B, Attachment A; Shames' Dec, para 70.)
- 26 • UCAN began an executive compensation review in December 2011 but abandoned it after Plaintiff provided evidence of a comparable position paying more than Mr. Shames' total compensation; (Ames' Dec, para 24 and Shames' Dec, para 70.)

- UCAN has not presented the compensation review upon which it based its October 3rd demand as evidence in this case and even if it did, it had to have ignored both the comparable salary presented by Plaintiff to UCAN in December 2011 and the fact that Ms. Malcolm was paid a salary in excess of that paid to Plaintiff even though her position involved a more narrow set of responsibilities and substantially smaller organization budget. (Shames' Dec, para 73.)
- UCAN had been put on notice about this issue in March 2011 and waited until May 2013 to take formal action regarding this issue, well past the statute of limitations. (Shames' Dec, para 75.)

The malicious aspect of Squires' false republication of this falsehood centers on the fact that UCAN failed to disclose the contents of its "executive compensation review" to Shames or to this Court. It didn't disclose this so-called compensation review because UCAN knew that it was deeply flawed it could not have contained the comparable salary paid to the only comparable executive position that Plaintiff could find when he conducted his own review in 2011, pursuant to Paul Dostart's advisory to the Board. Shames found a comparable position advertised by the Los Angeles Department of Water and Power that paid well over \$200,000 for a position with less responsibility and a smaller budget than UCAN. This information led to the cessation of a comparison review then on-going by Robert Ames in 2011. (Shames' Dec, para 70.) As to the Defendant's claim of litigation privilege, aside its revocation due to the media republication (*Rothman v. Jackson*), the State AG's office had been asked to pursue this matter and had steadfastly declined. (Shames' Dec, para 75.)

The unrebutted facts are that UCAN investigated the this matter, received legal counsel on how to cure the technical violation, admitted to Plaintiff in an email that the incentives were legitimate and then waited over two years before bringing any action, in violation of California Code of Civil Procedure Section 337. Moreover, UCAN never brought a claim with the Department of Labor Standards Enforcement and thus failed to exhaust its remedies.

ALLEGATIONS OF INTERFERENCE/FINANCIAL MISMANAGEMENT

PUBLISHED	PUBLISHER	TRUTH
Shames interfered in an independent investigation into UCAN's finances by Paul Dostart by limiting the scope of the auditor's review. Squires claims that	UCAN through anonymous leaks of emails. (Shames' Dec, paras 76-81; NOL, Exhibit 33-34.)	Shames neither made the statements attributed to him nor had the authority to influence the Dostart investigation. Mr. Dostart gave me no "instructions". I was merely reporting to Ames and Squires what Dostart wanted them to know.(Shames Dec, para 81.)

1	Plaintiff received		
2	"instructions"		
3	from Dostart.		
4	Misdirection of	Kendall Squires via	The hedge fund investment was not illegal, did
5	dedicated grant	media. (NOL,	not involve any dedicated grant funds and was
6	funds into an	Exhibit 36.)	fully authorized by the Board. In fact, it was
7	illegal "out of		promoted by Board members against the advice
8	state" hedge fund		of Plaintiff. (Shames Dec, para 83-87.)
9	without proper		
10	Board		
11	authorization.		
12	Utility	Kendall Squires and	Utility Consumers' bank accounts were fully
13	Consumers	UCAN employees	accounted and audited as of July 2012 and
14	accounts at	and/or	contained only \$43,000 as per the UCAN
15	Morgan Stanley	representatives.	auditors. The auditors confirmed the Dostart
16	were not subject	(NOL, Exhibit 37.)	findings.(Shames' Dec, para 90-91.)
17	to a full audit,		
18	auditors could not		
19	get the		
20	documents, the		
21	accounts had more		
22	than \$600,000 in		
23	them and the		
24	Dostart findings		
25	were wrong.		
26			UCAN admitted that the Consumer accounts
27			were fully accounted for in its public statement
28			on the matter. (Shames' Dec, para 19, 92; NOL,
			Exhibit 2.)

The last set of defamatory actions by Defendant UCAN pertains to four UCAN financial transactions. Because of page constraints, they will be discussed cursorily, but are detailed in the Declarations of Michael Shames and Robert Ames.

Beginning on October 31 2012, Plaintiff was contacted by media regarding financial transactions that he made in 2005 on behalf of UCAN and about his correspondence regarding the independent financial analysis by Paul Dostart in 2011. In each of these contacts, the reporters expressly referred to internal UCAN emails from 2011 that had never been produced during any formal discovery. These emails were being leaked to the media to suggest that Plaintiff had been personally using UCAN monies and then attempting to cover-up the illicit transactions.

The subsequent stories that ran relied upon these emails and false statements by Defendant.

1 The stories cast the internal UCAN emails as efforts by Plaintiff to interfere with Dostart's
2 independent investigation. (See Shames Dec, para 80.)

3 Each of Defendant UCAN's factual assertions, are provably false and demonstrate a reckless
4 disregard for truth. The falseness of the statements addressed in the supportive declarations, to wit:

- 5 • Audit results by the UCAN auditors that turned up no "misdirection of monies" or
undocumented financial transactions; (Ames' Dec, paras 14-15.)
- 6 • That both the independent attorney determined in July 2011 and the AKT auditors
also found no issues relating to those "Comsumers" accounts and so stated in a July
7 2012 audit given to Squires a month before he lied to the media; (Shames Dec, para
8 90.) So Squires knew that there was never anything close to \$600,000 in the
"Comsumer" accounts at five institutions complained of by the whistleblowers;
- 9 • That Squires had been informed by Robert Ames and others that the "Comsumers"
accounts were so labeled by a repeated typo by Morgan Stanley in 2006 that, because
it was inconsequential, had never been corrected. There could not have been five
10 "keying mistakes" made by separate institutions, as he asserted in the San Diego
Reader; (Shames Dec, para 89.)
- 11 • That Squires had been informed in February 2012 about the details of the Red Rock
investment and, at that time, asked for and had received a full briefing by Robert
12 Ames. (Ames' Dec, paras 20-21.)
- 13 • Squires intentionally distorted the meaning of an email to suggest that Plaintiff was
attempting to limit the independent investigators' review when Squires knew that the
investigator was not reporting to Shames and that Shames' role was simply to provide
14 whatever information was requested. (Ames' Dec, para 14, Shames Dec, para 80.)

15 Like the "loss of confidence" cited by Defendants in *Hawran v. Hixson*, 209 Cal.App.4th 256
16 (2012), Defendants made public statements of matters that can be proven or disproven. The
17 statements above suggest that Squires possessed undisclosed, and provably false, facts concerning
18 what Shames actually did or did not do at UCAN to implicate him in the wrongdoing. (*Hawran*, at
19 p. 293.)

20 **REBUTTAL TO UCAN DECLARATIONS**

21 UCAN presents declarations by UCAN employees asserting facts that are erroneous and/or
22 misleading. This brief is supported by the declarations of Michael Shames and Robert Ames that
23 debunks many of the facts underlying Defendants' defenses. The UCAN declarations are riddled with
24 provably false statements and highlight the degree of reckless disregard for truth demonstrated by
25 Defendants. (Shames' Dec, paras 93-108; Ames' Dec, paras 14-31, 35-36.)

26 ///

27 ///

28 ///

1 **IV. DAMAGES**

2 The damages caused to Mr. Shames' professional reputation are substantial and on-going, as
3 detailed in his declaration. (Shames Dec, paras 109-115.) A poignant example of the damage to
4 Plaintiff's reputation is found in an article written by Don Bauder of the San Diego Reader in July
5 2008. It counters a UTSanDiego editorial that had criticized Mr. Shames' \$90,000 salary:.

6 "Getting even sillier, the [UT] editorial went on to criticize Shames for making
7 \$90,000 a year over a three-year period. This is peanuts. In big firms, first-year
8 attorneys, right out of law school, can make \$150,000. Shames has been practicing
9 law for UCAN for 23 years. He says he charges \$350 an hour and that this is half of
10 what SDG&E's outside lawyers charge. SDG&E would not reveal what it pays its
outside attorneys. "Shames could make four times the money if he went to work for
the industry," says someone who has studied San Diego utilities for decades, noting
that Sempra paid its chairman \$9.5 million last year and its president \$6.5 million."
(NOL, Exhibit 47.)

11 After UCAN's smear campaign, Mr. Bauder's attitude had changed dramatically. By 2013,
12 he challenged Mr. Shames' motives in an email:

13 "...there was a symbiotic relationship between SDG&E and you while you were at
14 UCAN. They got huge rate increases and you got intervenor fees on which you took
15 bonuses that UCAN wants returned. Do you have a response to this?" (NOL, Exhibit
46.)


16 As a result of the defamation campaign, Plaintiff went from underpaid hero to on-the-take
17 SDG&E collaborator in Mr. Bauder's mind. However, even if the court were to determine that
18 Plaintiff has failed to properly plead malice and/or damages with respect to any cause of action, the
19 court must grant leave to amend solely to conform the pleadings to the evidence adduced in support
20 of Shames' SLAPP opposition. *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858.

21
22 Respectfully submitted,

23 Dated: August 15, 2013

ROSNER, BARRY & BABBITT, LLP

24
25 By:


Hallen Rosner
Attorney for Plaintiff
and Cross-Defendant
MICHAEL SHAMES