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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

08/20/2013 at 10:08:00 AM
Clerk of the Superior Court
By Lee McAlister, Deputy Clerk

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION
10

11 MICHAEL SHAMES, an individual,
12 Plaintiff,

13 v.

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

16 Defendants.
17

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

20 Cross-Complainants,
21

22 v.

23 MICHAEL SHAMES, an individual,
and DOES 51-100, inclusive,

24 Cross-Defendants.
25
26
27
28

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

DECLARATION OF ROBERT AMES
IN SUPPORT OF PLAINTIFF AND
CROSS-DEFENDANT'S 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

ATTACHMENT TO DECLARATION OF ROBERT AMES

1. I offer the following facts as a direct witness to the activities at UCAN from April 2011 through May 2012, when I ended my formal association with UCAN, although I continued as corporate secretary until late 2012.
2. I am a former partner of the San Diego-based law firm Gray, Cary, Ames & Frye/Gray, Cary, Ware & Freidenrich where I worked for 44 years. In 2005, that firm was incorporated into DLA/Piper LLP where I have and continue to serve as a consulting partner.
3. I worked for over forty years specializing in corporate bankruptcy, work-outs and debtor/creditor matters. I have participated in most of the major bankruptcy filings in San Diego during this period, which included multi-year, multimillion dollar matters. I have also advised clients with respect to real estate and general business matters. Currently, I serve as an active attorney although most of my time is spent as a volunteer member of local non-governmental organization (NGO) Boards.
4. I was retained by the UCAN Board of Directors in April 2011 to serve as Chief Operating Officer (COO) of UCAN. At that time, Plaintiff Michael Shames served as Executive Director of the organization. I was retained on the basis that I would serve a temporary six-month assignment to run the office operations during the pendency of Mr. Shames' involvement in a consuming and important regulatory case at the Public Utilities Commission and throughout an investigation by independent counsel of a whistleblower complaint by defendant David Pepper. In my various roles at UCAN, I directly witnessed a number of activities that I believe are germane to the Court for its consideration.
5. I have reviewed the verified complaint filed on February 28, 2013 by attorneys for Michael Shames and as will be explained below, I can verify accuracy of the following paragraphs based upon my first-hand knowledge: 11, 16, 21, 23-24, 37, 41 (except for first sentence), 42, 53-54. However, I seek to add the following observations that I directly observed during my involvement at UCAN which may be helpful to this court.
6. In my over fifty years as a member of the State Bar, I do not recall ever directly witnessing a scenario in which the reputation of a licensed professional was subject to such unwarranted assassination as was evidenced in this matter. As will be explained below my dealings with Messrs. Pepper and Langley their level of vitriol and unprofessionalism was extreme.
7. I believe it is fair to describe what happened at UCAN that I witnessed from April 2011 through May 2012 was an attempt at a palace coup by Messrs. Pepper and Langley with the added intent to assassinate the king – in this case, Mr. Shames. When I assumed the COO position at UCAN, it eventually became evident to me that the organization was in the throes of a succession battle.

8. My observation about this succession battle was affirmed by UCAN employees who privately spoke to me about this issue. I have direct knowledge that UCAN employees were told in late 2010 by other staff members that Messers. Pepper and Langley planned to wrest control of UCAN from Mr. Shames. For example, on or about November 2011, I was directly informed by Patricia Anderson, who was an employee at UCAN, that within weeks of when she was hired by UCAN in late 2010, she was informed by a staff member that they planned to wrest control of UCAN from Mr. Shames and she was instructed not to interfere with this effort. I asked Ms. Anderson to sign an statement documenting her experience, which she duly executed and gave to me. I placed Ms. Anderson's written statement in UCAN records which were turned over to Ms. Malcolm when she assumed the Executive Director position in May 2012. I have not seen it since. Ms. Anderson's statement was consistent what I'd witnessed myself.

9. UCAN was an attractive "takeover target". At the time, UCAN's financial books showed close to \$3 million in cash on hand and it was an attractive "acquisition", if you will. Messrs Pepper and Langley did ask about the \$3 million cash reserve in conversations with me, although I can't recall the specific dates of those conversations. It was apparent to both myself and affirmed by UCAN Board Chairman Kendall Squires in his statements to me, that these defendants sought to take control of UCAN and continue UCAN's advocacy before the Public Utilities Commission.

10. In our preliminary discussions with Mr. Aguirre prior to his formal retention by UCAN employees, he pressed very hard for Mr. Shames' dismissal even though Mr. Shames was fully engaged in some very complex and technical regulatory litigation involving SDG&E at the time. In meetings with Mr. Aguirre, prior to his September 16, 2011 formal representation of unnamed UCAN employees, Mr. Aguirre argued to myself and Mr. Squires that Mr. Pepper – a first-year attorney with literally no regulatory experience – could step in and continue the litigation on which Mr. Shames had worked for the better part of two years and had over 25 years of experience doing such complex regulatory cases. My supervision of Mr. Pepper on a less complicated water case led me to believe that Mr. Pepper was supremely unqualified to handle the SDG&E rate case and other litigation at the CPUC.

11. Throughout my personal discussions with Mr. Aguirre from June 2011 through May 2012, Mr. Aguirre repeatedly pushed for UCAN to fire Mr. Shames. It is my recollection that Mr. Aguirre specifically stated that the lawsuit against UCAN Board members would go away if they agreed to fire Mr. Shames.

12. Mr. Pepper and Mr. Aguirre enjoyed an unusual relationship prior to and during Mr. Pepper's employment at UCAN. In a meeting that I had with Mr. Squires and Mr. Shames about Mr. Aguirre's potential representation of Mr. Pepper, I was informed by Mr. Squires that Mr. Aguirre had a long-standing close personal relationship with Mr. Pepper's father and that Mr. Aguirre viewed Mr. Pepper as a "son".

13. Messrs. Aguirre, Pfeffer and Langley made a host of accusations, privately and publicly, that Mr. Shames had "misappropriated" UCAN assets. These accusations were false. As COO, one of my jobs was to track all assets --- financial and otherwise. From the time that I began my service at UCAN until the day I left UCAN's employment, I was provided with no documents or proof to support any allegation that Mr. Shames had misappropriated any UCAN assets; i.e. that he had taken any UCAN monies, files or other assets without permission. From all of the information available to me, it appeared that these gentlemen's allegations had no basis in fact. I had no knowledge that UCAN had concluded otherwise until I started reading allegations in the newspapers in late 2012.

14. AKT was retained to conduct an audit to assist Mr. Dostart in his investigation and to conduct an audit of expenditures for 2010-2011. As the person who was directly involved in the AKT audit process, there were no issues relating to the unavailability of records. Mr. Shames was very responsive to each of my requests for records. The financial records were, from the best that I could tell, very available. Mr. Shames usually had any financial record we sought available within minutes, if not hours, of the request. The delays in the audit were largely the result of staffing issues at AKT and the dissolution action that UCAN initiated in March 2012. At no time did the AKT auditors suggest to me that UCAN's financial records were inadequate or unavailable.

15. In regards to alleged missing monies or UCAN assets raised in a number of newspaper stories, I worked directly with the auditing firm of AKT throughout 2011 and some of 2012 to ensure that all UCAN assets were fully accounted. In my conversations with Ron Mitchell, who was the lead auditor and partner at AKT, he indicated to me that all UCAN assets were fully accounted and there was no evidence of missing or unaccounted assets. Mr. Mitchell's findings were presented to the UCAN Board in 2012. Throughout the process, I'd satisfied myself that all UCAN monies were accounted for and I informed the UCAN Board of my findings. No Board member raised any concerns about my findings. At no time was I presented with any credible evidence to the contrary, notwithstanding the unfounded allegations by Messrs. Pfeffer and Aguirre made directly to me and subsequently made public through media leaks. Moreover, Mr. Squires made our auditor available to meet with Mr. Aguirre to explain his findings. I attended that meeting at which our auditor was entirely forthcoming.

16. In regards to class action suits, I investigated Mr. Shames' involvement in class action lawsuits that were brought both on behalf of UCAN and those in which Mr. Shames was a named plaintiff. I did not find any problems with the role that UCAN played in these cases nor the arrangements between UCAN and the class action attorneys. In fact, I was directly involved a referral of a class action lawsuit on the City of San Diego's water meter reading accuracy. I directed Mr. Pfeffer to cooperate with a "class action attorney" in pursuing a matter that had come to UCAN's attention regarding the City of San Diego's failure to accurately read its water customers' meters. In light of the information accumulated by UCAN staff, I negotiated with and engaged Alan Mansfield to bring a class action using complaint data that UCAN's Fraud Squad had developed. Because UCAN was not a water customer, it could not serve as the

plaintiff, so it was determined that Mr. Shames was best situated to serve as the plaintiff in the case. Mr. Pepper had collected specific data from the UCAN staff in his role as an attorney assigned to the UCAN Water Project. I repeatedly asked Mr. Pepper to turn the relevant documents over to Mr. Mansfield so that he could commence a civil action. Mr. Pepper repeatedly refused to do so. As a result, UCAN was unable to bring the class action to compel the City to accurately read its water customers' meters. I had concluded, as Mr. Shames had in previous matters, that UCAN staff was not competent to handle complex civil class actions. It was entirely appropriate for UCAN to have engaged an expert attorney to handle such matters and entirely inappropriate for UCAN to have pursued the matter using in-house attorneys.

17. Not content to question the legal basis of the Water Class Action that I reference in the above paragraph, Mr. Pepper also alleged that Messrs Shames and Mansfield had been involved in illegal attorney kickbacks. On or about December 21, 2011, Mr. Pepper asserted to Mr. Squires and me that Mr. Shames had likely been receiving kickback payments from attorney Alan Mansfield, who had handled some UCAN-related class actions. I requested any documentation in Mr. Pepper's possession upon which this allegation was made and he did not provide any factual basis to support this rather startling allegation. Mr. Squires asked that Messrs Shames and Mansfield address those allegations in writing. He then indicated to both gentlemen that the matter would be referred to Paul Dostart, UCAN's independent counsel, for further investigation. I was subsequently informed verbally by Mr. Dostart that Mr. Pepper had provided no facts to support his allegation and that there was no evidence of any such kickbacks.

18. I brought the Nucor Foundation grant to the attention of the Board, although Mr. Shames made no overt effort to hide the transaction and even pointed out at the time that UCAN had received another large grant (in excess of \$250,000) to do a similar project and that, like the Nucor grant, he had not believed that either grant warranted Board approval as a precondition to acceptance of the grant. The Nucor grant is the only one which the Board ever raised an issue of a preapproval requirement while I served at UCAN. While I was at UCAN, we sought and received another grant for \$10,000 but the Board did not require preapproval of that grant.

19. At my request, Mr. Shames provided Paul Dostart with all of the data about the Nucor Foundation grant and Mr. Dostart provided the Board an analysis of the transaction. Mr. Dostart made a verbal report to the Board on Nucor and did not find anything inappropriate. Mr. Shames was fully forthcoming about all elements of the transaction.

20. The Red Rock investment matter was raised by Mr. Aguirre the day of a Board meeting that I recall occurring in February 2012. Mr. Squires asked that I bring any records relating to Red Rock to that Board meeting. Mr. Aguirre's allegations, as conveyed to me by Mr. Squires, caused me alarm as Mr. Aguirre had no reason to know what was in UCAN's investment portfolio and was not publicly known and could only be accessed through UCAN's financial files. At the Board meeting, Mr. Shames was asked about the transaction and he explained that the Board had asked him to look into such

investments and had expressly approved the transaction. At least two Board members of the three Board members at the meeting concurred with Mr. Shames and expressed the Board's approval of the investment. At the time of the meeting, I brought a fairly large file of documents related to this transaction and they should still be in UCAN's possession.

21. When Mr. Aguirre brought the matter of this 2006 investment to "Red Rock Mutual Fund" to the Board's attention, Mr. Squires asked me to investigate the circumstances around the investment and whether all of the monies were properly accounted. I found no indication of wrong-doing, nor did UCAN's independent counsel. I informed Mr. Squires and the Board that I found the transaction had been properly accounted for. The matter was not raised with me again. To date, I have not seen any evidence to suggest that Mr. Shames misled the Board on this particular investment. I have seen no evidence of any illegalities or wrong-doing related to this transaction.

22. When Mr. Shames announced in June 2012 that he created an entity that would allow him to continue representation of the SDG&E customers in matters before the PUC, it was not a surprise to me, as throughout my tenure at UCAN he spoke openly to both me and Mr. Squires about his perceived commitment to continue the SDG&E General Rate Case litigation, even if UCAN stopped functioning or ran out of money. In one conversation, early in 2012, he informed both of us that he had raised funds to pay for experts in a second phase of the case and that he was willing to work for no compensation from UCAN, if needed, to complete the case. He also indicated as early as January 2012 that he had made provisions to be able to intervene in the General Rate Case in the event that UCAN's operations were dissolved, as was being contemplated at around the time of those discussions. This was an important matter that was discussed during internal evaluation of the dissolution petition filed by UCAN in May. It was important to all of us that the General Rate Case litigation be continued whether UCAN was functional or not. We also knew that we were burning through resources and were concerned that we'd run out of money. Mr. Shames repeatedly assured both myself and Mr. Squires that he was prepared and committed to complete both phases of the General Rate Case. So his continuation of that litigation was entirely predictable and consistent with the direction that he had received from Mr. Squires and I.

23. As to Mr. Shames' incentive payments, I can directly attest to the fact that the issue as to the validity/legality of that compensation was raised in a whistleblower complaint to the Board by Mr. Pfeffer in about March 2011 and was, in part, the trigger for my retention at UCAN. The Board hired the law firm of Dostart, Clapp and Coveney to investigate this, and other, matters raised in the whistleblower complaint. I served as liaison between Paul Dostart, the principal of the firm, and the UCAN Board. Mr. Dostart prepared a preliminary assessment of the matters raised by Mr. Pfeffer. That law firm completed its investigation into the incentive payment matter by June 2011 and informed Mr. Pfeffer and Mr. Shames that it found no merit to Mr. Pfeffer's assertions. A copy of a draft memo produced by Mr. Dostart was mysteriously posted on the Internet and I reference that publicly posted copy from the UTSanDiego

website:<http://www.utsandiego.com/documents/2012/mar/08/dostart-report-ucan/>. (Attachment A) From the best that I can tell, this attachment is identical to the preliminary memo that I read. No final written report was requested by the Board or delivered by Mr. Dostart.

24. In that memo and in statements that he made to me and the UCAN Board, Mr. Dostart indicated that Mr. Shames' incentive payments were not illegal. However Mr. Dostart did recommend that in order to technically comply with the law, the Board would be well served to conduct an independent Compensation Study. In late 2011, I was instructed by Mr. Squires to retain a firm to conduct said compensation study. I retained the Reward Strategy Group to perform a compensation review of Mr. Shames in early 2012 and began assembling the requested information/data for the study. However, in or about February 2012, I discontinued the Compensation Study in light of the pending dissolution action. The matter was not raised again with me or, to my knowledge, Mr. Shames. Mr. Shames continued to work at UCAN through June 2012 and the incentive payment policy had not been modified or rescinded, to my knowledge, while either of us were employed at UCAN.

25. In regards to the alleged missing files, I can personally attest to the fact that the status of UCAN's files was highly insecure. UCAN's security measures would not by any stretch of the imagination be confused with those deployed at Fort Knox. During my tenure as COO, I frequently discovered that paper files were missing – usually financial-related documents such as bank statements – from UCAN's file room. It was very obvious to me that the files had been searched by UCAN employees other than Mr. Shames. One example of the pilfering was the instance referenced in Paragraph 20 above regarding Mr. Aguirre's questions about the Red Rock investment. All of the information about this investment was in a paper file that Mr. Aguirre could not have known about as information about UCAN's investment portfolio was not publicly known and could only be accessed through UCAN's financial files. Similarly, the whistleblower allegations about the bank accounts labeled "Utility Consumers' Action Network" could only have been discovered through a UCAN employee going through private financial paper files.

26. In some instances, Messers Langley and Pepper took UCAN files that they refused to return, even when confronted and sent letters demanding their return. I recall specifically that sometime in March 2012, I sent a letter to Messers Langley and Pepper demanding that they return specific UCAN files to me that they had wrongfully taken. They both refused to return the files. In one case, as mentioned above, when I ordered Mr. Pepper to provide UCAN documents in his possession to Mr. Mansfield he consistently refused.

27. The pilfering of the UCAN files was alarming but generally didn't create operational problems because Mr. Shames had arranged to have electronic back-ups for just about every important operational file. When I became aware of missing files, Mr. Shames was able to provide back-up files that filled the void of the missing files. Mr. Shames also showed me how he had arranged to have UCAN's bookkeeper and

accountant's firm possess many of the important financial files, such as bank statements. However, the repeated instance of file pilfering by unknown UCAN employees prompted Mr. Squires, in June 2011, to instruct me to begin removing some of the more sensitive files from the UCAN offices for storage at my home. I did as instructed and then returned the files to UCAN to the custody of Patricia Anderson on or about March 2012.

28. In regards to the custodianship of UCAN files, I previously indicated that I had possession of a number of important files during the 2011 time period. In September 2012, I was contacted by a reporter from the UTSanDiego (previously, the Union-Tribune) was inquiring as to whether Mr. Shames was the custodian of UCAN's records. While I can't opine as to what Mr. Shames had in his possession, I can state that I was custodian of most of the financial files, such as "contracts" and "invoices" while I was COO at UCAN. I talked to the Board about how I should respond to the reporter's inquiry and I told by the Board that I was not authorized to speak to the media about UCAN's affairs. I made that exact statement to UTSanDiego reporter by e-mail and said nothing else about the matter.

29. Despite the fact that I did have control and access to these records during 2011 and part of 2012, I was never consulted by UCAN's new Executive Director or by Mr. Squires in regards to the location of any files over which I had custody during 2011 prior or subsequent to that August 29th letter sent to Mr. Shames. I was unaware of any issue relating to the alleged missing files until I was sent a copy of Mr. Squires' August 29th letter by Mr. Shames.

30. At a February 2012 meeting with Mr. Aguirre, he showed me e-mail correspondence between Mr. Shames and Mr. Shames' wife. Both Mr. Squires and I concluded that Mr. Aguirre had possession of Mr. Shames' personal and professional e-mails and so informed Mr. Shames. I had reason to believe that my own e-mails were being read because of articles that would appear in the media about matters that were only discussed in e-mails. Frequently, Mr. Shames and I discussed the insecurity of the UCAN e-mail server. At one point, the insecurity of e-mails was so high that in mid-October 2011, I instructed UCAN staff to all change their passwords. At around that time, Mr. Shames and I began correspond using our personal e-mail addresses because of the well-known insecurity of the UCAN e-mail system.

31. While I was at UCAN, a state agency reviewed UCAN's timesheet policy and did not find any statutory violations. I was not aware of any violations of state law regarding timesheet requirements nor were any of the non-attorney timesheets relevant to UCAN's compensation requests at the CPUC. Out of an abundance of caution, during my tenure at UCAN, however, I implemented a policy by which timesheets were required of all employees. Mr. Shames was not involved in the collection of those timesheets and would not have been in possession of them.

32. Unsubstantiated allegations by Messrs. Pepper and Langley was a common and, almost daily, occurrence. For example, Mr. Pepper complained to me that he could not work at the UCAN office and could not use the UCAN computer assigned to him because Mr. Shames had put software on the computer that monitored all of Mr. Pepper's work on that computer. When I asked Mr. Pepper to substantiate this claim he could not and did not feel compelled to even try. Similarly, Mr. Langley repeatedly alleged at meetings that because I had experience in bankruptcy, I had been expressly hired to put UCAN into bankruptcy. Mr. Langley also accused me of having destroyed evidence relating to an action that Mr. Aguirre planned to, but had not yet, filed.

33. Mr. Aguirre subsequently echoed Mr. Langley's accusation and called Kendall Squires complaining that I was destroying evidence. He followed up with a cease and desist letter demanding that I stop destroying/shredding files. Of course, this wasn't true in the slightest. I explained that I was assigned the task of destroying or recycling old UCAN historical files that were no longer needed as part of the August 2011 move to new offices. I had specifically identified boxes that contained files prior to 1990 which I believed Mr. Shames might want for his own memorabilia purposes and invited him to take any of these old files that he might want. Mr. Aguirre was not assuaged and demanded that all UCAN files be preserved for the purpose of potential litigation. As a result, UCAN had no choice to but store these old files and absorb the cost of that storage.

34. At some point, these gentlemen figured out that I wasn't going to be an ally of theirs after which they began targeting with me with false allegations, such as the destruction of records and the bankruptcy rumors. In short order, Messrs Pepper and Langley were extremely uncooperative and hostile towards me and had largely alienated the staff. UCAN was steadily losing most of its talent because of the insurrection and baseless allegations being made by these two employees in the media, in internal e-mails and in staff meetings. As much as I tried, the poisoned atmosphere at UCAN was unrelenting and these two employees had pretty much stopped producing anything of value to the organization.

35. Ms. Malcolm joined UCAN as its Executive Director after I had ended my role as COO at UCAN. However, in her declaration, she makes a very inaccurate representation that I am in a position to address. From the first Board meeting at which I was hired as COO, I was instructed to interact with the UCAN staff members. Responsibilities were clearly divided whereby I handled all staff matters and Mr. Shames focused his efforts on the Rate Case. Specifically, I was charged with overseeing Mr. Pepper who had no involvement in that case – or any case in which Mr. Shames was involved. Ms. Malcolm asserts a fact at paragraph 31 in which she states: "I also disagreed with Mr. Shames regarding his strategy to isolate and discredit David Pepper because of the liabilities it could possibly create for UCAN according to whistleblower statutes."

31. I did have disputes with Shames regarding his failure to inform me of hundreds of thousands of dollars in liabilities that were not entered into UCAN's books of account, and his failure to inform me that he had engaged expert witness consultants without a written contract, which I understood was in contravention of the instructions of UCAN's receiver. I also disagreed with Mr. Shames regarding his strategy to isolate and discredit David Pepper because of the liabilities it could possibly create for UCAN according to whistleblower statutes. I was also aware of my commitment, according to the court-approved settlement in the derivative lawsuit, to retain Mr. Pepper for at least six months and, consistent with labor law, to treat him with respect and according to his professional conduct and work products.

36. Ms. Malcolm's statement referencing Mr. Shames' "strategy to isolate and discredit David Pepper" is divergent with what really happened. All matters pertaining to Mr. Pepper were handled by myself, Mr. Squires and UCAN's employment legal counsel, Rod Betts. Mr. Shames was not involved and could not have been involved in any matters pertaining to Mr. Pepper. I do not see how Ms. Malcolm could attribute to or be in disagreement with a "strategy" with which Mr. Shames had no connection whatsoever.

ATTACHMENT A

LETTER FROM PAUL DOSTART TO UCAN BOARD
AS POSTED AT UTSANDIEGO WEB SITE



4370 LA JOLLA VILLAGE DRIVE, SUITE 970
SAN DIEGO, CALIFORNIA 92122-1253
TELEPHONE: 858-623-4200
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PAUL J. DOSTART
DIRECT DIAL: 858-623-4210
E-MAIL: PAUL.DOSTART@SDLAW.COM

CONFIDENTIAL AND PRIVILEGED

June 8, 2011

Via Electronic & U.S. Mail
(Squires.sherman@cox.net)

Utility Consumers Action Network
Attn: Kendall Squires, Chairman
c/o Squires, Sherman & Bioteau, LLP
1901 First Avenue, Suite 310
San Diego, CA 92101

Re: Report to the UCAN Board of Directors in Response to Allegations Made
in Employee Complaint filed March 4, 2011 (the "Report")

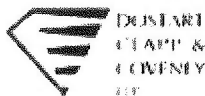
Dear Mr. Squires:

This letter reports on our review and analysis of the allegations made concerning UCAN's Executive Director, Michael Shames.

The Complaint

We have received the following two documents from you: (i) a three-page March 4, 2011, letter, plus several pages of attachments identified below, addressed to UCAN Board members, identifying four areas of concern (the "Complaint"); and (ii) a five-page undated document titled "Responses to Allegations..." to which is attached a three-page newsletter excerpt identified as the "Latham & Watkins Article." We understand this second, 5-page document to be the response ("Response") of UCAN Executive Director Michael Shames ("Shames") to the Complaint. Receipt of the Complaint and the Response by the UCAN Board prompted the Board to engage this firm ("DCC") to undertake an appropriate factual and legal review, and thereafter to provide you with this Report.

During the course of our engagement we have spoken on a confidential basis with various individuals (each an "Informant") having or purporting to have knowledge of relevant facts. In accord with our agreement with UCAN, our interview notes and such documentation as has been provided by each Informant is covered by our work product



privilege. Accordingly, we have not and will not voluntarily disclose the identity of any of the Informants to you, nor disclose documents any of them has provided to us except as we determine is appropriate and does not disclose the identity of the supplying Informant.¹

We summarize the four allegations in the Complaint as follows:

1. Unlawful bonuses, unreported to IRS, that violate 501(c)(3) requirements.
2. Shames has engaged in unlicensed practice of law, implicating UCAN.
3. UCAN has failed to have procured a required audit of its financial statements in violation of law.
4. There are suspicious accounts at financial institutions.

We address the four allegations of the Complaint in the order in which they appear in the Complaint.

1. **Unlawful Bonuses**

Allegation: The Complaint reads, in part, that:

“Executive director Michael Shames benefits from an unlawful bonus scheme under which he receives a 10% share of all intervenor compensation awards.... These bonuses are not listed in any of UCAN’s publically available IRS filings. ... This bonus scheme violates Internal Revenue Code § 501(c)(3), which provides that no part of a tax exempt organization’s net earnings may inure (be distributed) to the benefit of any private shareholder or individual.... “Shames’ bonuses constitute an even more egregious violation of the inurement prohibition than a traditional distribution of net profits, as Shames takes a 10% share of gross revenue (i.e. before expenses), rather than a cut of net profit (what’s left over after expenses have been accounted for).”

Our analysis of each component of this first allegation follows.

1.1 *Bonuses/Incentive Payments were paid to Shames.*

A. 2008: Our review of Paychex (payroll service) compensation reports discloses Shames received the following bonuses from awards in 2008:

¹ We shall always use the male gender when referring to an Informant. In fact, some or all of them might have been female. In some cases, this Report obscures precise dates



December 2008: SDG&E \$50,000
November 2008: Otay Mesa Compensation \$2,184
August 2008: SDG&E GRC Phase II \$4,865
May 2008: SDG&E DSM \$3,215
Total 2008 bonuses to Shames: \$60,264

B. 2009: Shames received the following bonuses from awards in 2009:

January 2009 MCI Complaint \$756
March 2009 SDG&E GRC \$8,853.66
April 2009 AT&T \$1,131.50
May 2009 SDG&E AMI \$26,718
June 2009 SBC (warmline) \$26,242
December 2009 AT&T \$7,390
December 2009 Sunrise \$30,000 (notes read 'first installment' of \$107,827 bonus)
Total 2009 bonuses to Shames: \$101,091.16

C. 2010: Shames received the following bonuses from awards in 2010:

January 2010 Sunrise case \$77,828 (notes read 'second installment')
March 2010 SDG&E De-Energize Case \$5,420
April 2010 SDG&E Rate Design Case \$1,975
June 2010 AB2790 implementation \$381.44
September 2010 GRC scheduling proceeding \$461
October 2010 Sprint Pioneer Plan \$1,643
Total 2010 bonuses to Shames: \$87,708.44

DCC Conclusion: We conclude based upon the reports identified above that Shames did receive significant bonus or incentive payments in the indicated calendar years.

1.2 *Were the identified bonus payments made to Shames properly reported to the IRS?*

There are two principal reports relating to compensation of officers and other employees. The first is the IRS payroll tax reporting series of forms, including Form 941. The second is the Form 990, which is the annual filing by the entity itself (UCAN) with the IRS. The Form 990 (but not Form 941), is a public document and is viewable on the internet at either the website maintained by Guidestar, or on the website maintained by the Registry of Charitable Trusts of the California Department of Justice.²

² UCAN's Form 990 is filed on a fiscal year basis, not a calendar year basis (the latter being required for payroll tax returns). UCAN's Form 990 for FYE 06/2010 was



Payroll tax reporting: The calendar year 2010 report prepared for UCAN by Paychex indicates that Shames received \$202,208.36 in wages. During 2010, we understand Shames' regular wages to have been \$4,770.83 every two weeks for twenty four payments aggregating \$114,499.92 per annum. When that amount is added to the \$87,708.44 of bonuses for 2010 identified above, the total is \$202,208.36, which is also the amount Paychex reports shows on Shames' 2010 W-2 for Wages, tips, other compensation from UCAN.

Form 990 reporting: Shames is not listed as an officer in Part VII of the Form 990. IRS Form 990, Part VII, 1a, first bullet point reads "List all of the organization's current officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation.³ If an organization fails to disclose fully the information requested on the Form 990, the organization could be liable for penalties, regardless of whether the total compensation is reasonable." Neither Shames nor his compensation is identified on the most recent IRS Form 990 – which (unlike Form 941) is available for public inspection.

DCC Conclusions as to IRS Reporting of Bonuses paid to Shames:

A. Based upon the existence of Paychex compensation reports that include the bonus payments identified above, we conclude that the IRS was notified of the bonus payments via Paychex-prepared employment tax returns.

B. Based upon the absence of disclosure of Shames' title and compensation on the IRS Form 990 (which is open for public inspection), we conclude that the CPA preparing UCAN's Form 990 failed to disclose Shames' identity and compensation as required.

1.3 Authorization of Shames' Bonuses by UCAN Board

The minutes of the UCAN Board meeting of February 7, 2008, read in part, as follows:

"2008 Budget:

ED gave presentation on budget items.

M/S/C to approve an incentive policy that awards 10% of fees earned or monies raised by all employees at UCAN. (5-0)

³ In addition to officer compensation, Part VII of the Form 990. IRS Form 990, Part VII, 1a, third bullet point reads "List the organization's five current highest compensated employees (other than an officer, directors, trustee, or key employee) who received reportable compensation (Box 5 of W-2 and/or Box 7 of Form 1099-MISC) of more than \$100,000 from the organization and any related organizations.



M/S/C to require the ED to notify the Board within 30 days of a determination by the PUC to award only part of the costs for expert work conducted by UCAN (5-0)

M/S/C to approve the 2008 budget and, specifically, the ED's salary and incentives (5-0)"

Mr. Shames response to the Complaint indicates that the bonuses are disclosed in the annual report to the Board members. However, we reviewed minutes of the Board meetings from the greater-than-ten-year period from March 24, 1999 to December 15, 2010, and there is no mention of specific bonuses in the minutes. We inquired of Shames as to whether a written policy exists regarding bonuses. Shames responded by email: "It is not written out in any employee manual. The only writing is in Board minutes approved by the Board a few years ago. (you have all of the minutes on disk)."

Minutes of the November 18, 2002, UCAN Board meeting note "that the Board should be more proactive in reviewing UCAN expenditures. The ED will provide a print-out of monthly general ledgers at future Board meetings so that Board members can review transactions." Minutes of the June 18, 2003, meeting reflect that the Executive Committee will "make periodic visits at the UCAN office to oversee operations."

DCC Conclusion as to UCAN Board Authorization of the Bonus Policy:

The February 2008 minutes do include mention of a ten percent "incentive policy" but we find little to show the Board monitored the implementation of any such otherwise oral policy. Six years prior to the Board approval of the incentive policy, the Board indicated a desire to see the monthly cash reports at Board meetings; thus, it is possible the Board in fact closely monitored the bonus payments to Shames. However, that speculation cannot be determined from the minutes.

1.4 An incentive or bonus payment is permitted by the Internal Revenue Code, if reasonable

IRC section 501(c)(3) describes as exempt from federal income tax, organizations organized and operated exclusively for various exempt purposes, including charitable, scientific, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual. A public charity described in section 501(c)(3) -- a description that includes UCAN -- may pay bonus or incentive compensation to a disqualified person (such as the executive director), so long as the compensation paid is reasonable and does not result in an excess benefit being received by Shames.

In determining the reasonableness of compensation, all items of compensation provided by an applicable tax-exempt organization in exchange for the performance of services are



- All forms of cash and non-cash compensation, including salary, fees, bonuses, severance payments, and deferred and noncash compensation.
- The payment of liability insurance premiums, or the payment or reimbursement by the organization of taxes or certain expenses under section 4958, unless excludable from income as a de minimis fringe benefit.
- All other compensatory benefits, whether or not included in gross income for income tax purposes.
- Taxable and nontaxable fringe benefits, except fringe benefits described in section 132
- Foregone interest on loans.

An economic benefit is not treated as consideration for the performance of services unless the organization providing the benefit clearly indicates its intent to treat the benefit as compensation when the benefit is paid. A tax-exempt organization is treated as clearly indicating its intent only if the organization provides written substantiation that is contemporaneous with the transfer of the economic benefits under consideration. Ways to provide contemporaneous written substantiation include:

- The organization produces a signed written contract.
- The organization reports the benefit as compensation on an original Form W-2, Form 1099, or Form 990, or on an amended form filed prior to the start of an IRS examination.
- The disqualified person reports the benefit as income on his original Form 1040 or an amended form filed prior to the start of an IRS examination.

The courts have focused heavily on the concept of the employee's value to the organization in evaluating reasonableness of contingent compensation. Incentive compensation is not reasonable or unreasonable in itself. The issue is the employee's total compensation considering all the circumstances. The focus is on whether the form of compensation serves a real and discernable business purpose for the exempt organization. One purpose contingent payments might serve is to relieve an organization of the need to maintain a large reserve to cover its risk of loss if a venture failed. In World Family Corporation v. Commissioner, 81 T.C. 958 (1983), the Tax Court found that fundraising commissions contingent on actually raising money were an "...incentive well-suited to the budget of a fledgling organization." The court approved an up to a 20% commission on funds raised, even though, under that system, the organization's founder and president was entitled to a 10% commission, or \$20,000, for procuring a large stock donation in the late 1970's. A significant factor in the court's decision was that various state statutes approve



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Other legal authorities approving contingent compensation include Rev. Rul. 69-383, ruling favorably on a hospital's percentage-of-income arrangement for doctors, and G.C.M. 39674 approving a percentage-of-savings incentive compensation plan for a broad class of non-management hospital employees. Similarly, G.C.M. 39670 ruled that payment of compensation from a separate tax-exempt fund established by a college to provide deferred compensation plus interest earned and bonuses for post-season games to athletic coaches did not create inurement. In all these cases, the compensation was negotiated at arm's length and was reasonable.

Courts appear most likely to disapprove incentive compensation where there is no ceiling on the total compensation possible. Also, where an arrangement creates a joint venture between the organization and the compensated party, or is a device to distribute the organization's profits, inurement exists. Interestingly, Rev. Proc. 75-13 provides that an entity intending to qualify for classification in IRC section 501(c)(3) as a "public interest law firm" is forbidden to pay bonuses or incentives to lawyers based upon recoveries received by the charity.

We have reported to the UCAN Board that although the Internal Revenue Service ("IRS") had once taken the position that any percentage compensation resulted in revocation of the charity's tax exemption, that hard-line is no longer the position of the IRS. Rather, the current IRS test for a public charity such as UCAN is whether the compensation paid is "reasonable." The IRC provides an optional "safe harbor" at section 4958 to protect UCAN and its individual directors and officers from liability for federal excise (penalty) taxes. Qualification under the safe harbor has the limited legal effect of reversing the presumption of correctness as to the propriety of the amount of compensation paid to UCAN's executive director; *in practice*, bona fide qualification under the safe harbor typically concludes all inquiry by an IRS auditor of the compensation paid.

While the safe harbor under the federal Internal Revenue Code is optional, compliance with California Government Code section 12586(g) is mandatory. This state law provision, as applied to UCAN, requires that the board of directors, or a committee authorized for this purpose, approve substantially every change in compensation of UCAN's Executive Director (whom we conclude functions as UCAN's chief executive officer), and Treasurer. Specifically, California Government Code section 12586(g) reads in its entirety as follows:

"(g) The Board of directors of a charitable corporation or unincorporated association, or an authorized committee of the Board, and the trustee or trustees of a charitable trust shall review and approve the compensation, including benefits, of the president or chief executive officer and the treasurer or chief financial officer to assure that it is just and reasonable. This review and approval shall occur initially upon the hiring of the officer



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extended, and whenever the officer's compensation is modified. Separate review and approval shall not be required if a modification of compensation extends to substantially all employees. If a charitable corporation is affiliated with other charitable corporations, the requirements of this section shall be satisfied if review and approval is obtained from the Board, or an authorized committee of the Board, of the charitable corporation that makes retention and compensation decisions regarding a particular individual."

DCC Recommendation as to Compensation Approval:

We recommend that UCAN procure a compensation study for the compensation package paid to UCAN Executive Director Michael Shames. In addition, the Board should evaluate procuring a compensation study for UCAN's treasurer (or the second-highest paid employee of UCAN if the treasurer is a volunteer position). Subsequent changes in the compensation of Shames (in particular) can be approved by the Board or authorized committee (which will comply with Cal Govt Code section 12586(g)), or by having the outside consultant update the study (in order to continue the safe harbor qualification under IRC section 4958). Compensation studies are performed by many firms; representative firms that perform compensation studies include:

AKT
Connie Burke
5946 Priestly Drive, Suite 200
Carlsbad, California 92008
Phone 760.268.0276
Fax 760.431.9052
cburke@aktcpa.com

RSM McGladrey, Inc.
Brian S. Repsold, CCP
Director, Human Capital Services
Phone 847.413.6276 or 414.298.2800
Cell 847.345.4433
Fax 847.517.7067
brian.repsold@mcgladrey.com

2. Unlicensed Practice of Law

The second allegation made in the Complaint is that Shames has engaged in the unauthorized practice of law in the course of his UCAN officer duties. The Complaint reads, in part, as follows:

"Michael Shames is registered with the State Bar of California as inactive, and has been since 1988. Despite this, Shames regularly holds himself out to be an attorney and engages in the practice of law. ...Shames has also engaged in the practice of law by requesting attorney's fees from the California Public Utilities Commission.... In at least one instance Shames has represented UCAN as an attorney before the California Court of Appeals, Second District by filing an Amicus Brief."



Our search of the California State Bar website confirms that Michael Edward Shames was admitted to the State Bar of California on June 3, 1983, and was issued State Bar ID number 108582. The State Bar website indicates that Shames' status is currently "Inactive." We are not aware of Shames being admitted to the bar of any other state or jurisdiction.

Supporting Materials Provided by Complainant:

2.1. Complaint Attachment 2a is a Decision Granting Intervenor Compensation to UCAN in a California Public Utilities ("PUC") matter. Appendix A to the Decision is the compensation decision summary information. Appendix A has a chart that identifies "Advocate Information." Under Advocate Information, Michael Shames is listed as an "Attorney" (versus Expert) at an hourly rate of \$310. Item 2b is similar documentation in another PUC Decision document.

2.2. Complaint Attachment 4 is Mr. Shames bio from the UCAN website. The bio reads, in part: "Also serves as an expert witness and attorney on behalf of UCAN..."

2.3. Complaint Attachment 5a is a report of hours to the PUC in the Sunrise Powerlink matter. The report identifies the hours as "Attorney Hours of Michael Shames."

2.4. Complaint Attachment 5b is UCAN's Claim to the PUC for Intervenor Compensation, submitted by Michael Shames. Part III, Section B lists the hours for Michael Shames under the "Attorney and Advocate Fees."

2.5. Complaint Attachment 6 is a printout from the California Appellate Courts, 2nd Appellate District, website of the parties and attorneys for the Southern California Edison Co. v. Public Utilities Commission et al, Division 8, Case Number B166993. Michael Shames is identified as "Attorney" for UCAN. The Party name identified is "Utility Consumers' Action Network: Amicus curiae for respondent."

Complainant provided additional supporting documentation in a memorandum dated April 7, 2011. Additional supporting documents are:

2.6. Attachments 1a, 1b, and 1c are service lists in PUC matters in which Michael Shames is identified as "Attorney at Law."

2.7. Attachment 1c is a PUC Decision document in the Southern California Edison Company case (2007) in which the first page identifies "Michael Shames, Attorney at Law."



- 2.9. Attachment 2b is a PUC document "Comments by UCAN on Proposed Decision" (2010) and the signature block reads "Michael Shames, Esq."
- 2.10. Attachment 2c is a PUC document prepared by UCAN "Response of UCAN to Request for Intervenor Compensation" (2011) wherein "Michael Shames, Esq." is on page 1 as well as the signature block.
- 2.11. Attachment 2d is a PUC document prepared by UCAN (2006) wherein page 1 identifies "Michael Shames, Esq." as well as the signature block.
- 2.12. Attachment 3 is a PUC document "Opinion Awarding Intervenor Compensation" (2004), wherein under "Advocate Information" Michael Shames is identified on three occasions as "Attorney".
- 2.13. Attachment 9a is a "Request of UCAN for Award of Compensation" (2008) prepared by UCAN. Page 2 identifies "Michael Shames, attny/expert". Page 18 reads, in part, "K. Hourly Rates. ...UCAN is requesting a 3% across-the-Board increase for its attorneys... K 1. Michael Shames. UCAN requests compensation for Michael Shames' attorney and expert hours..." This document is under the signature of Mr. Shames.
- 2.14. Attachment 9b is a PUC document identifying "Attorney Hours of Michael Shames" in the SDG&E GRC (2007).
- 2.15. Attachment 9c is a "Notice of Intent to Claim Intervenor Compensation" prepared by UCAN (SDG&E 2008). Part II, Section B indicates "Attorney Fees" and identifies "Michael Shames" as attorney.
- 2.16. Attachment 9d is a "Notice of Intent to Claim Intervenor Compensation" prepared by UCAN (Sprint 2009). Part II, Section B indicates "Attorney Fees" and identifies "Michael Shames" as attorney.
- 2.17. Attachment 9e is a "Notice of Intent to Claim Intervenor Compensation" prepared by UCAN (SDG&E 2009). Part II, Section B indicates "Attorney Fees" and identifies "Michael Shames" as attorney.
- 2.18. Attachment 9i is a "Notice of Intent to Claim Intervenor Compensation" prepared within the range that is allowed for advocates and for experts. Specifically, in 2010, the PUC generally awarded intervenor fees of \$150-535 per hour for attorneys, and \$125-390 per hour for advocates/experts (See PUC Resolution ALJ-267). The exact hourly rate depends on the years of experience for each individual. The PUC documents reviewed by DCC awarding intervenor fees often identified Shames as an attorney requesting an hourly



Post-Complaint Development – Moskal Motion to Intervene at PUC

Former UCAN employee Phil Moskal filed a “Motion to Strike UCAN’s Motion for Sanctions Upon Counsel for Ruth Hendricks” on May 10, 2011. In that Motion, Mr. Moskal claims that Shames may not appear before the PUC as an “attorney” since Shames is classified as “inactive” by the California State Bar.⁴

The PUC issued an “Administrative Law Judge’s Ruling Denying Motions” dated May 27, 2011. The ALJ ruling reads, in part, as follows:

“...Moskal claims that UCAN representative Michael Shames is an inactive member of the California bar and is therefore unable to practice before the Commission. Neither the Commission’s Rules of Practice and Procedure, nor the Public Utilities Code requires any party appearing before the Commission to possess a valid law license. Common Commission practice allows active bar members and non-bar members alike to appear in proceedings. For this reason, were the concurrent motion referenced by Moskal, portending to prove that Shames has been prohibited by California state law from practicing before the Commission, to be filed, we would not find merit in it, because we do not require representatives to possess a valid law license to practice before us. Given that this is the sole reason for party status provided, the motion is denied.”

DCC Legal Analysis:

In California, there are essentially two classes of lawyers: active and inactive. Active members of the California State Bar are permitted to practice law. “Practicing” law while on inactive status is a misdemeanor (Cal Bus & Prof Code § 6126). Practice of law encompasses more than just court appearances; it also includes giving legal advice and

⁴ Prior to learning of Moskal’s filing with the PUC, we had discussed with Robert Ames, UCAN’s interim Chief Operating Officer, the possibility of UCAN having to refund monies that Shames received in an identified role as “attorney.” Even when we had that concern, however, we were aware that a potentially saving argument exists; namely, that Shames could be classified as an “advocate” or “expert” for PUC matters because the hourly rate Shames has been awarded by the PUC as an “attorney” coincidentally falls within the range that is allowed for advocates and for experts. Specifically, in 2010, the PUC generally awarded intervenor fees of \$150-535 per hour for attorneys, and \$125-390 per hour for advocates/experts (See PUC Resolution ALJ-267). The exact hourly rate depends on the years of experience for each individual. The PUC documents reviewed by DCC awarding intervenor fees often identified Shames as an attorney requesting an hourly



preparing legal instruments and contracts by which legal rights are secured. Engaging in negotiations regarding settlement constitutes the practice of law. Morgan v. State Bar (1990) 51 Cal. 3d 598.

California Business and Professions Code Sections 6006, 6125 and 6126, 6126.3, and 6127, read in part as follows:

“6006. Active members who retire from practice shall be enrolled as inactive members at their request. Inactive members are not entitled to hold office or vote or practice law....

6125. No person shall practice law in California unless the person is an active member of the State Bar.

6126. (a) Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so, is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand dollars (\$1,000), or by both that fine and imprisonment. Upon a second or subsequent conviction, the person shall be confined in a county jail for not less than 90 days, except in an unusual case where the interests of justice would be served by imposition of a lesser sentence or a fine. If the court imposes only a fine or a sentence of less than 90 days for a second or subsequent conviction under this subdivision, the court shall state the reasons for its sentencing choice on the record.”

Rules of the State Bar, Title 2, Division 3 reads in part as follows:

Rule 2.30 Inactive membership

(A) Any member not under suspension, who does not engage in any of the activities listed in (B) in California, may, upon written request, be enrolled as an inactive member. The Secretary may, in any case in which to do otherwise would work an injustice and subject to any direction of the Board permit retroactive enrollment of inactive members.

(B) No member practicing law, or occupying a position in the employ of or rendering any legal service for an active member, or occupying a position wherein he or she is called upon in any capacity to give legal advice or counsel or examine the law or pass upon the legal effect of any



act, document or law, shall be enrolled as an inactive member. [Emphasis added.]

In contrast, the California Public Utilities Code, uses the word "advocate" rather than the word "attorney," and reads in part as follows:

"1801. The purpose of this article is to provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the commission.

[***]

1802. As used in this article:

(a) "Compensation" means payment for all or part, as determined by the commission, of reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a proceeding, and includes the fees and costs of obtaining an award under this article and of obtaining judicial review, if any.

1803. The commission shall award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a hearing or proceeding to any customer who complies with Section 1804 and satisfies both of the following requirements:

(a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.

(b) Participation or intervention without an award of fees or costs imposes a significant financial hardship."

Thus, while it is fairly clear that non-attorneys may participate in PUC proceedings in a representative or advocacy capacity, and may receive intervenor compensation for their work as an advocate (Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal.3d 891), it is not crystal clear whether a person who has been licensed as an attorney by the State Bar of California is eligible to hold inactive status while doing so. In Consumers Lobby, the California Supreme Court carefully distinguished between "attorney fees" and the fees awarded to non-attorney intervenors, describing the latter as "representative fees."

Moreover, a lawyer cannot expressly or impliedly create or leave undisturbed the false impression that he or she has the present or future ability to practice law when in fact he or she is or will be on suspension. In the Matter of Werrick (Review Dent 1992) 2 Cal. State



Members who have selected inactive status violate California Business and Professions Code Section 6068(a) and can be charged with violation of a lawyer's oaths and duties if they practice law while inactive. In the Matter of Tandy (Review Dept. 1992) 2 Cal. State Bar Ct.Rptr. 121.

Because the practice of law requires a license in California, individuals who wrongly hold themselves out as lawyers are also subject to prosecution under Business and Professions Code section 16240. This misdemeanor statute does not depend on the definition of what constitutes the practice of law. Instead, mere holding oneself out while not actually having a valid certificate is a completed misdemeanor violation.

California Business and Professions Code Section 16240 reads:

“16240. Every person who practices, offers to practice, or advertises any business, trade, profession, occupation, or calling, or who uses any title, sign, initials, card, or device to indicate that he or she is qualified to practice any business, trade, profession, occupation, or calling for which a license, registration, or certificate is required by any law of this state, without holding a current and valid license, registration, or certificate as prescribed by law, is guilty of a misdemeanor.”

DCC Conclusion and Recommendation:

While the May 27, 2011, ALJ ruling quoted above is clearly favorable to Shames and UCAN in that it appears to resolve the legal position promoted by Moskal under the Public Utilities Code, we are not altogether certain that the ALJ ruling accurately states California law as set forth in the Business & Professions Code. Moreover, even if the Commissioners of the PUC or the Attorney General of California, were to affirm the ALJ's ruling with respect to practice before the PUC, we predict a different result would emanate from a California court.

Our recommendation is that Shames should style himself as an “advocate” or “representative” rather than as “attorney” on papers filed with the PUC, and that he not identify himself as an “attorney” on court pleadings. Even doing this, however, leaves open the possibility that because Shames is an inactive member of the State Bar of California he might be viewed as engaged in the practice of law. The most obvious alternative route that would seem to avoid (and thereby solve) all issues is for Shames to reactivate his membership in the California State Bar.

3. Failure to Audit

“UCAN is currently in violation of the Nonprofit Integrity Act of 2004 (Gov. Code § 12586(e)(1)), which requires that nonprofits with over two million dollars in gross revenue subject their finances to a thorough and independent audit. ... Rather than being conducted by an independent auditor as required by the Nonprofit Integrity Act, UCAN’s review was conducted by Gregory Villard, UCAN’s usual accountant.”

California Govt. Code Section 12586(e)(1) requires that charitable corporation with gross revenues of \$2 million or more must prepare annual financial statements audited by an independent certified public accountant (CPA). The audited financial statements must use generally accepted accounting principles. The independent CPA must follow generally accepted auditing standards. The audited financial statements must be made available for inspection by the Attorney General and by the public, no later than nine months after the close of the fiscal year covered by the audited financial statements. The \$2 million-threshold excludes grants received from governmental entities, if the nonprofit must provide an accounting of how it used the grant funds to the granting governmental agency.

In addition, California Govt Code Section 12586(e)(2) requires that charities with gross revenues of \$2 million or more must establish an audit committee. The audit committee, under the governing Board’s supervision, is responsible for making recommendations to the Board on the hiring and firing of independent certified public accountants. The audit committee must: (i) confer with the auditor to satisfy committee members that the financial affairs of the nonprofit organization are in order; (ii) review the audit and decide whether to accept it; and (iii) approve non-audit services by the CPAs accounting firm, and ensure such services conform to standards in the Yellow Book issued by the U.S. Comptroller General.

The California Department of Justice has announced that the \$2 million gross revenues threshold specified in Cal Govt Code 12586(e) is defined as the amount shown on Line 12 of the charitable entity’s IRS Form 990.

3.1 *UCAN Board has appointed an Audit Committee*

The UCAN Board recently appointed an audit committee as required by the California Government Code. UCAN’s audit committee solicited proposals from qualified auditors to perform an independent audit of UCAN’s FYE June 2011 financials. On approximately April 15, 2011, UCAN engaged the services of AKT, led by audit partner Ron Mitchell CPA, to perform an audit of UCAN’s financial statements for FYE June 2011, and also for UCAN’s FYE June 2010 if required.

3.2 *UCAN did not have \$2 Million of Gross Revenues in FYE June 2009*



Government Code 12586(e) does not *require* audited financial statements unless the charitable entity reports \$2 million or more revenues on line 12 of the IRS Form 990. That amount had not been reached for UCAN's FYE June 2009.

3.3 *UCAN might have an audit requirement for its FYE June 2010*

UCAN's tax return prepared for FYE June 2010 shows gross revenues on line 12 of \$2,986,386. If that amount is accurate, then an audit of UCAN's financial statements for FYE June 2010 was required to have been completed and made available for inspection not later than March 31, 2011 (over two months ago).

As communicated to you in a separate writing, we have some uncertainty as to the accuracy of the Form 990 reported gross revenues for UCAN's FYE June 2010. Specifically, that number appears to be based upon two key assumptions: (i) the UCAN financial statements are prepared on the accrual basis, and (ii) a \$1.3 million cash receipt in August 2010 for UCAN's Privacy Rights Clearinghouse ("PRC") was required by reason of the accrual basis of accounting to be included in the period prior to its actual receipt by UCAN. If either of those assumptions is incorrect, then it would appear that UCAN does not need to procure an audit for its FYE June 2010.⁵

Because of the uncertainty as to this issue, Ron Mitchell CPA, the AKT audit partner with cognizance for the UCAN account, has been tasked with determining whether the inclusion of the \$1.3 million PRC receipt was in fact required for UCAN's FYE June 2010 financial statements.

3.4 *UCAN will likely have an audit requirement for its FYE June 2011*

⁵ Specifically, we have viewed photocopies of two checks payable to Privacy Rights Clearinghouse aggregating about \$1.6 million dollars. Both checks were dated in the last half of 2010 (i.e., in UCAN's FYE June 2011). However, the QuickBooks cash receipts (electronic) file provided to us by Shames shows the \$1,353,704.89 check (which check is dated August 26, 2010, and was sent under cover letter dated August 27, 2010) as being deposited into the Wells Fargo account on June 30, 2010. We now suspect the QuickBooks entry might be the result of UCAN's accountant making closing year-end entries to UCAN's books to conform cash books to the accrual method. The entry including the \$1.35 million receipt in FYE June 2010, when added to UCAN recurring revenues, implicates the California Government Code section 12586(e) audit requirement for FYE June 2010.



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We have been informed that UCAN has agreed to serve as fiscal sponsor for a documentary movie dealing with the exodus of employment from American manufacturing plants to Asian (and in particular Chinese) manufacturing plants. We were recently told that UCAN has already received a \$1 million grant to support the production of this documentary.

UCAN's recent-year recurring revenues, not counting the \$1.3 million PRC receipt noted in the preceding section, are about \$1.5 million. If that number holds for FYE June 2011, then the addition of the \$1 million grant for the Chinese manufacturing documentary will likely push UCAN's gross receipts over the \$2 million audit-required threshold. Alternatively, if CPA Mitchell determines that the \$1.3 million PRC receipt should be reported in the FYE June 2011 period, then the audit requirement for FYE June 2011 will similarly be implicated.

DCC Recommendation:

Our recommendation is to secure the input of AKT as to the correct amount of gross revenues for FYE June 2010. If such amount is less than \$2 million, an amended IRS Form 990 should be immediately filed and no audit of UCAN's FYE June 2010 financial statements will be required. If the FYE June 2010 gross receives exceed \$2 million, then AKT should be authorized to perform an audit of UCAN's financial statements for both FYE June 2010 and FYE June 2011.

4. Suspicious Bank Accounts

The Complaint's fourth allegation reads as follows:

"Shames currently has at least four investment accounts under the name "Utility Consumers Action Network" (spelled with an "m" rather than an "n") rather than "Utility Consumers Action Network." The accounts are with American Stock Transfer and Trust Company, Ironstone Bank, BNY Mellon, and Morgan Stanley. All share the same address with UCAN. ...

In order to satisfy its duty of inquiry, I advise the Board to procure complete transactional records directly from each bank, have the records analyzed by an independent auditor..."

We have reviewed account statements for each of American Stock Transfer & Trust Company, LLC, Ironstone Bank, BNY Mellon, and Morgan Stanley.

UCAN's name is spelled correctly on the Ironstone Bank and Wells Fargo Bank accounts. However, the account statements of Morgan Stanley, BNY Mellon, and American Stock Transfer & Trust Company, LLC all contain the name "Utility Consumers Action Network."



We could not confirm the Employer Identification Number ("EIN") for the accounts from the referenced statements. More importantly, we cannot locate on the UCAN financial statements the balances of all the UCAN accounts for which we have statements.

Shames provided to us recent-month account statements for three of the four accounts identified in the Complaint (i.e., those with the second "M" rather than an "N" in the word "Consumers"). We cannot locate inclusion of the balances in these three wrongly named accounts on UCAN's QuickBooks balance sheet. The aggregate value of the three wrongly named accounts for which we were provided statements is under \$42,000, which total is comprised of the following amounts: (i) Morgan Stanley China A share fund with a February 1, 2011, balance of \$39,810.07; (ii) BNY Mellon (First Trust/Four Corners Sr Floating Rte II Dividend Reinvestment Plan) with a December 15, 2010, balance of \$15.27; and (iii) American Stock Transfer & Trust (Eaton Vance Tax-Managed Global Diversified Equity Income Fund) having a February 26, 2010, balance of \$1,259.94.

DCC Recommendations

Each of these financial accounts should be closed with the account balance being transferred to UCAN's general account, unless there are restrictions on the funds in the closed account in which case the deposit should be into a UCAN account holding only restricted funds. At the time of closing each of these accounts, the monthly account statements for each of these accounts (and for the missing Ironstone account, if such exists) should be reviewed for the preceding five years to confirm that there are no unexplained distributions. (This can most cost-effectively be accomplished by AKT, UCAN's new auditors.) In addition, the EIN for all these accounts should be confirmed to be (and to have always been) the EIN assigned by the IRS to UCAN.

Conclusion of Report, and of Engagement

Except for any appearance before UCAN's audit committee or UCAN's board of directors to respond to questions, the delivery of this Report concludes our work with respect to the Complaint. Thank you for allowing us to provide this service to UCAN. Unless we hear from you and confirm to you that we are undertaking additional work not already tasked to us, our engagement to prepare a Report responding to the particulars of the Complaint has now reached the end.

Sincerely,

DOSTART CLAPP & COVENY, LLP

A handwritten signature in black ink, appearing to read "Kendall Squires", is written over the printed name of the firm. Below the signature, the name "Kendall Squires" is printed in a small, bold, sans-serif font.