In the

UNITED STATES COURT OF APPEALS

for the Ninth Circuit

No. 06-15860

SDV/ACCI, INC.(SERVICE DISABLED VETERAN/AMERICAN CONSULTING AND COMMODITIES, INC.) dba SDV/ACCI, R. GERALD METZ and TONIA METZ,

Plaintiffs/Appellants,

v.

AT&T CORPORATION and MARGARET E. ROMAN

Defendants/Appellees.

Appeal from the April 13, 2006 Judgment of the United States District Court for the Northern District of California Honorable Vaughn R. Walker (USDC Case No. C02-1529 VRW)

APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

1. BASIS FOR SUBJECT MATTER JURISDICTION IN THE DISTRICT COURT

After this action was filed in the state court, defendant and appellee AT&T Corporation removed the case to the District Court based on diversity of citizenship under 28 U.S.C. section 1332, subdivision (a), on the grounds that AT&T was a New York corporation with a principal place of business in New Jersey, defendant Margaret E. Roman was a citizen of New Jersey, and plaintiffs and appellants were all citizens of California. Clerk's Docket No. ("CD") 1.

2. BASIS FOR JURISDICTION IN THE COURT OF APPEAL

This Court has jurisdiction pursuant to 28 U.S.C. section 1291 on this appeal from a final decision of the District Court dismissing the action with prejudice as to all defendants and disposing of all claims with respect to all parties.

3. TIMELINESS OF APPEAL

The District Court entered Judgment in this case on April 13, 2006, CD 100, Excerpts of Record ("ER") 358, and appellants filed their Notice of Appeal on May 2, 2006. CD 101, ER 359. This appeal is therefore timely

under Federal Rule of Appellate Procedure 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. Is a defamatory statement privileged under California Civil Code section 47, subdivision (c), where a reasonable jury could conclude that the statement was immaterial to the common interest between the defamer and the recipients, was not reasonably calculated to further that interest, and had no logical bearing on it.
2. Could a reasonable jury conclude that a defamer acted with malice under section 47(c) despite a victim's statement that the defamer did not hate him, where there had been a prior threat to spread information, the defamer had reacted angrily to a decision made by the victims which caused her additional work, the defamer asked the victim not to communicate with the recipients and then sent the defamatory statement in secret, and the defamer initially denied making the statement.
3. Could a reasonable jury conclude that a defamer acted without

a good faith belief in the truth of a false statement where she has admitted that part of the statement was false, the statement was based on a hunch that contradicted information she had received from the victim, and she gave no consideration to the potential damage.

STATEMENT OF THE CASE

1. NATURE OF THE CASE

Plaintiff and appellant SDV/ACCI, Inc.(Service Disabled Veteran/American Consulting and Commodities, Inc.) dba SDV/ACCI ("SDV/ACCI") is a small company owned by plaintiffs and appellants R. Gerald Metz and Tonia Metz.

In 1999, defendant and appellee AT&T Corporation ("AT&T") entered into a contract with SDV/ACCI for temporary employees, but routinely breached that contract by refusing to reimburse SDV/ACCI for the employees' salaries, causing SDV/ACCI to lose money on the deal.

When Mr. Metz finally informed AT&T employee Margaret E. Roman in December 2000 that he was terminating the contract due to AT&T's breaches, she sent e-mails to all of the AT&T managers, falsely

stating that "SDV/ACCI are (*sic*) currently having financial difficulties and can no longer provide services to AT&T."

SDV/ACCI and the Metzes brought suit initially for defamation and placing plaintiffs in false light, but ultimately filed an Amended Complaint adding causes of action for breach of contract and breach of implied covenant of good faith and fair dealing. CD 28, ER 1.

2. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Appellants filed their Amended Complaint on December 19, 2002. CD 28, ER 1. AT&T and defendant and appellee Roman answered the Amended Complaint on January 17, 2003. CD 30-31, ER 9-25. On October 2, 2003, AT&T and Ms. Roman moved for partial summary judgment/judgment on the pleadings, seeking dismissal of the defamation and false light causes of action on the grounds that the Metzes were not personally defamed by the false statements, and the statements themselves were privileged under California Civil Code section 47, subdivision (c). CD 44-47, ER 26-254.

Following argument on November 13, 2003, the District Court took the matter under submission. CD 61, Reporter's Transcript of Proceedings 24-26. On January 28, 2004, the Court issued its order granting summary judgment on the defamation claim and granting judgment on the pleadings on the false light claim. Order, CD 62, ER 339, 355.[1] The Court concluded that the statements had been published without malice on a privileged occasion and so were privileged pursuant to Civil Code section 47, subdivision (c). Order, CD 62, ER 346-353. In the alternative, the Court found that the individual plaintiffs had not been defamed. Order, ER 353-354.

On April 12, 2006, the Court issued an Order dismissing with prejudice the causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, and false light, and directing that judgment on the defamation and false light claims be entered pursuant to its January 28, 2004 Order. Order, CD 99, ER 356. Judgment was entered on April 13, 2006. Judgment in a Civil Case, CD 100, ER 358.

SDV/ACCI and the Metzes now appeal from the summary judgment on their defamation claim.

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[1] There was no opposition to the motion on the false light claim. (Order, ER 338-39.)

STATEMENT OF FACTS

SDV/ACCI is a professional consulting service and staff augmentation company that is certified as a "Disabled Veteran Business Enterprise" under both federal and California law. Declaration of R. Gerald Metz. ("R. G. Metz Dec.") ¶ 3, CD 56, ER 256.

Plaintiff R. Gerald Metz is the President, Chief Financial Officer and principal shareholder of plaintiff SDV/ACCI, while plaintiff Tonia Metz serves as the Chief Executive Officer of SDV/ACCI. R. G. Metz Dec. ¶ 1, ER 255; Declaration of Tonia Metz ("T. Metz Dec.") ¶ 1, CD 57, ER 271. Mr. Metz enlisted in the United States Marines in 1967, and has received numerous commendations, including the Purple Heart, the Marine Corps Medal and the Bronze Star. In 1969, he was seriously wounded by enemy fire while serving in Vietnam. He has never recovered from his wounds, and qualifies as a service disabled veteran. R. G. Metz Dec. ¶ 2, ER 255-256.

Effective February 1, 1999, AT&T and SDV/ACCI entered into a "General Agreement for Temporary Services Between AT&T Corp. and Service Disabled Veteran, American Consulting & Commodities, Inc.," under which SDV/ACCI would provide temporary workers to augment

staffing at AT&T and its subsidiaries. Under the General Agreement, AT&T specifically agreed that, "All invoices are payable ten (10) days from the date of receipt." R. G. Metz Dec. ¶ 4, ER 256-57.

Although the 10-day payment requirement was essential to SDV/ACCI's ability to profit from the General Agreement, AT&T simply failed to pay the invoices within 10 days of receipt, at one point admitting that the AT&T bureaucracy made it impossible to make payments on time. Despite attempts to resolve this aging problem, the situation did not improve. R. G. Metz Dec. ¶¶ 5-6, Exhibits 57 and 59, ER 257, 269-270.

When Ms. Metz first advised AT&T procurement specialist Margaret E. Roman of the problem and suggested the Metzes would have to be more selective about which employees to payroll, Ms. Roman responded with a veiled threat about how bad it would look if SDV/ACCI could not service AT&T properly, and stating her willingness to "spread the information widely." T. Metz Dec. ¶ 3, ER 272.

Over the life of the General Agreement, AT&T paid on a timely basis only about 25% of the time, forcing ADV/ACCI to wait weeks or even months before being reimbursed for tens of thousands of dollars in employee payrolls. SDV/ACCI sent 722 invoices totaling over $500,000 in 1999, and over $1,600,000 in 2000. Out of a total invoiced amount of

$2,231,847, AT&T paid only $580,000 per its agreement. R.G. Metz ¶ 6, ER 257.

SDV/ACCI payrolled 72 employees in 1999 and 109 employees in 2000, and cut over 2,200 paychecks, with only one complaint prior to November 2000. R. G. Metz Dec. ¶ 7, ER 257-258. In November 2000, AT&T forwarded complaints regarding a small number of employees to SDV/ACCI. At that time, SDV/ACCI was employing approximately 40 people who were performing services for AT&T under the General Agreement, and the remainder of the employees were receiving timely paychecks despite AT&T's failure to pay SDV/ACCI's invoices within the 10 day period. R. G. Metz Dec. ¶ 7, ER 257-258; T. Metz Dec. ¶ 5, ER 272.

The problems primarily involved the logistics of getting the paychecks to employees, and employees who insisted they had not been paid when a paycheck had already been sent to their bank, resulting in the issuance (and cashing) of two paychecks. There was never any problem with making the payroll – not a single payroll check was ever returned for insufficient funds, and SDV/ACCI was at all times capable of making all payments. R. G. Metz Dec. ¶ 7, ER 257-258; T. Metz Dec. ¶ 5, ER 272.

Responding to an inquiry from Ms. Roman, Ms. Metz sent an e-mail

acknowledging some problems at SDV/ACCI and discussed the matter with her at length. T. Metz Dec. ¶ 5 and Exhibit 12, ER 272, 274-277. Ms. Metz explained to Ms. Roman that while ADV/ACCI had suffered an internal embezzlement, the amount was relatively small, and the Metzes were dealing with it. T. Metz Dec. ¶ 5. Ms. Roman acknowledges that there had been no prior problems with SDV/ACCI. Deposition of Margaret E. Roman ("Roman Dep.") 120:7-121:2, ER 294.

On December 5, 2000, Mr. Metz notified Ms. Roman that he was going to terminate the General Agreement due to AT&T's failure to pay the invoices within 10 days. When Mr. Metz told Ms. Roman that he would not cut payroll beyond that week, she objected that it was an "outrageous change" and "too short of notice," so he agreed to keep the employees on payroll until Friday, December 15, 2000. R. G. Metz Dec. ¶ 8, ER 258.

Ms. Roman complained that she could not "spin on a dime and transition employees at Christmas," and seemed to be very annoyed that Mr. Metz was insisting the transition occur at that time. Ms. Roman asked whether the decision was due to the recent embezzlement SDV/ACCI had suffered, or whether it was "because you can't afford to do business?" Mr. Metz assured her that:

> ACCI is healthy except for the cost we've incurred from this

> contract, which I'm resolving today. Marge, there's nothing wrong with my business except for the time I'm having to spend on our contract ....

R. G. Metz Dec. ¶ 9, ER 258.

Ms. Roman asked Mr. Metz not to say anything to the managers or employees about the transition, reiterating that request in an e-mail on December 15, 2000. R. G. Metz Dec. ¶ 10 and Exhibit 36, ER 259, 265.

By that time, Ms. Roman had already sent an e-mail to one AT&T manager stating that SDV/ACCI employees would be transitioned to another company because "SDV/ACCI is having financial difficulties and are unable to provide services to AT&T." Declaration of Margaret E. Roman ("Roman Dec.") ¶ 6 and Exhibit 2D, CD 46-11, ER 123, 132. On December 19-20, 2000, Ms. Roman sent e-mails to sixteen more managers that contained slightly different language:

> Effective COB Friday, December 15, 2000, SDV/ACCI employees will be transitioned to "Alert Staffing". SDV/ACCI are currently having financial difficulties and can no longer provide services to AT&T.

Roman Dec. ¶ 6 and Exhibit 2D, ER 123, 133-163.

The statements were false – while AT&T's repeated breaches of the contractual terms had caused financial damage, SDV/ACCI was completely solvent and fully capable of providing services to AT&T, but chose to

terminate the deal as a result of AT&T's failure to pay within 10 days. R. G. Metz Dec. ¶ 12, ER 259; T. Metz Dec. ¶ 6, ER 272-273.

Ms. Roman has acknowledged that SDV/ACCI was capable of providing services to AT&T, but had simply chosen not to do so, and that Mr. Metz never said that his company was experiencing "financial difficulties." Roman Dep. 90:11-21, 91:20-92:10, 115:6-116:4, ER 287, 293.

Ms. Roman claims that she made the statements to convey a sense of urgency to the managers, and that she believed there could be "financial difficulties" based on her conversation with Mr. Metz, the earlier problems with SDV/ACCI, and her own experience with prior vendors who went bankrupt. Roman Dep. 82:17-83:4, 83:25-84:-13, 105:24-107:19, 115:6-116:4, 120:7-121:2, ER 285, 290-291, 293-

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294.[2] Asked to explain how the statement about "financial difficulties"

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[2] While she now claims to have received an e-mail from Ms. Delia about a subsequent conversation with Mr. Metz, Roman Dec. ¶ 5 and Exhibit 2C,

would make the managers move more quickly, Ms. Roman could only say, "It was just where my head was at the moment when I was writing the e-mail." Roman Dep. 83:19-24, ER 285.

According to Ms. Roman, she gave no consideration to the effect that the statements would have on the plaintiffs' reputations, including whether the recipients would believe SDV/ACCI was going bankrupt. Roman Dep. 83:25-86:11, 89:22-90:10, 101:24-102:4, ER 285-287, 289-290. She did not consider telling the managers the real reason that SDV/ACCI was terminating the General Agreement. Roman Dep. 87:6-18, 90:19-91:19, ER 286-287. She did not discuss the wording with the Metzes, and gave no consideration to whether they would agree that she could tell the managers that SDV/ACCI was having "financial difficulties." Roman Dep. 96:12-97:18, ER 288.

At her deposition, Ms. Roman insisted that she did not have time for any such considerations when she hurriedly drafted the allegedly defamatory e-mail on December 19th – it took her less than a minute to draft

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ER 123, 131, she did not mention it at the time of her deposition, Mr. Metz denies making the statements to Ms. Delia, R. G. Metz Dec. ¶ 11, ER 259, and Ms. Delia previously acknowledged that handwritten notes, which did not support the most extreme statements in her e-mail, accurately summarized her conversation with Mr. Metz. Deposition of Shirley Delia 75:2-79:7 and Exhibit 47, ER 321-325.

the first paragraph regarding SDV/ACCI, and her sole concern was that the managers realize that the matter was urgent. Roman Dep. 82:17-83:4, 83:19-84:5, 99:22-102:4, ER 285, 289-290. According to Ms. Roman, prior to that time she had given no consideration to the language she would use, Roman Dep. 100:9-12, ER 289, though it is now clear that she had actually drafted the first e-mail on December 15, 2000. Roman Dec. ¶ 6 and Exhibit 2D, ER 123, 132[3]; Declaration of Paul Kleven ("Kleven Dec.") ¶ 5, ER 279.

By Ms. Roman's account, ten days elapsed from the time Mr. Metz advised her of the need to transition the employees until she began drafting the e-mail, and two weeks elapsed between the December 5, 2000 conversation with Mr. Metz and the bulk e-mailing on December 19-20, 2000. In the past, Ms. Roman had been able to transition SDV/ACCI employees almost immediately, successfully transitioning all of the employees under AT&T managers Jennifer Laxer and Mary Perkowski over a weekend. Roman Dec. ¶¶ 3-4 and Exhibits 2A, 2B, ER 123, 126-130; Roman Dep. 80:12-21, ER 284.

Even though Ms. Roman had already transitioned the employees

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[3] The first e-mail date on ER 132, April 25, 2001, is simply the date of a later e-mail; the next section under "Original Message" carries the original date of Ms. Roman's first e-mail, December 15, 2000.

supervised by these managers in November 2000, she sent the allegedly defamatory e-mails to both managers on December 19, 2000, explaining that all of the managers received "basically the same verbiage." Roman Dec. ¶ 6 and Exhibit 2D, ER 123, 311-312, 313-14; Roman Dep. 136:18-137:14, ER 295. She sent the same verbiage to the managers of ten other employee who were already in the process of being transitioned, and copies also went to Bonnie Pote, a contractor who worked for Adecco, a competitor of SDV/ACCI. Roman Dep. 81:4-82:16, 135:11-136:2, 137:20-139:14 and Exhibits 50, 52, ER 284-285, 295-296, 304, 317; Roman Dec. ¶ 6, ER 123. Ms. Roman also sent the allegedly defamatory e-mails to an SDV/ACCI competitor, Alert Staffing. Roman Dec. ¶¶ 7-10 and Exhibits 2D and 2E, ER 124, 164-165. Ms. Roman has acknowledged that there is normally no reason to advise managers of the reasons for transitioning employees, and stated with regard to Alert Staffing, "'It's not their business.'" Roman Dep. 93:7-14, 111:24-112:4, ER 287, 292.

Neither AT&T nor Ms. Roman sent copies of the e-mails to the Metzes, Roman Dep. 104:16-20, ER 290, who first learned that they had been defamed from AT&T manager Carol Lewis. R. G. Metz Dec. ¶ 12 and Exhibit 14, ER 259, 263-264; T. Metz Dec. ¶ 6, ER 272-273. When the Metzes asked Ms. Roman about the e-mail, she initially denied sending it,

then admitted that she had sent the e-mail, but only to Ms. Lewis. R. G. Metz Dec. ¶ 13, ER 259-260; T. Metz Dec. ¶ 7, ER 273.

In January 2001 Mr. Metz spoke to AT&T manager Duncan Elliot, who said that he "thought SDV/ACCI was out of business since I received the e-mail from AT&T corporate contracts headquarters stating SDV/ACCI was 'financially insolvent.'" R. G. Metz Dec. ¶ 14, ER 260.

ARGUMENT

A. STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

A grant of summary judgment is reviewed *de novo*. *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001.) On appeal, the Court applies the same standard used by the District Court in applying Federal Rules of Civil Procedure, rule 56(c). *Far Out Products, Inc. v. Oskar*, 246 F.3d 986, 992 (9th Cir. 2001.)

A party moving for summary judgment has the burden of establishing that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving party has met that burden, the opposing party must "set

forth specific facts showing that there is a genuine issue [of material fact] for trial." Fed. R. Civ. P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Supreme Court has urged lower courts to act with caution in granting the drastic remedy of summary judgment. *Anderson*, 477 U.S. at 255. The opposing party's "version of any disputed issue of fact is presumed to be correct," *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992), and "all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. The court must draw these inferences from disputed as well as undisputed facts, and the inference must be rational or reasonable in light of the undisputed facts. *T.W. Electrical Service, Inc. v. Pacific Electrical Services, Inc.*, 809 F.2d 626, 631 (9th Cir. 1987).

Because resolution of the privilege issues requires an evaluation of a defendant's state of mind, the Supreme Court has warned that a defamation case "does not readily lend itself to summary disposition." *Huchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979). While *Hutchinson* involved proof of the "actual malice" necessary to overcome the constitutional privilege

afforded by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a court deciding whether jury could reasonably conclude that a defendant had published a defamatory statement "without malice" under Civil Code section 47, subdivision (c), must also consider the defendant's state of mind.

Although the District Court in this case acknowledged the general principles governing summary judgment, Order, CD 62, ER 345-346, in practice the Court implicitly accepted all of the evidence proffered by the moving parties, AT&T and Ms. Roman, while discounting or simply rejecting the evidence in opposition.

The Court erred in concluding that the statements were made on a "privileged occasion" under section 47(c), because there was no common interest in SDV/ACCI's financial condition, an immaterial matter which had no logical bearing on the need to transition the employees.

A reasonable jury could easily conclude that the statements had been made with malice, either because Ms. Roman was motivated by ill will, or because she lacked a good faith belief in the truth of the statements. Ms. Roman had reacted angrily when Mr. Metz told her that he was terminating the relationship, and had previously threatened to spread the word of any problem. She has admitted that a portion of the statement was false, and she had no real basis for her statement about the "financial difficulties," which

was directly contrary to what Mr. Metz had told her.

B. TO BE PRIVILEGED UNDER SECTION 47(c), A STATEMENT MUST HAVE BEEN MADE WITHOUT MALICE TO AN INTERESTED PERSON, AND MUST HAVE BEEN REASONABLY CALCULATED TO FURTHER THAT INTEREST

In 1872, California codified the "common interest privilege" developed under the common law in Civil Code section 47, subdivision (c).[4] *Brown v. Kelly Broadcasting Company*, 48 Cal.3d 711, 726-27 (1989.) The common interest privilege was one of several defenses and privileges that had evolved to "ameliorate the harshness of the strict-liability standard" imposed on defamation cases under the common law, and it:

> protected communications made in good faith on a subject in which the speaker and hearer shared an interest or duty. This privilege applied to a narrow range of private interests.... The legislative history of section 47(3)[5] indicates the Legislature intended to codify the narrow common law privilege of common interest,...

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[4] A privileged publication or broadcast is one made:
(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.
Civil Code § 47, subd. (c).

[5] In 1990, section 47 was amended by redesignating former subds (1)-(5) to be subds (a)-(e).

Brown, 48 Cal.3d at 726-27.

In order to come within the protection of section 47(c),[6] a defamation defendant has the burden of establishing that the allegedly defamatory statement was made on a privileged occasion; *i.e.*, that the defendant published the statement "to a person interested" in the subject matter of the statement. § 47, subd. (c); *Kashian v. Harriman*, 98 Cal.App.4th 892, 915 (2002).

The term "interested" does not refer to something of mere general or public interest, *Brown*, 47 Cal.3d at 738, but to a more direct and immediate concern such that the defendant is protecting a pecuniary or proprietary interest, and has a "contractual, business or similar relationship" with the recipient. *Rancho La Costa, Inc. v. Superior Court*, 106 Cal.App.3d 646, 664-665 (1980.) To be protected, the statement must be one "'reasonably calculated to further that interest.'" *Cuenca v. Safeway San Francisco Employees Federal Credit Union*, 180 Cal.App.3d 985, 995 (1986), quoting *Kelly v. General Telephone Co.*, 136 Cal.App.3d 278, 285 (1982).

As the California Supreme Court has admitted, "the common-interest

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[6] References to the statute will be shortened to "section 47(c)," a practice typically used in the opinions. See, e.g., *Lundquist v. Reusser*, 7 Cal.4th 1193, 1203-14.

privilege has proved to be a source of vexation and bafflement to courts and commentators alike." *Lundquist v. Reusser*, 7 Cal.4th 1193, 1204 n.10 (1994). The scope of the privilege is "not capable of precise or categorical definition," and the court must evaluate the "competing interests which defamation law and the privilege are designed to serve." *Institute of Athletic Motivation v. University of Illinois*, 114 Cal.App.3d 1, 11 (1980.)

> [T]he Restatement suggests a privilege exists "if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know." (§ 596.)

Institute of Athletic Motivation, 114 Cal.App.3d at 11.

While courts have found privileged occasions in defamation cases involving employment situations, before doing so they have carefully examined the circumstances under which the statements were made, including the nature of the actual statements. In *Deaile v. General Telephone Company of California*, 40 Cal.App.3d 841 (1974), for example, the Court found a privileged occasion where misinformation had been spreading through a workplace about the reasons for plaintiff's forced early retirement, and the defendants made allegedly defamatory statements about those reasons to coworkers who worked in the same facility. *Deaile*, 40 Cal.App.3d at 846. The Court cautioned that the privilege could be abused

and lost by "the inclusion of immaterial matters which have no bearing upon the interest sought to be protected,..." *Deaile*, 40 Cal.App.3d at 847.

Similarly, *Cuenca* found that confidential statements to the board of directors and other responsible parties regarding the conduct of the plaintiff/employee were privileged, at least where the statements "were all directly relevant to plaintiff's fitness as a manager ... and as such were matters of direct interest" to the recipients. *Cuenca* 180 Cal.App.3d at 995-96.[7]

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[7] Older California Supreme Court cases sometimes conflated the concept of abuse of the privilege with malice which, as discussed in Section D, the Court now treats separately:

> "[T]he occasion may be abused and the protection of the privilege lost, by the publisher's lack of belief, or of reasonable grounds for belief, in the truth of the defamatory matter, by excessive publication, by a publication of defamatory matter for an improper purpose, or if the defamation goes beyond the group interest." Thus the privilege is lost if the publication is motivated by hatred or ill will toward the plaintiff ..., or by any cause other than the desire to protect the interest for the protection of which the privilege is given.
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> *Brewer v. Second Baptist Church of Los Angeles*, 32 Cal.2d 791, 797 (1932), quoting *Emde v. San Joaquin Central Labor Council*, 23 Cal.2d 146, 154-55 (1943); see also *Agarwal v. Johnson*, 25 Cal.3d 932, 944-45 (1979), quoting *Brewer*.

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C. A REASONABLE JURY COULD CONCLUDE THAT THERE WAS NO COMMON INTEREST IN A STATEMENT ABOUT "FINANCIAL DIFFICULTIES," WHICH HAD NO LOGICAL BEARING ON THE NEED FOR PROMPT TRANSITION OF EMPLOYEES

While Ms. Roman and the recipients of the e-mail had a business or contractual relationship, and had a common interest in transitioning the employees, a reasonable jury could conclude that they had no legitimate common interest in SDV/ACCI's "financial difficulties."

In finding in favor of AT&T and Ms. Roman on this issue, the District Court fully credited Ms. Roman's testimony that she sent the e-mails, including the allegedly defamatory statement, in order "to inform these persons of the transition, to identify actions to be taken to expedite the transition and to create a sense of urgency in completing these actions." Order, CD 62, ER 348-349. While acknowledging that the statements would not be privileged if they had "no bearing" on the protected interest, ER 349, quoting *Deaile*, 40 Cal.App.3d at 847, the Court accepted Ms. Roman's assertion that she made the "financial difficulties" statement

"because she was concerned that the managers might not act promptly," concluding that SDV/ACCI's financial condition therefore "has at least some bearing on the interest to be protected." Order, ER 349.

But this conclusion is not the only justifiable presumption to be drawn from the evidence, particularly if the presumptions are actually drawn in favor of the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A reasonable jury could readily reject Ms. Roman's testimony regarding her purported justification for adding the "financial difficulties" statement to the e-mails. At the outset, her story makes no logical sense – action was needed because SDV/ACCI was not going to be payrolling the employees after December 15, 2000, but the reason for SDV/ACCI's decision had absolutely no bearing on the managers' need to take action, or on the urgency with which they needed to take action. Ms. Roman herself has acknowledged that managers normally would not need to know why AT&T was changing vendors, and could not explain any connection in this case between the reason and the need for urgency, simply stating that it was "where my head was at the moment when I was writing the e-mail." Roman Dep. 83:19-84:13, 93:7-14; ER 285, 287.

Based on the evidence, a jury could reasonably conclude that the "financial difficulties" statement was not of direct interest to the recipients,

and was not reasonably calculated to further the common interest. *Cuenca*, 180 Cal.App.3d at 995-96. The immaterial statement about "financial difficulties" had no bearing on the interest in the timely transition of the employees, *Deaile*, 40 Cal.App.4th at 847, and there was no evidence that Ms. Roman reasonably believed this was information that the managers were "entitled to know." *Institute of Athletic Motivation*, 114 Cal.App.3d at 11.

A reasonable jury could also simply dismiss Ms. Roman's claims that she was actually concerned about creating a sense of urgency, or that the managers might not act promptly. Mr. Metz had advised her on December 5, 2000, that he would no longer be paying the employees, R.G. Metz Dec. ¶¶ 8-9; ER , 258-259, but Ms. Roman waited two weeks before sending out the bulk e-mails. Roman Dec.¶ 6 and Exhibit 2D, ER 123, 133-163.

A jury could further conclude that Ms. Roman had no sense of urgency because she knew that, in the past, two of the managers had completed the transition over a weekend. Roman Dec. ¶¶ 3-4, ER 123; Roman Dep. 80:12-21, ER 284. Ms. Roman sent the e-mails with " basically the same verbiage" to those two managers, even though there was certainly no sense of urgency, and not even any common interest in whether additional employees were going to be transitioned on December 15, 2000.

Roman Dec. ¶ 6 and Exhibit 2D, ER 123, 134-135, 138-139; Roman Dep. 136:18-137:14, ER 295. The privilege was therefore lost through excessive publication. *Brewer*, 32 Cal.3d at 797.

Even if a jury were to believe Ms. Roman's explanation, a defendant cannot use immaterial, defamatory statements to shock a recipient into action and expect those statements to be privileged under section 47(c). There is simply no authority for this aspect of the District Court's ruling, which carried to its logical extreme would immunize gratuitous defamation made on a privileged occasion, as long as the defamer could conceive of some theoretical connection between the defamatory statement and the common interest. This Court should reject such a ruling based on the "competing interests which defamation law and the privilege are designed to serve," *Institute of Athletic Motivation*, 114 Cal.App.3d at 111, and as contrary to the Legislature's intention in adopting section 47(c) to "codify the narrow common law privilege of common interest. *Brown*, 48 Cal.3d at 726-27.

AT&T and Ms. Roman did not sustain their burden of establishing that the statement, "SDV/ACCI are having financial difficulties and can no longer provide services to AT&T," was entitled to the protection of section 47(c). On summary judgment , the District Court was required to draw all

justifiable inferences in favor of SDV/ACCI and the Metzes, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), and it erred in granting summary judgment against them.

D. A REASONABLE JURY COULD HAVE CONCLUDED THAT THE STATEMENTS WERE MADE WITH MALICE, EITHER BECAUSE THEY WERE MOTIVATED BY ILL WILL, OR BECAUSE MS. ROMAN MADE THEM WITH NO REASONABLE BASIS TO BELIEVE THEY WERE TRUE

Under Civil Code section 47, subdivision (c), even if a communication occurred on a privileged occasion, it is not privileged unless it was made "without malice." § 47, subd. (c). While some courts initially referred to the section 47(c) privilege as a conditional one that could be overcome by proof of malice, the California Supreme Court has clarified that, since the statute defines a privileged communication as one made without malice, "if malice is shown, the privilege is not merely overcome; it never arises in the first instance." *Brown v. Kelly Broadcasting Company*, 48 Cal.3d 711, 723 n.7 (1989).

The plaintiff has the burden of establishing that the defamer acted with malice, *Lundquist v. Reusser*, 7 Cal.4th 1193, 1203 (1994), and can do so either by showing that the defamer was "'1. Motivated by hatred or ill-will toward the plaintiff which induced the publication; or 2. Was without a good faith belief in

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the truth of the statement.'" *Lundquist*, 7 Cal.4th at 1213.[8]

The first prong of the definition refers to a concept that has been confusingly described as "actual malice" or "malice in fact," which involves "a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person." *Lundquist*, 7 Cal.4th at 1204; *Brown*, 48 Cal.3d at 729; *Agarwal v. Johnson*, 25 Cal.3d 932, 944 (1979), citing *Davis v. Hearst*, 160 Cal.143, 160 (1911). The second prong refers to the defamer's attitude toward the truth or falsity of the statements rather than toward the plaintiff, and so is more like the constitutional "actual malice" requirement of knowing or reckless falsity established by *New York Times Co. v. Sullivan*, 376 U.S. at 279 (1964). *Reader's Digest Association v. Superior Court*, 37 Cal.3d 244, 257 (1984).

1. The Defamatory Statements Were Motivated by Ill Will

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[8] The Court in *Lundquist*, 7 Cal.4th at 1213, and previously in *Sanborn v. Chronicle Publishing Company*, 18 Cal.3d 406, 413 (1976), quoted the holding from *Roemer v. Retail Credit Co.*, 44 Cal.App.3d 926 (1975), to the effect that the necessary malice could be established by "a showing that the publication was motivated by hatred or ill will toward the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." *Roemer*, 44 Cal.App.3d at 936 (emphasis in original).

In determining that SDV/ACCI and the Metzes could not establish that Ms. Roman defamed them out of hatred or ill will, the District Court rejected all of the evidence they introduced on that issue on the grounds that it contradicted a statement in Mr. Metz's deposition to the effect that "he did not believe that Roman hated plaintiffs at the time the e-mails were sent." Order, ER 351, citing R.G. Metz Dep. 357:19-25; ER 76. This was error, for a number of reasons.

The definition of malice established by the California Supreme Court is not redundant, but is disjunctive, allowing defamation victims to establish malice by showing that the defamer was "[m]otivated by hatred *or* ill will." *Lundquist v. Reusser*, 7 Cal.4th 1193, 1213 (emphasis added). The terms are not entirely synonymous – Webster's Third New International Dictionary of the English Language – Unabridged defines "hate" as "to feel extreme enmity toward: regard with active hostility...; to have a strong aversion to: DETEST, RESENT," while "ill will" means "unfriendly feeling: ANIMOSITY, HOSTILITY." The explication given by the Supreme Court includes aspects of both terms, requiring only "a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person." *Lundquist*, 7 Cal.4th at 1204.

At his deposition, Mr. Metz demonstrated a clear understanding of

this difference, explaining that he could not say that Ms. Roman defamed him due to hate, but that she did bear animosity toward him.

> Q. Do you believe that Marge Roman hates you and your wife ...?
> A. No. I don't believe she hates us.... She might now, but back then I don't believe she hated us in the year 2000.... She definitely didn't like working vacation – during the Christmas, but I don't think – hate's a pretty big word.
> Q. Why do you believe she didn't like working during the Christmas holiday?
> A. Same reason I don't. Because she had planned to take off.... And, by doing this during ... it made her come in and take on some responsibilities during that timeframe.... So, I'm sure she felt some animosity towards me about the fact that I had dumped – well, she said so....
> Q. Any other basis for your belief that she had animosity towards you?...
> A. [T]here was a lot of tension there about this thing not working out, and they were having to spend a lot of time on it.... But, I think that when she wrote that statement about my company I think there was – I think there was some anger, you know, some hostility.

R.G. Metz Dep. 357:19-358:22; ER 76. See also R.G. Metz. Dec. ¶¶ 8-9 and Exhibit 49, ER 258, 266-68.

The annoyance Ms. Roman exhibited at Mr. Metz's decision to terminate the agreement was not the only evidence he and the other plaintiffs produced to establish hatred or ill will. When Ms. Metz had previously complained about SDV/ACCI's ongoing problems receiving timely payment, Ms. Roman had responded with a veiled threat about how

powerful AT&T was and how bad it would look if others thought SDV/ACCI could not perform, and promised to spread the information. T. Metz Dec. ¶ 3, ER 272. In carrying out her threat, Ms. Roman of course added the damaging statement about "financial difficulties," and then spread the defamation secretly while at the same time demanding that the Metzes *not* communicate with the managers and employees about the transition. R. G. Metz Dec. ¶ 10 and Exhibit 36, ER 259, 265; Roman Dep. 94:18-95:5, 96:12-97:18, ER 288.

This evidence, particularly coupled with Ms. Roman's false denial that she had made the defamatory statements until confronted with a copy of one of the e-mails, R.G. Metz Dec. ¶ 13, ER 259; T. Metz Dec. ¶ 7, ER 273, could easily convince a reasonable jury that Ms. Roman was well aware of the damage the e-mails would cause.

A reasonable jury could, in fact, reject all of Ms. Roman's story about her preparation of the e-mails – not only her insistence that she never considered whether they would be damaging, Roman Dep. 84:14-86:11, 90:5-10, 100:23-101:16, 101:24-102:4, ER 285-286, 289-290, but also her illogical contention that she thought "financial difficulties" would result in a more prompt response, as discussed at length in the section C.

The District Court erred in refusing to consider any of this evidence.

The Metzes and SDV/ACCI did not have to prove that Ms. Roman hated them in order to survive summary judgment, and they presented ample evidence from which a reasonable jury could conclude that the e-mails had been sent due to "a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person." *Lundquist*, 7 Cal.4th at 1204.

While a jury could ultimately reject this evidence, it was sufficient to preclude a grant of summary judgment under section 47(c).

2. Ms. Roman Did Not Have A Good Faith Belief That SDV/ACCI Was "Having Financial Difficulties And Can No Longer Provide Services To AT&T"

The District Court also rejected plaintiffs' argument that they had met the other prong of the malice definition, accepting Ms. Roman's testimony that she in good faith believed that SDV/ACCI was in financial difficulties, while dismissing as "unpersuasive" the contrary evidence that tended to undermine her alleged basis for that belief. Order at 15-16; CD 62; ER 352-53. Once again, a reasonable jury might well have doubted Ms. Roman's sincerity on this issue, and the Court erred in evaluating the evidence and taking that issue away from a jury.

The Court did not consider Ms. Roman's startling *admission* that she lacked a good faith belief in the second half of the statement – contrary to her statement that SDV/ACCI "can no longer provide services to AT&T," she knew when she wrote the e-mails that SDV/ACCI was fully capable of performing those services, but had chosen not to do so due to AT&T's failure to pay on time. Roman Dep. 90:11-21, 91:20-92:10, 115:6-116:4, ER 287, 293. Since the e-mails equate SDV/ACCI's inability to provide services with the "financial difficulties," this lack of belief in a critical part of the defamation constitutes malice, and there was no privilege. *Biggins v. Hanson*, 252 Cal.App.2d 16, 21 (1967.)

Obviously, if SDV/ACCI was having "financial difficulties" it could not provide payroll services to AT&T, but Ms. Roman testified that, despite her belief that the company *could* provide services, she also believed it was having "financial difficulties." She claimed that she arrived at this conclusion based on the November 2000 problems involving employee embezzlement and a few late payroll checks, and a totally unrelated problem with vendors. Roman Dep. 83:25-86:11, 89:22-90:10, 101:24-102:4, ER 285-287, 289-90.

Ms. Roman was essentially relying on a hunch rather than on any actual information, Roman Dep. 115:6-116:4, 120:7-121:2, ER 293-294,

and a jury could reasonably conclude that she had not even made her hunch in good faith. The embezzled amount was small. T. Metz Dec. ¶ 5, ER 272. The November 2000 complaints had involved a minuscule number of paychecks out of the thousands that SDV/ACCI had issued without incident and were due to logistics, not to any inability to pay. R.G. Metz Dec. ¶¶ 6-7, ER 257-258; T Metz Dec. ¶ 5, ER 272. Mr. Metz never said that his company was having financial difficulties, Roman Dep. 115:21-116:4, ER 293, and when she specifically asked him if his decision to terminate was due to the embezzlement or money problems, he had told her that "there's nothing wrong with my business except for the time I'm having to spend on our contract." R.G.Metz Dec. ¶ 9, ER 258-259.

A jury could also consider Ms. Roman's reckless disregard of the potential damage caused by the e-mails in concluding that she was not publishing them in good faith. *Lundquist v. Reusser*, 7 Cal.4th 1193, 1213 (1994). At her deposition, Ms. Roman repeatedly, almost boastfully, insisted that she simply wanted to convey a sense of urgency to the managers, and gave no thought to how the statements would affect plaintiffs' reputation. Roman Dep. 82:17-86:11, 89:2-90:10, 96:23-97:18, 99:22-102:4, ER 285-290. As she explained:

Q. Did you consider whether AT&T managers receiving

this e-mail would believe that ACCI was going bankrupt?...

A. I didn't put that thought into it....

Q. Did you give any consideration to whether the AT&T managers receiving this e-mail would think that ACCI's financial difficulties were preventing them from providing services to AT&T?

A. Did I put that much thought into it? No....

Q. Did you give any consideration to whether the term "financial difficulties" would damage the reputation of the business?...

A. It wasn't in my thought process.

Roman Dep. 85:2-7, 90:5-10, 101:24-102:4, ER 285, 287, 290.

While a jury could conceivably indulge all presumptions in Ms. Roman's favor, find her story convincing, and conclude that she in good faith believed that SDV/ACCI was "having financial difficulties," a reasonable jury could also consider the evidence that she had no such belief and was not acting in good faith when she wrote the e-mails, and conclude that there was malice precluding any protection under section 47(c).

At the summary judgment stage, that is all SDV/ACCI and the Metzes had to do, and this Court should reverse.

E. A JURY COULD REASONABLY INFER THAT THE DEFAMATORY STATEMENTS ADVERSELY AFFECTED THE METZES' REPUTATIONS

In the alternative, the District Court held that, because the defamatory statements refer to SDV/ACCI rather than referring to the Metzes by individual names, they could not maintain individual claims for defamation. Order, CD 62, ER 353-54. While it is true, as the Court notes, that the corporate name does not contain the name Metz, Order, ER 354, that is not the end of the issue, and in reversing the summary judgment this Court should also find that the Metzes can seek recovery for the damage to their individual reputations.

While a defamatory statement must be "of and concerning" the plaintiffs in order to be actionable as to them:

> "it is of course possible that two persons may stand in such a relation that defamation of one will be found to reflect upon the reputation of the other – as where, for example, it is said the plaintiff's mother was not married to his father; and where such is the case, the plaintiff may have an action in his own right." (Citations.)

Dong v. Board of Trustees 191 Cal.App.3d 1572, 1587 (1987).

As the California Supreme Court made clear in *Blatty v. New York Times Company,* 42 Cal.3d 1033, 1044-46 (1986), the law imposes the "of and concerning" requirement in order to prevent members of large groups from being able to claim damages from important statements on matters of general concern. The plaintiff in *Blatty* could not state a claim because his

book was one of at least thirty-six that were not designated best sellers by the defendant, and statements about such a large group are not actionable. *Blatty*, 42 Cal.3d at 1046.

Contrary to the District Court's holding, California law does not require that the plaintiff be identified by name in the defamatory statement, as long as a jury could infer a reference to the plaintiff by reasonable implication. *Blatty*, 42 Cal.3d at 1046; see also *Church of Scientology of California v. Flynn*, 744 F.2d 694, 697 (9th Cir. 1984), and *DiGiorgio Fruit Corp. v. AFL-CIO*, 215 Cal.App.2d 560, 569-70 (1963). As explained in *Aguilar v. Universal City Studios, Inc.*, 174 Cal.App.3d 384 (1985):

> A cause of action for defamation is not established merely because someone believes the character depicted as "Bertha" referred to plaintiff. "The issue [is] whether persons who knew or knew of the plaintiff could *reasonably* have understood the exhibited picture to refer to [her]." (Citations).

Aguilar, 174 Cal.App.3d at 391 (emphasis in original).

California courts have long allowed individual proprietors of companies to state defamation claims even though the allegedly defamatory statement did not identify the individual, *Bohan v. The Record Publishing Company*, 1 Cal.App. 429, 430-31 (1905), and has also allowed corporations to proceed with claims even though the allegedly defamatory statement referred only to the proprietor. *DiGiorgio*, 215 Cal.App.2d at

569-70.

Schiavone Construction Co. v. Time, Inc., 619 F.Supp. 684, 696-97, contains a detailed review of cases, including instances where courts allowed individual claims where the companies were owned by only one or two people. While the corporation in that case bore the name of the individual, the court also relied on other facts that are similar to those here – the corporation was owned by only a few people, one of whom was the principal, chairman, CEO and made all major decisions. *Schiavone*, 619 F.Supp. at 696-97.

In this case, the Metzes were the owners of SDV/ACCI, so that any statements defaming their corporation regarding its financial problems and inability to perform would necessarily reflect on their reputations. R. G. Metz Dec. ¶¶ 1, 15, ER 255, 260-61; T. Metz Dec. ¶¶ 1, 9, ER 271, 273. Although the corporate name does not contain "Metz," it does contain "Service Disabled Veteran," referring specifically to Jerry Metz, the service disabled veteran whose injuries allowed SDV/ACCI to be certified to do business as a Disabled Veteran Business Enterprise. R. G. Metz Dec. ¶¶ 2-3 and 15, ER 255-267, 260-261. As Ms. Roman was aware, some of the AT&T managers had dealt directly with the Metzes and knew who they were. Roman Dep. 88:21-89:1, ER 286.

Those who knew of the Metzes could reasonably have understood the reference to their small corporation's financial difficulties to refer to them, because in such a tiny operation any such difficulties were necessarily the result of actions or inactions on the part of the Metzes.

CONCLUSION

For all the above reasons, this Court should reverse the summary judgment and allow the Metzes and SDV/ACCI to present their case to a jury.

DATED: September 18, 2006 LAW OFFICE OF PAUL KLEVEN

By:_____
PAUL KLEVEN

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed.R.App.P. 329a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Appellant's Opening Brief is proportionately space, has a typeface of 14 points or more and contains 8013 words, as calculated by my WordPerfect 11 word processing program.

Dated: September 18, 2006

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PAUL KLEVEN