Filed 12/14/07 Eagle Broadband v. Mould CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

EAGLE BROADBAND, INC.,

Plaintiff and Appellant,

v.

ROY THOMAS MOULD,

Defendant and Respondent,

RICHARD WILLIAMS,

Defendant and Appellant.

H030169
(Santa Clara County
Super. Ct. No. CV050179)

The plaintiff brought this lawsuit for defamation and unfair competition after statements were posted about it on an internet message board. These appeals are taken from the trial court's rulings on two related motions: a special motion to strike the plaintiff's complaint as a strategic lawsuit against public participation, brought by two defendants, and a motion to lift the discovery stay, brought by the plaintiff. At issue here is the trial court's grant of the special motion to strike as to one defendant, its denial of the motion as to another defendant, and its refusal to continue the hearing and allow discovery as requested by the plaintiff.

Independently reviewing the rulings on the special motions to strike, we conclude that the trial court should have granted the special motion to strike as to both defendants. As for the court's denial of the plaintiff's discovery motion, we find no abuse of discretion. Based on those conclusions, we affirm in part and reverse in part.

INTRODUCTION

In this introductory section, we briefly describe the parties and the events that brought them to this court. In the next section of the opinion, we set forth the general legal principles that inform our analysis. Against that backdrop, we describe the procedural history of this case in greater detail. Finally, we analyze the specific issues presented in these combined appeals.

The parties before us are plaintiff Eagle Broadband, Inc. (plaintiff); defendant and respondent Roy Thomas Mould, called "DOE 5" by plaintiff, who posted messages under the screen name "benderanddundat" (Mould); and defendant and appellant Richard Williams, called "DOE 4" by plaintiff, who posted messages under the screen name "richwill21" (Williams).

This action was filed in 2005, after Mould, Williams, and others posted unflattering messages on the Yahoo! Finance message board concerning plaintiff. Plaintiff sued those responsible for the internet postings as "Doe" defendants, alleging defamation and unfair competition. Defendants Mould and Williams responded with a special motion to strike the complaint on the ground that it was a "SLAPP" – a strategic lawsuit against public participation – within the meaning of section 425.16 of the Code of Civil Procedure.[1] Plaintiff opposed that motion, and it filed its own motion seeking a continuance in order to conduct discovery. (§ 425.16, subd. (g).)

[1] Further unspecified statutory references are to the Code of Civil Procedure.

This appeal follows the trial court's rulings in favor of Mould but against Williams on their special motion to strike, and against plaintiff on its discovery motion.

LEGAL BACKGROUND

To establish the proper framework for our analysis, we summarize the law governing the special motion to strike, and we also review the general legal principles relevant to plaintiff's claims for defamation and unfair competition.

I. Section 425.16

Strategic lawsuits against public participation are commonly referred to by the acronym "SLAPP." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57 (*Equilon*); see *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 519, fn. 1 (*Integrated Healthcare*).) The paradigm action of this type is "a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2 (*Wilcox*), disapproved on another ground in *Equilon*, at p. 68, fn. 5; see also *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier I*); see generally 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 962, pp. 422-424; *id*. (2007 supp.) § 962, pp. 69-80; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶¶ 7:207 to 7:271.30, pp. 7-72 to 7-123.)

In 1992, the Legislature responded to the "disturbing increase" in such suits by enacting section 425.16. (§ 425.16, subd. (a); *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees* (1999) 69 Cal.App.4th 1057, 1063.) The statute incorporates the Legislature's express declaration "that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (§ 425.16, subd. (a).) In 1997, the

statute was amended to clarify the Legislature's intent that "this section shall be construed broadly." (*Ibid*.; see *Equilon, supra*, 29 Cal.4th at p. 60.)

A. Motion to Strike

Section 425.16 was enacted "to bring about an early test of the merits in actions tending to chill citizen participation in public affairs." (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1014.) To that end, the statute furnishes a mechanism for quickly identifying and eliminating suits that chill public participation: a special motion to strike, commonly called an anti-SLAPP motion. The California Supreme Court recently described that mechanism as "a summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192 (*Varian*).) The statute provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) As this court recently observed, "the statute was designed to protect defendants from having to expend resources defending against frivolous SLAPP suits unless and until a plaintiff establishes the viability of its claim by a prima facie showing." (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1124.)

A special motion to strike triggers a two-step process in the trial court. (*Varian, supra*, 35 Cal.4th at p. 192.) "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 (*Cotati*), quoting § 425.16, subd. (b)(1).) As relevant here, the statutory definition of protected activity expressly includes "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest…." (§ 425.16, subd. (e)(3).)

"If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Cotati*, at p. 76.)

In each part of the two-step process, the party with the burden need only make a threshold, prima facie showing. (*Cotati, supra*, 29 Cal.4th at p. 76.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851 [summary judgment].) In deciding whether the party with the burden has carried it, the court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

B. Discovery Stay

In addition to the motion to strike, the statute provides another mechanism designed to minimize the financial impact of a SLAPP, a discovery stay. (§ 425.16, subd. (g); see *The Garment Workers Center v. Superior Court* (2004) 117 Cal.App.4th 1156, 1161.) The statute thus provides in part: "All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion." (§ 425.16, subd. (g).) "This language has been uniformly interpreted to provide a general stay on discovery in accordance with the statute's overall purposes." (*Britts v. Superior Court, supra*, 145 Cal.App.4th at p. 1125.)

The statute expressly permits the trial court to lift the discovery stay: "The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision." (425.16, subd. (g).) The discovery stay thus may be lifted "to permit specified discovery limited to the issues raised in the special motion to strike." (*Ruiz v. Harbor View Community Association* (2005) 134 Cal.App.4th 1456, 1475 (*Ruiz*).) To warrant that relief, there must be a " 'proper showing' " that "includes 'good cause' for the requested discovery." (*Tutor-Saliba Corp. v. Herrera*

(2006) 136 Cal.App.4th 604, 617.) The decision whether to lift the discovery stay is within the trial court's discretion. (*Ibid*.)

C. Types of Claims

The range of legal actions that might qualify as strategic lawsuits against public participation is broad. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 652 (*Church of Scientology*), disapproved on another ground in *Equilon, supra*, 29 Cal.4th at p. 68, fn. 5.)

As relevant here, defamation is among the "favored causes of action in SLAPP suits…." (*Wilcox, supra*, 27 Cal.App.4th at p. 816; see, e.g, *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1573 (*Ampex*) [action against internet poster for defamation]; *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 915 (*Rivero*) [action against union for libel and slander]; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1005 (*ComputerXpress*) [action against former merger target for trade libel]; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 471 [action against homeowners' association for defamation].)

The statute also may apply to a "cause of action … for unlawful business practices pursuant to Business & Professions Code section 17200" so long as the plaintiff is "seeking damages personal to himself." (*Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1067, fn. omitted; see § 425.17, subd. (b) [exempting specified public benefit actions from the operation of § 425.16].)

D. Appellate Review

An order granting or denying a special motion to strike is appealable. (§ 425.16, subd. (j); § 904.1, subd. (a)(13).) As to each step of the two-prong analysis, we review the record de novo. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103 (*Mann*).) We "assess the pleadings and admissible evidence in the record to

undertake our independent review." (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1240.) We review a trial court's decision on the discovery stay for an abuse of discretion. (*Tutor-Saliba Corp. v. Herrera, supra,* 136 Cal.App.4th at p. 617.)

II. Defamation Law

One of plaintiff's two causes of action is for defamation. In papers filed below, plaintiff asserts that its "defamation claim is essentially a trade libel/libel per se cause of action." Plaintiff continues to press that assertion in its briefs in this court.

"Defamation and trade libel both require the intentional publication of a false and unprivileged statement of fact." (*Mann, supra*, 120 Cal.App.4th at p. 104.) Even so, courts have recognized defamation and trade libel as two distinct torts. (See *Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 381 (*Barnes-Hind*); *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548-550 (*Polygram Records*); *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 573 (*Leonardini*); *Guess, Inc. v. Superior Court* (1986) 176 Cal.App.3d 473, 479 (*Guess*).)

A. Defamation

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) "In California, a corporation's right and redress against defamation is well established." (*Vegod Corp. v. American Broadcasting Companies, Inc.* (1979) 25 Cal.3d 763, 770 (*Vegod*).)

Defamation in written form is called libel, which is defined by statute as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to

injure him in his occupation." (Civ. Code, § 45.) As the California Supreme Court has long recognized, libel includes "almost any language which, upon its face, has a natural tendency to injure a person's reputation." (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 803.) "Libel is recognized as either being per se (on its face), or *per quod* (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5; see also *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 549; Civ. Code, § 45a.)

1. Requirement of falsity

"There can be no recovery for defamation without a falsehood." (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809, citing *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259.) "Thus, to state a defamation claim that survives a First Amendment challenge, plaintiff must present evidence of a statement of fact that is provably false." (*Seelig*, at p. 809, citing *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 20 (*Milkovich*).) Truth is a complete defense to defamation. (*Smith v. Maldonado, supra*, 72 Cal.App.4th at p. 646.) "However, the defendant need not justify the literal truth of every word of the allegedly defamatory matter. It is sufficient if the defendant proves true the *substance* of the charge…." (*Id.* at pp. 646-647.)

2. Fact versus opinion

"It is an essential element of defamation that the publication be of a false statement of *fact* rather than opinion." (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1181.) "In this context courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse." (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601.) Like other forms of opinion, hyperbole and insults are expressions that typically receive constitutional protection. (*Seelig v. Infinity Broadcasting Corp.*, *supra*, 97 Cal.App.4th at p. 809.)

Parody and satire fall within the same constitutionally protected category. (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385 (*Franklin*).)

There is no "artificial dichotomy" between opinion and fact, however. (*Milkovich, supra,* 497 U.S. at p. 19.) Expressions of opinion thus do not "enjoy blanket constitutional protection." (*Franklin, supra*, 116 Cal.App.4th at p. 384, discussing *Milkovich,* at p. 18.) "If a statement of opinion implies a knowledge of *facts* which may lead to a defamatory conclusion, the implied facts must themselves be true." (*Ringler Associates Inc. v. Maryland Casualty Co.*, *supra*, 80 Cal.App.4th at p. 1181.) An opinion thus loses its constitutional protection and becomes actionable when it is "based on implied, undisclosed facts" and "the speaker has no factual basis for the opinion." (*Ruiz, supra,* 134 Cal.App.4th at p. 1471.) The same is true of hyperbole and satire, which may be actionable if they convey false and defamatory information. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 902.)

The determination of whether a statement expresses fact or opinion is a question of law for the court, "unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood [citations]." (*Franklin, supra*, 116 Cal.App.4th at p. 385.) Ultimately, "the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact." (*Ibid.*)

3. Malice requirement for public figures

In addition to the other elements of the tort, a public figure suing for defamation must show "actual" or "constitutional" malice, defined for these purposes as knowledge of falsity or reckless disregard for the truth. (See *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280; *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 342; *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 275.)

"The characterization of 'public figure' falls into two categories: the all-purpose public figure, and the limited purpose or 'vortex' public figure. The all-purpose public figure is one who has achieved such pervasive fame or notoriety that he or she becomes a public figure for all purposes and contexts. The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues." (*Ampex, supra,* 128 Cal.App.4th at p. 1577.)

There is a higher standard of proof for public-figure defamation plaintiffs, who "must prove by clear and convincing evidence that the defamatory statement was made with knowledge that it was false, or with reckless disregard of whether it was false or not." (*Walker v. Kiousis* (2001) 93 Cal.App.4th 1432, 1445-1446, criticized on another point in *People v. Stanistreet* (2002) 29 Cal.4th 497, 512.) "This heightened standard of proof must be taken into account in deciding a defendant's motion to strike a claim for defamation under section 425.16." (*Id.* at p. 1446; see also, *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 113 (*McGarry*); *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 700 (*Overstock*).)

B. Trade Libel

"Trade libel is the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner." (*ComputerXpress, supra,* 93 Cal.App.4th at p. 1010.) "To prevail in a claim for trade libel, a plaintiff must demonstrate that the defendant: (1) made a statement that disparages the quality of the plaintiff's product; (2) that the offending statement was couched as fact, not opinion; (3) that the statement was false; (4) that the statement was made with malice; and (5) that the statement resulted in monetary loss." (*Optinrealbig.com, LLC v. Ironport Systems, Inc.* (N.D.Cal. 2004) 323 F.Supp.2d 1037, 1048, citing *Guess, supra,* 176 Cal.App.3d at p. 479; see also, e.g., *Global Telemedia*

Intern., Inc. v. Doe 1 (C.D.Cal. 2001) 132 F.Supp.2d 1261, 1266 (*Global*); *Nichols v. Great American Ins. Companies* (1985) 169 Cal.App.3d 766, 773 (*Nichols*); *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 73-74 (*Erlich*).)

1. Nature of the tort as trade disparagement, not injury to reputation

With trade libel, the focus is on statements concerning the plaintiff's property or business. This is in contrast to "common law defamation," which "relates to the standing and reputation of the businessman as distinct from the quality of his or her goods." (*Barnes-Hind, supra,* 181 Cal.App.3d at p. 381; see generally, 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 640, p. 945; *id.* (2007 supp.), p. 73.)

In *Polygram Records*, a case decided in 1985, the court described trade libel as "a confusing concept that has not been subjected to rigorous judicial analysis in California." (*Polygram Records, supra*, 170 Cal.App.3d at p. 548, fn. omitted.) In the court's view, this "confusion arises primarily from uncertainty whether 'trade libel' should be treated as a species of defamation, … or instead constitutes the distinct tort of injurious falsehood…." (*Ibid*.) After analyzing the question, the court held that "the two torts are distinct; that is, 'trade libel' is not true libel and is not actionable as defamation." (*Id.* at p. 549.) Other California courts have reached the same conclusion. (See, e.g., *Leonardini, supra,* 216 Cal.App.3d at p. 573; *Guess, supra*, 176 Cal.App.3d at p. 479.) However, as recognized in *Polygram Records*, "the distinction between personal aspersion and commercial disparagement will sometimes be difficult to draw, because statements may effectuate both harms." (*Polygram Records*, at p. 550.)

2. Requirement of false statement of fact

"To constitute trade libel, a statement must be false." (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1010.) "Since mere opinions cannot by definition be false statements of fact, opinions will not support a cause of action for trade libel." (*Id*. at pp. 1010-1011.)

3. Malice element

As just explained, the key element distinguishing defamation and trade libel is whether the challenged expressions "defamed the reputation of [the plaintiff] or merely disparaged products it owns or markets." (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1360 (*Melaleuca*).) The distinction is critical, it has been said, since "only statements which directly damage a plaintiff's reputation will give rise to liability without a showing of actual malice." (*Ibid.*)

As thoroughly analyzed in the *Melaleuca* case, various reasons support the imposition of a malice requirement for trade libel claims, but not for defamation claims. (*Melaleuca, supra,* 66 Cal.App.4th at pp. 1360-1362.) They include policy justifications based on differing societal values placed on reputation versus commerce, historical common law distinctions, and constitutional precepts. (*Ibid.*; see 5 Witkin, Summary of Cal. Law, *supra,* Torts, § 642, p. 948, discussing *Melaleuca* on this point.)

Other courts have identified malice – or at least intent – as a requirement of trade libel. For example, in several cases, the court has defined trade libel as the intentional disparagement of goods or property. (*Polygram Records, supra,* 170 Cal.App.3d at p. 548; *Leonardini, supra,* 216 Cal.App.3d at p. 572; *Erlich, supra,* 224 Cal.App.2d at p. 73.) In *Polygram Records,* the court adopted the Restatement view that a trade libel plaintiff must prove the " 'fault of the defendant' " who was " 'subject to liability only if he knew of the falsity or acted with reckless disregard concerning it, or if he acted with ill will or intended to interfere in the economic interests of the plaintiff in an unprivileged fashion.' " (*Polygram Records,* at p. 549, quoting Rest.2d Torts (1977) § 623A, com. g, pp. 340-341; cf., *Gudger v. Manton* (1943) 21 Cal.2d 537, 544 ["malice is an essential element in slander of title" but it may "be express or implied"], disapproved on another ground in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381; 5 Witkin, Summary of Cal.

Law, *supra*, Torts, § 642, p. 948 [for slander of title, "all that is required is the fictional malice or 'malice implied in law' from the unprivileged character of the act"].)

By contrast, in *Nichols,* the court concluded that "it is not absolutely necessary that the disparaging publication be intentionally designed to injure." (*Nichols*, *supra*, 169 Cal.App.3d at p. 773.) But as its analysis makes clear, the *Nichols* court drew no distinction between trade libel and libel. First, the court spoke in terms of "defamatory meaning" and "recovery on a defamation theory." (*Id.* at p. 774.) Moreover, in support of its conclusion that liability could be premised on negligent conduct alone, the court cited a case of libel, not trade libel. (See *id.* at p 773, fn. 3, citing *Hellar v. Bianco* (1952) 111 Cal.App.2d 424, 425, 426-427.)

In view of the differences between defamation and trade libel, the better reasoned authority recognizes malice as a required element of trade libel.

4. Special damages

The distinctions between trade libel and defamation also give rise to differing requirements concerning damages. "Unlike personal defamation, the plaintiff seeking damages for trade libel must prove special damages in the form of pecuniary loss…." (*Guess, supra,* 176 Cal.App.3d at p. 479; see also *Leonardini, supra,* 216 Cal.App.3d at p. 573.) Moreover, like New York, California "requires a plaintiff to allege special damages specifically, by identifying customers or transactions lost as a result of disparagement, in order to state a prima facie case." (*Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.* (C.D.Cal. 1998) 12 F.Supp.2d 1035, 1043; see *Erlich*, *supra*, 224 Cal.App.2d at pp. 73-74; *New.Net, Inc. v. Lavasoft* (C.D.Cal. 2004) 356 F.Supp.2d 1090, 1113.) The plaintiff in a trade libel case thus "may not rely on a general decline in business arising from the falsehood, and must instead identify particular customers and transactions of which it was deprived as a result of the libel." (*Mann, supra*, 120

Cal.App.4th at p. 109.) A cause of action for trade libel thus carries "rigorous requirements of proof of damage…." (*Erlich*, at p. 73.)

III. Unfair Competition Law

In addition to its defamation claim, plaintiff also sued under California's unfair competition law (UCL). (See Bus. & Prof. Code, § 17200 et seq.; *id.*, § 17500 et seq.) "Business and Professions Code section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143, fn. omitted (*Korea Supply*).) The UCL protects both consumers and competitors. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 676.)

A. The Statute's Reach

"The UCL covers a wide range of conduct." (*Korea Supply*, *supra*, 29 Cal.4th at p. 1143.) "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices." (*Ibid.*, citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).) "In addition, under section 17200, 'a practice may be deemed unfair even if not specifically proscribed by some other law.' " (*Korea Supply*, at p. 1143.)

Despite the statute's breadth, "some conduct is beyond the reach of the UCL." (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1009.) For example, at least one court has concluded that "section 17200 does not apply to securities transactions." (*Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 788.) Other authorities cast some doubt on that conclusion, however. (See *Overstock, supra,* 151 Cal.App.4th at pp. 715-716, discussing *Spinner Corp. v. Princeville Development Corp.* (9th Cir.1988) 849 F.2d 388, 390-391; and *Roskind v. Morgan Stanley Dean Witter & Co.* (2000) 80 Cal.App.4th 345, 355.)

As this court recently stated, "a UCL action is barred only if another law specifically bars the subject UCL action or specifically permits the conduct complained of." (*Paulus v. Bob Lynch Ford, Inc., supra,* 139 Cal.App.4th at p. 679; cf., *In re Tobacco Cases II* (2007) 41 Cal.4th 1257 [UCL claim preempted by Federal Cigarette Labeling and Advertising Act].) Even so, a UCL claim " 'is not an all-purpose substitute for a tort or contract action.' " (*Korea Supply, supra,* 29 Cal.4th at p. 1150.)

B. Remedies

"While the scope of conduct covered by the UCL is broad, its remedies are limited." (*Korea Supply, supra*, 29 Cal.4th at p. 1144.) "Suits asserting statutory UCL claims are equitable actions." (*Feitelberg v. Credit Suisse First Boston, LLC, supra*, 134 Cal.App.4th at p. 1009.) "For that reason, 'compensatory damages are not available' in such suits." (*Ibid*.) Instead, successful private UCL plaintiffs "are generally limited to injunctive relief and restitution." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at p. 179.)

With the foregoing general legal principles in mind, we turn to the case at hand.

FACTS AND PROCEDURAL HISTORY

According to its complaint, plaintiff is a Texas corporation authorized to do business in California, which provides broadband and communications technology and services. Defendants Mould and Williams are two individuals who posted negative messages about plaintiff on the internet in 2005.

Plaintiff's Complaint

In October 2005, plaintiff complained against 25 "Doe" defendants for unfavorable internet postings about it. The complaint identifies seven of those defendants by their respective screen names. Defendant Mould (Doe 5) and defendant Williams (Doe 4) are among them.

The complaint makes a number of general allegations, including these:

"13. Internet-based stock manipulation schemes are both common and increasing. These types of schemes often target smaller technology companies and such schemes rely on the dissemination of public misinformation coupled with illegal stock trading and other market manipulation schemes in an attempt to impact price movements in the marketplace."

"15. Activity on various public Internet message boards for Eagle Broadband such as Yahoo! Finance, Raging Bull and others indicate[s] that Plaintiff is a victim of market manipulation schemes designed to significantly damage Plaintiff's business…."

"16. The Yahoo! Finance message board contains many specific incidences of postings of false information that have had a negative impact on Plaintiff's business."

As an example of a false posting, the complaint cites a "fabricated press release purportedly issued by Eagle Broadband announcing that the company had been deleted from the Russell 3000 Index due to poor performance and business failures," which was posted by defendant Williams on June 10, 2005.

Concerning defendant Mould, the complaint asserts that he posted a "fabricated announcement" on January 24, 2005, stating that "Eagle Broadband was suffering from continued financial losses causing the share price to drop and encouraging others to '… go short to make some of your money back.…' "

Both the June 2005 "fabricated press release" by Williams and the January 2005 "fabricated announcement" by Mould were attached as exhibits to the complaint.

Based on these two messages, and on internet postings by other defendants, the complaint asserts two causes of action: one for violation of the unfair competition law and the other for defamation.

Defendants' Special Motion to Strike

Defendants Mould and Williams responded to the complaint with a special motion to strike, under section 425.16. (See § 425.16, subd. (b)(1); *id.*, subd. (f).) They asserted that the complaint is a "SLAPP" – a strategic lawsuit against public participation – which arose from their exercise of free speech. Defendants observed that section 425.16 contemplates a two-step analysis: the defendant must first make a prima facie showing that the statute applies, which then shifts the burden to the plaintiff to show a probability of prevailing. (See § 425.16, subd. (b)(1).)

Defendants offered argument concerning both parts of the analysis. Addressing the first prong, defendants asserted that their activity in posting internet messages was within the scope of the statute, under section 425.16, subdivision (e)(3). In defendants' view, the messages giving rise to the complaint were statements made in a public forum (an internet website) about a matter of public interest (plaintiff's performance as a publicly traded company). As for the second prong, defendants argued in abbreviated fashion that plaintiff would be unable to carry its burden of showing a probability of prevailing on its claims against them.

In support of their motion, defendants offered evidence concerning plaintiff, including press releases, historical data concerning its share price, and its website homepage, as well as a copy of the " 'Profile' page of the Yahoo! Finance message board for Eagle Broadband, Inc."

Plaintiff opposed the motion. It presented argument refuting both prongs of the analysis. Plaintiff also offered opposition evidence, including one declaration from its vice president of marketing, Frederick Reynolds, and another from an independent certified public accountant, Deirdre Flaherty. In addition, plaintiff filed a request for judicial notice of certain documents evidencing procedural aspects of the litigation.

Defendants replied to plaintiff's opposition, presenting both argument and further evidence. The additional defense evidence included declarations by defendants Williams and Mould, as well as a supplemental declaration by one of defendants' attorneys.

Plaintiff interposed written evidentiary objections to the defense evidence. Among other things, plaintiff objected to defendants' introduction of "new" evidence in their reply papers.

Plaintiff's Discovery Motion

As a further response to the defense motion to strike, plaintiff brought its own motion to lift the discovery stay. (See § 425.16, subd. (g).) Plaintiff sought: permission to take discovery in order to oppose the defense motion; a continuance of the hearing on the defense motion; and the opportunity for further briefing after discovery. Plaintiff offered five separate grounds for its motion, including the need to ascertain the applicability of a statutory exception, section 425.17, subdivision (c); the need to provide context for the defendants' postings; and the need to gather additional evidence concerning its probability of success on the merits.

Defendants opposed plaintiff's motion, and plaintiff replied to their opposition.

Trial Court's Determination

In February 2006, the trial court heard the motions together.[2] After entertaining oral argument by the parties, the court took the matters under submission.

In March 2006, the court issued a formal order after hearing. As relevant here, the order (1) granted the special motion to strike plaintiff's complaint as to defendant Mould; (2) denied the special motion to strike as to defendant Williams; and (3) denied plaintiff's motion for a continuance to conduct discovery.

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[2] At the same hearing, the court also considered a special motion to strike brought jointly by Does 2 and 3. The court's ruling on that motion is not at issue in this appeal.

Appeals

These appeals ensued. Plaintiff filed its notice of appeal on May 4, 2006. Defendant Williams filed his notice of appeal four days later.

In both appeals, the parties filed their appellate briefs pursuant to an agreed briefing schedule, as authorized by this court. In addition to receiving the parties' briefs, we granted an application by the Attorney General to file a brief as amicus curiae. The Attorney General's amicus brief was filed in the Williams appeal. It drew two responses, one from plaintiff and the other from Williams.

CONTENTIONS

In its appeal, plaintiff makes two main assignments of error. First, it contends that the trial court erred in granting Mould's special motion to strike. Plaintiff argues that it carried its burden of demonstrating a probability of prevailing on its defamation and unfair competition claims against defendant Mould. Second, plaintiff also asserts that the court abused its discretion in refusing to continue the hearing to allow discovery to meet evidence raised in the defense reply papers.

In his appeal, defendant Williams asserts that the court should have granted his special motion to strike the complaint as a strategic lawsuit against public participation. He argues that his posting is protected speech, not actionable defamation, and that it does not fall within the ambit of the unfair competition law. The Attorney General's amicus brief addresses the reach of the unfair competition law.

ANALYSIS

We begin our analysis with the trial court's order on defendants' special motion to strike.

I. Special Motion to Strike: Overview

A. First Prong – Defendants' Burden of Proof

"The courts have struggled to refine the boundaries of a cause of action that arises from protected activity." (*Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679, 685.) That struggle need not detain us in this case, however.

Although it disputed the point below, plaintiff now concedes that defendants carried their burden of proof under the first prong of the anti-SLAPP analysis. Given that concession, "we bypass the initial inquiry because everyone agrees that the first hurdle in obtaining anti-SLAPP relief has been met." (*Overstock, supra*, 151 Cal.App.4th at p. 99.)

B. Second Prong – Probability of Prevailing

Addressing the disputed second prong, plaintiff contends that it has established a probability of prevailing against both defendants as to both of its claims. Defendants disagree.

In addressing those contentions, we bear in mind that the burden is on plaintiff, who must make a prima facie showing of the likelihood of success on each cause of action arising from protected activity. (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1010; *Church of Scientology, supra,* 42 Cal.App.4th at pp. 653-654.) The plaintiff's showing is measured against a standard similar to that used in deciding a motion for nonsuit, directed verdict, or summary judgment. (*ComputerXpress,* at p. 1010; *Church of Scientology,* at p. 653.) A plaintiff's burden at this stage is minimal. (*Navellier I, supra*, 29 Cal.4th at p. 89.) "Precisely because the statute (1) permits early intervention in lawsuits alleging unmeritorious causes of action that implicate free speech concerns, and (2) limits opportunity to conduct discovery, the plaintiff's burden of establishing a probability of prevailing is not high…." (*Overstock, supra,* 151 Cal.App.4th at p. 699.)

The court assesses two factors: the legal sufficiency of the complaint and the existence of a prima facie factual showing that would support a judgment for the plaintiff.

(*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (*Wilson*).) The legal sufficiency of the claim is evaluated in the first instance against the allegations of the complaint. (*Vogel v. Felice, supra,* 127 Cal.App.4th at pp. 1017-1018.) Beyond that, in order to demonstrate a legally sufficient claim, plaintiff's evidentiary showing must negate defendants' constitutional defenses. (*Wilcox, supra*, 27 Cal.App.4th at p. 824.)

In evaluating the evidentiary showing, the court "must credit all *admissible* evidence favorable to [the plaintiff] and indulge in every legitimate favorable inference that may be drawn from it." (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.*, *supra*, 106 Cal.App.4th at p. 1238; see also, e.g., *Overstock, supra,* 151 Cal.App.4th at pp. 699-700.) The court must "accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 326, internal quotation marks deleted.) The defense evidence "defeats the plaintiff's showing as a matter of law," when it establishes "a defense or the absence of a necessary element." (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 585.) The court determines only whether the plaintiff has made the requisite showing of minimal merit; it does not weigh the plaintiff's evidence. (*Wilson, supra*, 27 Cal.App.4th at p. 821; *Flatley v. Mauro,* at p. 326; see *ComputerXpress, supra*, 93 Cal.App.4th at p. 1010.)

With that overview in mind, we turn to plaintiff's defamation claims.

II. Defamation and Trade Libel

To substantiate its defamation claims, plaintiff must present evidence that each defendant's posting constituted a provably false assertion of fact. As we explain, because plaintiff is a limited purpose public figure, it also must make a prima facie showing of malice.

A. Plaintiff's Defamation Claim Against Mould

Plaintiff's defamation action against Mould is based on a single message that he posted in January 2005 on the Yahoo! Finance message board devoted to plaintiff.

As alleged in the body of the complaint, Mould stated that changes were coming for plaintiff, he asserted that plaintiff "was suffering from continued financial losses causing the share price to drop," and he encouraged "others to '… go short to make some of your money back.…' " The complaint also alleges that Mould's posting contained "false and misleading information concerning Plaintiff's purported inability to sell a key product line essential to its business…."

The full text of Mould's posting was attached as a one-page exhibit to the complaint. It contains nothing about plaintiff's product lines. But it does contain these additional statements by Mould: "Significant change is coming at Eagle. They are out of cash, sales, and time. They must pay Aggregate back the $10mm which they do not have…." Plaintiff refers to this part of the posting as the "Out of Cash, Must Pay" statement. Mould also predicted that plaintiff's share price would "continue to drop significantly," that plaintiff would be forced to make hard financial choices, which might include bankruptcy, and that the situation ahead would be "ugly." Mould closed by stating: "This is truly a case study in professional incompetence and dereliction of fiduciary duty to shareholders[.]"

1. Threshold Procedural Issues

At the outset, we consider several procedural points.

Pleading of Defamatory Matter: The parties disagree as to which of Mould's statements are addressed by the complaint. According to Mould, the trial court should not have considered the so-called "out of cash, must pay" statements, since they do not appear in the body of the complaint. (See § 425.16, subd. (b)(2); *Navellier I, supra*, 29 Cal.4th at p. 89 ["court considers 'the pleadings, and supporting and opposing

affidavits' "]; *Church of Scientology*, *supra*, 42 Cal.App.4th at p. 656 [the pleadings "frame the issues to be decided"]; *Paulus v. Bob Lynch Ford, Inc.*, *supra*, 139 Cal.App.4th at pp. 672-673 [same].) For its part, plaintiff points to the principle of liberal construction of pleadings and argues that it need not set forth the challenged statement verbatim in the complaint. (See § 452 [pleadings must be liberally construed]; *Okun v. Superior Court* (1981) 29 Cal.3d 442, 458 ["slander can be charged by alleging the substance of the defamatory statement"]; cf., *Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1305 [on appeal from judgment of dismissal after demurrer was sustained without leave to amend, "an appellate court assumes the truth of … all facts contained in exhibits to the complaint"].)

We agree with plaintiff's position on this procedural question. In this case, plaintiff attached a "true and correct copy" of Mould's entire January 2005 posting as an exhibit to the complaint. "It is well settled that a written instrument which is the foundation of a cause of action may be pleaded in *haec verba*, rather than according to its legal effect, either by setting forth a copy in the body of the complaint or by attaching a copy as an exhibit and incorporating it by proper reference." (*Holly Sugar Corp. v. Johnson.* (1941) 18 Cal.2d 218, 225.) "Where an incorporated written instrument is the foundation of a cause of action or defense, its recitals may serve as a substitute for direct allegations ordinarily essential to the pleading." (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 391, p. 488; see generally, *id.*, §§ 388-391, pp. 486-488.) Concerning allegations of defamation, it has been said, "the complaint should set the matter out verbatim, *either* in the body *or* as an attached exhibit." (5 Witkin, Cal. Procedure, *supra*, Pleading, § 695, p. 155, italics added; see *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1612, fn. 5.) In this case, although plaintiff did not specifically incorporate the allegedly defamatory communication by reference, it did attach a copy as an exhibit to the complaint.

Under these circumstances, we conclude that plaintiff sufficiently pleaded the challenged "out of cash, must pay" statements and that the trial court properly considered those statements for purposes of the special motion to strike.

Statements Challenged on Appeal: We limit our review of plaintiff's claims against Mould to his "out of cash, must pay" statements about plaintiff.

In its briefs in this court, plaintiff addresses only the specific "out of cash, must pay" statements. It offers no argument that it was defamed by any other part of the January 2005 posting, which includes: (1) Mould's statement that plaintiff was suffering from "continued financial losses," (2) his advice to other shareholders to "go short to make some of your money back," (3) his prediction that plaintiff's share price would "continue to drop significantly," (4) his suggestion that plaintiff might be facing bankruptcy, (5) his characterization of the situation ahead as "ugly," and (6) his statement about "professional incompetence and dereliction of fiduciary duty to shareholders." In a passing reference in its reply brief, offered as part of its argument that the "out of cash, must pay" statements are subsumed within the complaint, plaintiff characterizes its pleading as alleging that Mould's posting "as a whole … falsely exaggerated Eagle's financial condition." As just explained, however, plaintiff offers no argument in this court concerning the defamatory nature of any other part of Mould's January 2005 posting.

Because plaintiff has failed to offer appellate argument that Mould's posting was defamatory, except as to his "out of cash, must pay" statement, we shall treat as abandoned any claims that any of Mould's other statements are defamatory. (See, e.g., *Taylor v. Roseville Toyota, Inc.* (2006) 138 Cal.App.4th 994, 1001, fn. 2 [contention forfeited, where it is "merely asserted without argument or authority"]; *Mann, supra,* 120 Cal.App.4th at p. 107 [contention deemed forfeited, where it is raised only by "passing reference" in appellants' reply brief].) Therefore, like plaintiff, we focus only on the "out of cash, must pay" statements here. (Cf., *Reader's Digest Assn. v. Superior Court* (1984)

37 Cal.3d 244, 266 [plaintiffs ignored most of the charges in defendant's article, focusing instead on just three sentences].)

Forfeiture of Malice Issue: The final threshold procedural issue is whether the issue of malice is preserved. According to plaintiff's reply brief on appeal, Mould failed to offer "any legitimate argument" to the trial court about plaintiff's failure to plead and prove malice. Plaintiff acknowledges that Mould mentioned malice "in passing" in his reply papers below. But plaintiff asserts that "a conclusory statement in a reply brief is not sufficient to raise the issue for consideration or preserve it for appeal." In plaintiff's view, it was "incumbent" on Mould, as the moving party, to demonstrate the inadequacy of plaintiff's claims.

We reject plaintiff's assertion that the question of malice has been forfeited. The cases cited by plaintiff address the issue of forfeiture in the context of appellate briefing. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [on fairness grounds, refusing "to consider the new issues raised by defendant in his reply brief" on appeal]; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 [same]; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 [same].) The principles reflected in those cases do not apply in the context of the special motion to strike, which employs a procedure that shifts the burden of making a prima facie evidentiary showing from the moving defendant to the plaintiff. Here, Mould adequately and timely raised the question of malice in his reply papers below. In placing the issue before the trial court at that juncture, Mould was not engaging in a belated attempt to carry his own burden of proving that his activity was within the ambit of the statute; rather, he was simply addressing plaintiff's failure to carry its burden of showing a probability of prevailing. The anti-SLAPP statute contemplates this very procedure. Thus, when replying to the plaintiff's opposition to a special motion to strike, the defendant may "properly point to the [plaintiff's] failure to meet [its] burden, regardless of any other theories he may have

advanced in his original moving papers." (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 775 (*Navellier II*).)

2. Substantive Contentions

On the merits, plaintiff argues that its evidence sufficiently establishes a prima facie case against Mould on theories both of libel per se and of trade libel. Mould disagrees. The parties dispute several key elements of plaintiff's libel claims.

Falsity: The first disputed element relates to the asserted falsity of Mould's "out of cash, must pay" statements.[3] Plaintiff accuses Mould of "misrepresenting that the company was 'out of cash' and owes Aggregate 10 million" dollars. It asserts that the evidence demonstrates the falsity of those statements. In the main, plaintiff relies for evidentiary support on the declaration of its vice president of marketing, Frederick Reynolds, a declaration that was executed nearly a year after Mould's January 2005 internet posting. As Mould points out, however, that declaration states – "in the present tense" – that plaintiff "*is not* 'out of cash' and [that it] *does not* owe 'Aggregate' any amount." The trial court was persuaded by that logic, concluding that plaintiff failed to offer "any evidence" that the challenged factual statements "were untrue *when they were made*." As the court explained, Reynolds's declaration "does not say anything about Eagle's financial condition and/or its debt to Aggregate on January 24, 2005." Apart from its reliance on the Reynolds declaration, plaintiff argues in its reply brief that evidence of falsity may be found in Mould's own declaration.

Malice: In addition to falsity, the parties also dispute the related question of malice. Plaintiff argues that it need not plead and prove malice in connection with its claim of libel per se, because is not a public figure. Mould disagrees. Plaintiff also

[3] To reiterate, that is shorthand for the full statement by Mould, which was: "They are out of cash, sales, and time. They must pay Aggregate back the $10mm which they do not have."

contends that it need not plead and prove malice in connection with its trade libel claim, because malice is not an element of that cause of action. In any event, plaintiff asserts, it made an adequate prima facie showing that defendant Mould acted with malice.

Damages: The final disputed element is the adequacy of plaintiff's showing on the question of damages. Plaintiff argues that it made the requisite minimal showing to support its prima facie case, principally through the declaration of its independent accounting expert, Deirdre Flaherty. Mould disagrees, arguing that plaintiff failed to show any damages as a result of his January 2005 posting. He asserts that the Flaherty declaration is speculative and fails to identify any specific injury caused by his posting. Moreover, Mould argues, to the extent that plaintiff asserts damages based on declines in share price, (1) the price actually increased immediately after his posting, and (2) the overall share price decline was caused by other factors, including dilution in value resulting from the issuance of tens of millions of additional shares. In reply, plaintiff attacks Mould's arguments as "self-serving" and impermissible "lay opinion" on the question of damages, which "either make no sense, are inadmissible, or at best, contradict Ms. Flaherty's analysis, and therefore cannot be considered by the Court."

3. Analysis: Plaintiff's status as a limited purpose public figure

"A threshold determination in a defamation action is whether the plaintiff is a 'public figure.' " (*McGarry, supra,* 154 Cal.App.4th at p. 113.) Addressing this issue first enables us to ascertain and apply the correct standard for assessing falsity.

This determination "is a question of law for the trial court." (*Khawar v. Globe Internat., Inc., supra,* 19 Cal.4th at p. 264.) "On appeal, the trial court's resolution of disputed factual questions bearing on the public figure determination is reviewed for substantial evidence, while the trial court's resolution of the ultimate question of public figure status is subject to independent review for legal error." (*Ibid*.) Notwithstanding plaintiff's arguments to the contrary, the trial court in this case implicitly determined that

plaintiff is a public figure. That determination is evident from its discussion of malice in connection with the motion brought by Does 2 and 3. In any event, neither party asserts any factual dispute on the question. We therefore decide the issue as a matter of law. (*Ibid*.)

As developed in the case law, there are three "elements that must be present in order to characterize a plaintiff as a limited purpose public figure. First, there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants. Second, the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue. In this regard it is sufficient that the plaintiff attempts to thrust him or herself into the public eye. And finally, the alleged defamation must be germane to the plaintiff's participation in the controversy." (*Ampex, supra*, 128 Cal.App.4th at p. 1577, citing *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845-846.) We consider each element in turn.

Public controversy: "To characterize a plaintiff as a limited purpose public figure, the courts must first find that there was a public controversy." (*Copp v. Paxton, supra,* 45 Cal.App.4th at p. 845.) "A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." (*Waldbaum v. Fairchild Publications, Inc.* (C.A.D.C. 1980) 627 F.2d 1287, 1296.) "Courts must exercise care in deciding what is a public controversy." (*Ibid.*) "To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question." (*Id*. at p. 1297, fn. omitted.)

On this point, our case is factually similar to *Ampex*, where the court found a public controversy based on "the public dimension of the [internet] exchanges." (*Ampex, supra*, 128 Cal.App.4th at p. 1578.) First, the *Ampex* court noted, "a number of postings on the Yahoo! message board" – a public forum – had criticized the plaintiff and its management, even prior to the specific postings at issue. (*Ibid.*) Second, the court

observed, the content of the challenged postings showed that they were in response to other messages circulating about plaintiff. (*Ibid.*) "Third, with 59,000 shares outstanding, the causes and consequences of discontinuing Ampex's multimillion-dollar venture into the Internet television business had foreseeable and substantial ramifications for nonparticipants." (*Ibid.*) In sum, the court concluded, "Ampex's decision and action in discontinuing iNEXTV amounted to a public controversy that elicited concerns about the management of Ampex." (*Ibid.*)

Here, there was a similar "public dimension" to the challenged postings, as demonstrated by the three factors cited in the *Ampex* case. (*Ampex*, *supra*, 128 Cal.App.4th at p. 1578.) First, "there were a number of postings on the Yahoo! message board criticizing" plaintiff. (*Ibid.*) According to plaintiff's own evidence, its message board on Yahoo! Finance had generated over 700,000 postings as of December 22, 2005. And its complaint cites "approximately 23,000 postings a month, the majority of which contain negative or derogatory information about the company…." Second, some of the challenged postings attached as exhibits to plaintiff's complaint indicate that they were posted in response to other messages circulating about plaintiff. (*Ibid.*) Finally, plaintiff is a publicly traded corporation, which had hundreds of millions of outstanding shares at the time of Mould's postings. (Cf., *ibid.* [plaintiff had 59,000 outstanding shares]; *Global, supra,* 132 F.Supp.2d at p. 1265 [plaintiff had "as many as 18,000 investors"].) A large public corporation "is of public interest because its successes or failures will affect not only individual investors, but in the case of large companies, potentially market sectors or the markets as a whole." (*Global,* at p. 1265.)

We acknowledge the teaching of our state's high court that "a person in the business world advertising his wares does not necessarily become part of an existing public controversy." (*Vegod, supra*, 25 Cal.3d at p. 770.) "Merely doing business with parties to a public controversy does not elevate one to public figure status." (*Id.* at p. 769.) And where no public controversy exists, "those assuming the role of business

practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur." (*Id*. at p. 770, fn. omitted; accord, *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 354 [plaintiff was not a "public figure for purposes of statements accusing him of false advertising"].) In this case, however, plaintiff went far beyond simply advertising its wares.[4] As discussed above, plaintiff's changing fortunes were the subject of extensive public debate and had the potential to affect many people.

Here, we conclude, there was a public controversy about plaintiff's operations and its financial circumstances.

Voluntary act: "Once the court has defined the controversy, it must analyze the plaintiff's role in it. Trivial or tangential participation is not enough." (*Waldbaum v. Fairchild Publications, Inc., supra,* 627 F.2d at p. 1297.) In making "a determination of public figure status, courts should look for evidence of affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies." (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at pp. 254-255.)

On this question, too, our case is factually similar to *Ampex.* As the court stated there: "Although respondents deny inserting themselves into the controversy, they did, by way of press releases and letters posted on their Web site." (*Ampex*, *supra*, 128 Cal.App.4th at p. 1578; cf., *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at

[4] As plaintiff points out: "Criticism of commercial conduct does not deserve the special protection of the actual malice test." (*Vegod, supra,* 25 Cal.3d at p. 770.) But this is not a case of commercial speech, as plaintiff would have it. As the California Supreme Court more recently explained, various factors are considered in determining whether particular statements are commercial speech. (*Kasky v. Nike, Inc., supra,* 27 Cal.4th at pp. 956-958.) At its core, the court reiterated, commercial speech proposes a commercial transaction. (*Id.* at p. 956.) In distinguishing commercial speech, it is also appropriate to consider any references to products or services. (*Id.* at p. 960.) Other relevant considerations are advertising format and economic motivation. (*Id.* at pp. 960-961.) Those factors are all absent from the statements challenged here.

p. 256 [plaintiffs "sponsored massive publicity and self-promotion efforts over a period of many years and apparently *increased* these efforts with regard to the present controversy"]; *Copp v. Paxton, supra,* 45 Cal.App.4th at p. 846 [the plaintiff attempted "to inject himself into this public debate by passing out flyers … and by speaking" at a local council meeting and "by organizing a worldwide conference on disaster mitigation"].)

As with the corporate plaintiff in *Ampex*, plaintiff in this case effectively thrust itself into the controversy by using press releases and its website. Through those vehicles, plaintiff provided information about its management, products, alliances, and financing as a means of promoting itself.

Germane statements: "Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy." (*Waldbaum v. Fairchild Publications, Inc., supra,* 627 F.2d at p. 1298.)

Again, as to this third element, our case shares factual similarities with *Ampex.* There, the court found that the challenged communications "were germane to [plaintiff's] participation in the controversy. These comments were counter to [its] version of events. They criticized management rather than ascribing [the project's] woes to market forces." (*Ampex, supra,* 128 Cal.App.4th at p. 1578.)

In this case, Mould's posting predicted further economic troubles ahead and ascribed the reasons for plaintiff's travails to poor management. Thus, like the internet messages in *Ampex*, Mould's statements were germane to the public debate over plaintiff's deteriorating financial situation.

For all the foregoing reasons, plaintiff is a limited purpose public figure.

4. Analysis: Plaintiff's insufficient showing of malice[5]

As a public figure, plaintiff must demonstrate that Mould acted with actual malice in making the challenged "out of cash, must pay" statements.

Legal standard: To demonstrate actual malice, plaintiff "must establish a probability that [it] can produce clear and convincing evidence that the allegedly defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity." (*Ampex, supra*, 128 Cal.App.4th at p. 1578.) "The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind." (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 950; *McGarry, supra,* 154 Cal.App.4th at p. 114.) "The reckless disregard test requires a high degree of awareness of the probable falsity of the defendant's statement." (*Ampex,* at p. 1579.)

"Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 510.) This is "a subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue." (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 257.)

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[5] The trial court did not address the issue of malice, having decided in favor of Mould on the question of falsity. As noted above, the court found no evidence that the challenged statements "were untrue *when they were made*." The court disregarded the January 2006 declaration of Frederick Reynolds because it stated – in the present tense – that plaintiff "is not 'out of cash' and does not owe 'Aggregate' any amount, $10 million or otherwise." With all due respect to the trial court (and to the concurring justice), we believe that the decision should – and can – rest on a more solid basis than verb tense. It *should*, since the ruling terminates plaintiff's entire case against Mould. (Cf., *Navellier I, supra,* 29 Cal.4th at p. 89 [the plaintiff's burden is minimal]; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist., supra*, 106 Cal.App.4th at p. 1238 [the plaintiff is entitled to "every legitimate favorable inference that may be drawn from" the evidence].) It *can*, since the record supports the trial court's decision on other grounds, as explained in this section of the opinion.

The key question whether the defendant actually entertained serious doubts about the truth of his statements. (See *Khawar v. Globe Internat., Inc., supra*, 19 Cal.4th at p. 275.)

As California Supreme Court precedent instructs, "actual malice can be proved by circumstantial evidence." (*Reader's Digest Assn. v. Superior Court, supra*, 37 Cal.3d at p. 257.) Thus "the plaintiff may rely on circumstantial evidence, including evidence of motive and failure to adhere to professional standards." (*Khawar v. Globe Internat., Inc., supra*, 19 Cal.4th at p. 275.) "Such factors as a failure to investigate the facts, or anger and hostility toward the plaintiff, may indicate that the defendant had serious doubts regarding the truth of the publication." (*Walker v. Kiousis, supra,* 93 Cal.App.4th at p. 1446.) In a given case, other pertinent factors might include the defendant's reliance on sources that are known to be either unreliable or biased against the plaintiff. (*Reader's Digest Assn. v. Superior Court*, at p. 258.) Even a corrupt business model or "practices that preordain negative reports" about the plaintiff could provide "probative evidence" that a defendant "acted in reckless disregard of the truth" in a proper case. (*Overstock, supra,* 151 Cal.App.4th at pp. 711-712.)

"However, we will not infer actual malice solely from evidence of ill will, personal spite or bad motive." (*Ampex, supra,* 128 Cal.App.4th at p. 1579.) Likewise, a defendant's "failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy." (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 258.) Furthermore, the defendant "does not have to investigate personally, but may rely on the investigation and conclusions of reputable sources." (*Id*. at p. 259.) "Neither is there a duty to write an objective account." (*Ibid*.) "So long as he has no serious doubts concerning its truth, [the defendant] can present but one side of the story." (*Ibid*.)

Application: Applying the foregoing standards to this record, we conclude that plaintiff did not carry its burden on the question of malice. Plaintiff was required both to

adequately allege malice in its complaint and to make a prima facie factual showing on the issue. (See *Vogel v. Felice*, *supra*, 127 Cal.App.4th at pp. 1017-1018.) It did neither.

First, in terms of pleading, plaintiff's complaint "is legally insufficient on its face" because "it fails to plead that defendant made the challenged statements with 'actual malice' as that term is used" under the *New York Times* standard. (*Vogel v. Felice, supra,* 127 Cal.App.4th at p. 1017, citing *New York Times v. Sullivan, supra,* 376 U.S. at pp. 279-280.) "The complaint here makes no attempt to plead a knowing and reckless falsehood." (*Vogel v. Felice*, at p. 1018.) It alleges only that Mould "deliberately posted false and misleading information" with no assertion of recklessness or knowledge of falsehood. "Such an allegation is insufficient to state a cause of action in a case where 'actual malice' of the [*New York Times*] type is required." (*Ibid*.)

Second, in terms of evidence, plaintiff has not made a prima facie showing of Mould's subjective awareness of falsity or his reckless disregard of the truth. Regarding the quantum and nature of the evidence that plaintiff must produce, the *McGarry* case is instructive. (See *McGarry*, *supra,* 154 Cal.App.4th at pp. 116-117.)

In *McGarry,* a defendant submitted a declaration in which she "affirmatively averred" that she believed the challenged statement to be true. (*McGarry*, *supra,* 154 Cal.App.4th at p. 117.) In response, the plaintiff "produced no contrary evidence, much less evidence capable of commanding the unhesitating assent of every reasonable mind [citation]" concerning the defendant's subjective belief. (*Ibid*., internal quotation marks omitted.) On that record, the court concluded, the plaintiff could not "show[] a likelihood of success on the merits…." (*Id*. at p. 115; cf., *Carver v. Bonds*, *supra,* 135 Cal.App.4th at p. 356 [where defendant's declaration refuted the element of falsity, and plaintiff "did not make a contrary showing," plaintiff "thereby failed to carry his burden on the motion to strike"].)

A similar situation obtains here, in terms of the evidentiary posture.

Concerning his January 2005 posting in general, Mould declared: "This message contains my opinion of Eagle's financial condition and prospects for the future, based on my reading of Eagle's SEC [Securities and Exchange Commission] filings, information which it publicly announced, as well as news reports regarding Eagle Broadband, its competitors and market over a five year period as a long-term shareholder."

Mould's declaration also specifically addressed the "out of cash, must pay" allegations. Mould declared that his "statement that Eagle was 'out of cash' … was based on" information from several identified sources, including an SEC filing made by plaintiff "just before" Mould's January 2005 posting, in which "Eagle reported that it had cash, cash equivalents and securities available for sale of only $474,000 and liabilities of over $17 million." Mould compared plaintiff's then-current cash situation with its circumstances at the close of its fiscal year 2000, at which time the company had "had a significant cash balance of $32 million and liabilities of $3,580,000." Mould further declared: "Eagle published in its own [SEC] filing that its 'cash burn rate' (net cash used by operations) for the quarter just ended was greater than its remaining cash, cash equivalents and securities available for sale." He continued: "My statement in my January 24, 2005, post that Eagle was 'out of cash', though perhaps a bit hyperbolic, was accurate from an accountant's point of view – Eagle had about one and one-half months' worth of operating expenses on hand, and no significant revenues, or prospects for revenues, and it was repeatedly announcing bad news …."

Regarding the "must pay" portion of his January 2005 posting, Mould declared that his statement "that plaintiff 'must pay Aggregate back the $10mm' was based on an SEC Form 8K filed by Eagle on August 27, 2003, and news releases by plaintiff and others that plaintiff had borrowed $10 million from Aggregate Networks, LLC." He continued: "After the very public announcement of the loan from Aggregate, I do not recall reading anywhere that plaintiff had repaid, or otherwise disposed of, the loan. As

disposing of this loan would be good news for the company, I would expect such to be announced at least as prominently as was the loan."

In our view, Mould's declaration supports a finding that he lacked actual malice in making the "out of cash, must pay" statements. Mould identified his sources of information as well as the specific data on which he relied in his posting.

Mould's declaration notwithstanding, plaintiff asserts, the record supports the requisite prima facie showing of malice based on circumstantial evidence.[6] We disagree.

Applying the factors developed in the case law, we find no adequate circumstantial evidence of malice here. First, Mould did not consult unreliable or biased sources. (See *Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at p. 258.) To the contrary, he based his statements on information that plaintiff itself had released or filed with the SEC. Moreover, there is no evidence of Mould's "failure to adhere to professional standards." (*Khawar v. Globe Internat., Inc.*, *supra*, 19 Cal.4th at p. 275.) No such standards applied here.

Plaintiff relies exclusively – and unsuccessfully – on a claimed lack of investigation, asserting: "Here, Mould admits that he failed to investigate pertinent facts." We reject plaintiff's position. First, as a factual matter, we cannot agree that Mould made such an admission. At most, Mould's declaration demonstrates (1) his apparent misunderstanding of the nature of the $10 million in financing that plaintiff obtained from Aggregate[7] and (2) his implicit acknowledgement that he did not

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[6] Because Mould's declaration was proffered with the defense reply papers below, plaintiff did not have the opportunity to counter it with affirmative evidence of its own in the trial court. Plaintiff relies on that circumstance in support of its claim that the court should have allowed discovery, a point we discuss below.

[7] In his declaration, Mould used the terms "borrowed" and "loan." The press release announcing the financing from Aggregate states: "The funding will consist of the purchase of a note and the issuance of Series A Preferred shares, with the terms calling

affirmatively seek more current data about that financing. Second, and more importantly, as a legal matter, "failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy." (*Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d at p. 258.) This slender reed of circumstantial evidence does not support the weight of plaintiff's burden, and plaintiff offers no other.

A prima facie showing of malice must be made by clear and convincing evidence, which must "be such as to command the unhesitating assent of every reasonable mind." (*Beilenson v. Superior Court*, *supra*, 44 Cal.App.4th at p. 950; *McGarry*, *supra*, 154 Cal.App.4th at p. 114.) That standard has not been met here. Viewed most favorably to plaintiff, the evidence in Mould's declaration does not demonstrate the requisite "high degree of awareness of the probable falsity of the defendant's statement." (*Ampex*, *supra*, 128 Cal.App.4th at p. 1579.)

5. Conclusion

Because it is a public figure, plaintiff was required (1) to sufficiently allege actual malice in its complaint and (2) to make a prima facie factual showing on this issue in response to the motion. Because it failed to do either, plaintiff cannot demonstrate the probability of prevailing against defendant Mould on its libel claim.

B. Plaintiff's Defamation Claim Against Williams

Plaintiff's defamation claim against defendant Williams rests on a single message that he posted in June 2005, which it terms a "fabricated press release." For his part, Williams characterizes his message as "classic parody," describing it as a "take-off" on an actual press release that plaintiff issued a year before, in June 2004, announcing its

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for an initial investment of $3M followed by an additional minimum of $7M within 90 days."

addition to the Russell 3000 Index. The mock press release purports to have been issued by plaintiff, complete with fabricated quotes ascribed to its chief executive officer.[8]

1. Contentions

The dispositive issue is whether this posting constitutes a defamatory statement of provably false fact, as plaintiff contends, or a constitutionally protected parody, as Williams argues.[9]

2. Legal Principles

As explained above, generally speaking, parody and satire are constitutionally protected speech. (*Franklin, supra,* 116 Cal.App.4th at p. 385.) But like opinion, they may be actionable if they convey provably false and defamatory information. (*Ibid.*;

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[8] The press release posted by Williams reads as follows: "LEAGUE CITY, Texas – June 10, 2005 – Eagle Broadband, Inc. (AMEX:EAG), a leading provider of broadband and communications technology and services, announced today that the company has been deleted from the Russell 3000 Index which measures the performance of the 3000 largest U.S. companies based on total market capitalization. [¶] 'We are very not very pleased to be deleted from the Russell 3000, which we consider a clear recognition of Eagle Broadband's continued failures in executing our business plan over the last year,' stated Dave Micek, Chairman and CEO of Eagle Broadband. 'Deletion from the index is a reflection of our continued stagnation, worsening financials and decreased market capitalization. The listing is also an indication of further customer rejection of Eagle's technology and services, the indifference of our employees and our continued focus on eroding shareholder value.' "

[9] As a threshold procedural matter, we reject plaintiff's claim that Williams forfeited his argument that his communication is protected parody by waiting to raise it in his reply papers below. As explained above, that claim lacks merit in the context of the special motion to strike, which shifts the burden to the plaintiff to respond to the defense evidence. (*Navellier II, supra,* 106 Cal.App.4th at p. 775.)

Substantively, we decide Williams's appeal on the question of his statement's character as parody, rather than on the issue of malice. We do so because Williams does not argue malice here. (See *Taylor v. Roseville Toyota, Inc., supra,* 138 Cal.App.4th at p. 1001, fn. 2 [contention forfeited]; *Mann, supra,* 120 Cal.App.4th at p. 107 [same].) In any event, the only evidence of motive that Williams offered below was his statement that he intended his message as parody.

Wilbanks v. Wolk, *supra*, 121 Cal.App.4th at p. 902.) "However, if the reasonable reader or hearer of the statements would understand that they could not have been intended to convey a provable false assertion of fact, but were clearly a mere joke or parody, there is no defamation as a matter of law." (5 Witkin, Summary of Cal. Law, *supra*, Torts, § 547, p. 803.)

Determining whether a particular communication is actionable can be difficult; "what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole." (*Gregory v. McDonnell Douglas Corp, supra*, 17 Cal.3d at p. 601.) "To decide whether a statement is fact or opinion, a court must put itself in the place of an average reader and determine the natural and probable effect of the statement, considering both the language and the context." (*ComputerXpress, supra,* 93 Cal.App.4th at p. 1011.) The court thus examines the totality of the circumstances in determining whether the statement conveys fact or opinion to a reasonable reader. (*Seelig v. Infinity Broadcasting Corp., supra,* 97 Cal.App.4th at p. 809.) "First, the language of the statement is examined." (*Baker v. Los Angeles Herald Examiner*, *supra*, 42 Cal.3d at p. 260.) "Next, the context in which the statement was made must be considered." (*Id.* at p. 261.) "The 'average reader' is a reasonable member of the audience to which the material was originally addressed." (*Couch v. San Juan Unified School Dist.* (1995) 33 Cal.App.4th 1491, 1500.)

Upon examination of all the circumstances, it is "for the trial court in the first instance to determine whether the question could be decided as a matter of law." (*San Francisco Bay Guardian, Inc. v. Superior Court* (1993) 17 Cal.App.4th 655, 659.) On appeal, the reviewing court must then "make its own independent determination of this question." (*Ibid.*; see also, e.g., *Polygram Records, supra*, 170 Cal.App.3d at pp. 551, 557; see *Couch v. San Juan Unified School Dist., supra*, 33 Cal.App.4th at p. 1500.)

3. Analysis

As governing precedent instructs, we first examine the content of the challenged statement. (*Baker v. Los Angeles Herald Examiner*, *supra*, 42 Cal.3d at p. 260.) We then turn to its context. (*Id.* at p. 261.)

Content: Williams argues that his message is obvious parody because it quotes plaintiff's chief executive officer "as saying some truly outlandish things." Among the fabricated quotations are references to "continued failures in executing our business plan … continued stagnation, worsening financials and decreased market capitalization … further customer rejection of Eagle's technology and services, the indifference of our employees and our continued focus on eroding shareholder value." According to Williams: "The average reader would not believe that Eagle had actually issued this press release. Clearly, a CEO would *never* boast in a company press release" about any of the quoted statements. Moreover, Williams points out, his message contains "a typographical error" in one such quote ("we are *very not very* pleased"). He urges that mistake as further evidence of parody, saying: "A press release by a publicity-conscious, publicly-traded corporation would be very unlikely to include such an obvious typo."

Plaintiff disagrees. In its pleading, plaintiff complains that the mock press release "had the 'look and feel' of an official press release …." And in this court, plaintiff argues: "The fact that Williams meticulously mimicked a real press release makes it more likely that someone reading the contents of the fake press release – no matter how allegedly 'outlandish' the statements therein might be – will believe [it] to be from Eagle."

In our view, plaintiff misapprehends the nature of parody, which is "to catch the reader off guard at first glance…." (*San Francisco Bay Guardian, Inc. v. Superior Court*, *supra*, 17 Cal.App.4th at p. 660.) "The butt of the parody is chosen for some recognizable characteristic or viewpoint which is then exaggerated." (*Id.* at p. 662.) To

qualify as parody, however, it is not necessary that the message "blazon its identity with blatant visual cues in order for the average reader to recognize it as such, nor that it must mimic any feature regularly appearing in the same publication. The facts which determine whether the average reader would grasp the parodistic intent of a newspaper article necessarily differ from case to case and from newspaper to newspaper." (*Couch v. San Juan Unified School Dist.*, *supra*, 33 Cal.App.4th at p. 1502.)

In this case, the most telling indication of the message's character is the "unremittingly facetious" nature of the fabricated quotations. (*Couch v. San Juan Unified School Dist.*, *supra*, 33 Cal.App.4th at p. 1503.) In content alone, we believe, the mock press release strongly suggests parody. That belief is further buttressed by an examination of the context in which the mock press release was communicated.

Context: As our state's high court has explained, "where potentially defamatory statements are published in a … setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (*Gregory v. McDonnell Douglas Corp*, *supra*, 17 Cal.3d at p. 601.) The communication at issue here took place in just such a setting.

In describing the environment of internet chat-rooms or message boards, the federal district court in *Global* used the expressions "free-wheeling and highly animated exchange" and "general cacophony." (*Global, supra,* 132 F.Supp.2d at p. 1267.) As that court explained: "Unlike many traditional media, there are no controls on the postings. Literally anyone who has access to the Internet has access to the chat-rooms. The chat-rooms devoted to a particular company are not sponsored by that company, or by any other company. No special expertise, knowledge or status is required to post a message, or to respond. The postings are not arranged by topic or by poster. The vast majority of the users are, because of the 'handles,' effectively anonymous. The messages range from

relatively straightforward commentary to personal invective directed at other posters and at the subject company to the simply bizarre." (*Id.* at p. 1264; see also, e.g., *Highfields Capital Management, L.P. v. Doe* (N.D.Cal. 2005) 385 F.Supp.2d 969, 978-979 (*Highfields*).)

Highfields is another federal district court case involving "sardonic commentary" on an internet financial message board. (*Highfields*, *supra*, 385 F.Supp.2d at p. 971.) Although the legal issues presented there are different from those before us, the court's general observations about the environment of internet message boards are nevertheless apt: "There is so much irreverence and jocularity in this venue, so much mockery, so much venting, so much indecency and play, that no even remotely rational investor would take messages posted here at face value or base investment decisions on them." (*Id.* at pp. 978-979.)

The same is true here. The offending message was published in this same unregulated and freewheeling milieu. Recognizing the nature of this forum, Yahoo! Finance message board users are warned not to rely on the information contained there. In fact, just such a reminder appears on the mock press release itself.[10]

Apart from the venue itself, other circumstances lend support to our determination that the mock press release is parody. One such circumstance is the existence of other postings by Williams submitted close in time to the challenged message. Ten minutes before posting his mock press release (message number 621314), Williams posted the genuine 2004 press release (message number 621310), using the title "Remember this golden oldie?" The two messages are linked: the mock press release indicates that it was posted as a reply to the earlier message containing the genuine 2004 release. About half an hour later, Williams responded to a comment about it from another poster (message

[10] The reminder states in pertinent part: "This board is not connected with the company. These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose."

number 621345), saying: "Wow, if you thought that was a real press release (with the obvious typo) you are really stupid." The message preceding the challenged posting is particularly pertinent as context. (Cf., *San Francisco Bay Guardian, Inc. v. Superior Court, supra,* 17 Cal.App.4th at p. 658 [relevant circumstances include "language prefatory to the statement"].)

Ultimately, we look to the understanding of the average reader of defendant's posting, i.e., "a reasonable member of the audience to which the material was originally addressed." (*Couch v. San Juan Unified School Dist., supra,* 33 Cal.App.4th at p. 1500.) Here, that audience consists of visitors to the Yahoo! Finance message board devoted to plaintiff. Not only is the unregulated nature of this milieu apparent, but readers are warned against relying on what they read there. Additionally, in this case, the offending message stated that it was a reply to an earlier posting, which further illuminated its character as parody. As stated in *Highfields,* under these circumstances, no "reasonable person perusing the message board at issue would understand the statements as having been made by plaintiff itself …." (*Highfields, supra,* 385 F.Supp.2d at p. 971.)

4. Conclusion

Based on the totality of the circumstances present here, and as a matter of law, we conclude that the average reader would recognize the mock press release as parody. That being so, it "does not defame [plaintiff] by false attribution or presentation of false facts." (*San Francisco Bay Guardian, Inc. v. Superior Court*, supra, 17 Cal.App.4th at p. 661.)

C. Plaintiff's Trade Libel Claims

Plaintiff's trade libel claims fare no better than its defamation claims.

1. No malice by Mould

As against Mould, plaintiff has not demonstrated a prima facie case of trade libel, because it has not shown malice on his part. Plaintiff's contrary arguments

notwithstanding, malice is a required element of trade libel. (*Melaleuca, supra,* 66 Cal.App.4th at pp. 1360-1362.)

2. No false factual statement by Williams

Nor can plaintiff prevail in its trade libel claim against Williams, because his statements constitute parody, a form of constitutionally protected opinion. "Since mere opinions cannot by definition be false statements of fact, opinions will not support a cause of action for trade libel." (*ComputerXpress, supra*, 93 Cal.App.4th at pp. 1010-1011.)

3. No special damages

Moreover, plaintiff's trade libel claims against both defendants fail on another ground, the failure to allege and substantiate special damages. A plaintiff seeking damages for trade libel must "allege special damages specifically, by identifying customers or transactions lost as a result of disparagement, in order to state a prima facie case." (*Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., supra,* 12 F.Supp.2d at p. 1043; see also, *Mann, supra,* 120 Cal.App.4th at p. 109.) Plaintiff has not done so here.

In the main, plaintiff relies on the declaration of Deirdre Flaherty, an independent certified public accountant, for evidence of damages. In her detailed declaration, Flaherty explained the concept of short trading, described her analysis of plaintiff's stock in terms of trading patterns and share price during the period from January to October 2005, and commented on her need for a "deeper understanding of the mechanics of the scheme that has been perpetrated which would require additional details to be provided by the John Does and other third parties, such as Yahoo!."

Based on the limited information available to her, Flaherty declared her belief that plaintiff had "suffered some damage." During the first 10 months of 2005, Flaherty stated, plaintiff "experienced a decline in stock price in excess of 76% of its value."

According to Flaherty: "This dramatic decline in share price could lead to a variety of losses for [plaintiff] including (but not limited to) the loss of investor confidence and goodwill, the inability to utilize 'non cash' incentives (such as stock options, often critical to maintain employee retention and morale) and a restriction in [plaintiff's] ability to access capital markets."

Flaherty's declaration fails to adequately substantiate special damages, because it does not "identify particular customers and transactions of which [plaintiff] was deprived as a result of the libel." (*Mann, supra,* 120 Cal.App.4th at p. 109.) Such evidence is required "in order to state a prima facie case." (*Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., supra,* 12 F.Supp.2d at p. 1043.) Without that showing, a trade libel claim will not survive a special motion to strike. (*Mann,* at pp. 109-110.)

Plaintiff also directs us to the declarations of its vice president of marketing, Frederick Reynolds. Again, however, neither his initial declaration nor his corrected declaration identifies any particular customers or transactions lost. Reynolds states only that he "fielded calls from shareholders" who "expressed concern" about whether the challenged internet messages "would have a negative impact on the investing community or Eagle Broadband in general." As explained above, this is not an adequate showing of trade libel damages. (*Mann, supra,* 120 Cal.App.4th at pp. 109-110.)

A plaintiff must substantiate damages in order "to meet its burden to establish a probability of prevailing on the merits…." (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist., supra,* 106 Cal.App.4th at p. 1241; *Mann, supra,* 120 Cal.App.4th at pp. 109-110.) Plaintiff failed to do so here. Its trade libel claims thus fail for this reason, as well as those articulated above.

D. Conclusion

Plaintiff failed to establish a probability of prevailing on its defamation claim, whether its theory is libel, or trade libel, or both.

III. Unfair Business Practices

We next consider whether plaintiff's claims for unfair competition should have been dismissed. As explained above, the UCL "prohibits unfair competition, including unlawful, unfair, and fraudulent business acts." (*Korea Supply, supra,* 29 Cal.4th at p. 1142.) A business practice may be unfair and thus actionable, even if it is not specifically prohibited by law. (*Ibid.*)

A. Contentions

Plaintiff defends its cause of action for unfair competition in two ways. First, plaintiff relies on the same conduct that underlies its defamation claim to support its unfair competition law claim. Alternatively, plaintiff asserts, there is a sufficient evidentiary basis to show market manipulation, which is independently actionable.

Defendants launch a multi-faceted attack on the validity of plaintiff's UCL claim, which includes arguments that the alleged stock manipulation scheme is not within the reach of the UCL and that it is preempted by federal securities law. Plaintiff disputes defendants' coverage and preemption arguments, a position shared by the Attorney General in his amicus brief.

B. Analysis

As we now explain, we conclude that plaintiff's cause of action for unfair competition lacks even minimal merit under either of the two theories advanced. We reach that conclusion without deciding the issues briefed by the Attorney General.

1. Derivative claim, based on libel

To the extent that plaintiff's cause of action for unfair business practices is premised on its unsuccessful defamation claim, it falls with that claim. (See *Franklin, supra,* 116 Cal.App.4th at p. 394; cf., *Reader's Digest Assn. v. Superior Court, supra,* 37

Cal.3d at p. 265 ["constitutional protection does not depend on the label given the stated cause of action"].)

2. Independent claim, based on stock manipulation

For purposes of our analysis here, we assume (without deciding) that an action on the stock manipulation scheme alleged in plaintiff's complaint is within the UCL's reach and not preempted by federal securities law. Even aided by those assumptions, though, the UCL claim fails, because plaintiff has not made a prima facie showing that these defendants participated in the alleged scheme.

To substantiate its unfair competition claim on this theory, plaintiff must show that defendants engaged in short sales of its stock and drove the price down with negative information. (See *Overstock*, *supra*, 151 Cal.App.4th at pp. 696-697 [defendants established short positions with plaintiff]; *id.* at p. 712 [defendants "initiated a negative campaign against [plaintiff]"]; *id*. at p. 716 [plaintiff adequately "pleaded 'unlawful, unfair, or fraudulent business acts or practices' " under the UCL].) Short selling occurs when a person borrows stock then sells it " 'at the current market price. The hope is that the stock price will fall so the short seller can repurchase the stock at a lower price and pay back' " the borrowed shares. (*Id.* at p. 694, fn. 5.)

In reply papers below, Mould and Williams both unequivocally declared that they had never engaged in short-selling plaintiff's stock.[11] And plaintiff offered no contrary

[11] Mould declared: "I have never sold short any shares in Eagle Broadband, or any other company. I have never profited or benefit[]ed from a decline in the price of Eagle Broadband stock, nor have I participated in any scheme, plan, or conspiracy to drive down the price of Eagle Broadband shares. In fact, my investment in Eagle Broadband stock has resulted in significant financial losses …."

Williams likewise declared: "I have never sold short any shares in Eagle Broadband. I have never profited or benefit[]ed from a decline in the price of Eagle Broadband stock, nor have I participated in any scheme, plan, or conspiracy to drive down the price of Eagle Broadband shares." He further declared: "I bought shares in Eagle Broadband because I believed it had potential to grow and become successful in a

evidence – direct or circumstantial – to suggest otherwise. Because the only evidence on the issue demonstrates that defendants did not engage in the challenged conduct, plaintiff's UCL claim lacks even minimal merit. (See *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.*, *supra*, 106 Cal.App.4th at p. 1241 [plaintiff "failed to meet its burden to establish a probability of prevailing on the merits" where there was no competent evidence of causation].)

C. Conclusion

Plaintiff failed to establish a probability of prevailing on its claim for unfair business practices.

IV. Continuance for Discovery

In addition to its arguments concerning the defendants' motion to strike, plaintiff also asserts that the trial court erred in denying its request to lift the discovery stay and continue the hearing. More specifically, plaintiff challenges the "court's decision to consider [reply] evidence without providing Eagle Broadband with time to conduct additional discovery …."

We review the trial court's decision on plaintiff's discovery request for an abuse of discretion. (*Tutor-Saliba Corp. v. Herrera*, *supra*, 136 Cal.App.4th at p. 617.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) In this case, the trial court carefully articulated its well-reasoned decision, devoting more than six pages of its formal order to the discovery question. We find no abuse of discretion.

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still-emerging market. My interest has always been in the stock increasing in price, not decreasing."

A. Legal Standards

The trial court may permit discovery notwithstanding the statutory stay. (§ 425.16, subd. (g).) A decision to lift the stay is "limited to the issues raised in the special motion to strike." (*Ruiz, supra*, 134 Cal.App.4th at p. 1475.) Good cause must be shown. (§ 425.16, subd. (g); *Tutor-Saliba Corp. v. Herrera, supra*, 136 Cal.App.4th at p. 617.)

B. Application

This record presents no good cause for lifting the discovery stay. In the first place, as explained above, the trial court was warranted in considering defense reply evidence offered to show plaintiff's failure to carry its burden of showing a probability of prevailing. (*Navellier II, supra*, 106 Cal.App.4th at p. 775.) Furthermore, discovery would not assist plaintiff in opposing the special motion to strike as to any of its claims. (*McGarry, supra*, 154 Cal.App.4th at p. 121.)

1. Discovery on defamation claims

Concerning plaintiff's asserted need for discovery to support its defamation claim against Mould, we agree with the trial court's ruling, though on different grounds. As we have analyzed that claim, plaintiff failed to make a prima facie showing of malice. As explained above, the claimed lack of investigation on Mould's part – to which he testified in his declaration – is not sufficient circumstantial evidence of malice. Unless Mould has perjured himself, no amount of discovery will change the facts about his investigation.

As for the defamation case against Williams, the issue is whether the average reader would recognize his post as parody. (See, e.g., *San Francisco Bay Guardian, Inc. v. Superior Court, supra*, 17 Cal.App.4th at p. 658.) That issue "does not raise a question of fact as to the view of the average reader. The question is not one that is to be answered by taking a poll of readers but is to be answered by considering the entire context in

which the offending material appears." (*Id.* at p. 660.) Evidence on the question thus would not assist plaintiff in carrying its burden.

2. Discovery on trade libel claims

As explained above, plaintiff's trade libel claims against each defendant fail for the same reasons as its defamation claims against them: the lack of malice (Mould) and the absence of factual falsity (Williams).

Given those conclusions, we need not consider whether discovery might allow plaintiff to adequately substantiate special damages, by identifying particular customers or specific transactions that it lost. (See *Mann, supra,* 120 Cal.App.4th at p. 109.)

3. Discovery to support UCL claim

Finally, discovery will not aid plaintiff in substantiating its unfair competition law claim. To carry its burden on that cause of action, plaintiff must make a prima facie showing that defendants engaged in short sales of its stock, driving down the price with negative information. But Mould and Williams both declared that they had never engaged in short-selling plaintiff's stock. Again, unless defendants perjured themselves, discovery will not change those facts.

C. Conclusion

The trial court did not abuse its discretion in denying plaintiff's motion to lift the discovery stay. No good cause was shown, as none of the requested discovery could assist plaintiff in establishing a probability of prevailing on any of its claims.

DISPOSITION

Insofar as it addresses the claims presented in this appeal, the trial court's order of March 7, 2006 is affirmed in part and reversed in part, as follows:

As to defendant Mould, the order granting the special motion to strike is affirmed.

As to defendant Williams, the order denying the special motion to strike is reversed with directions to grant the motion.

To the extent that it denies plaintiff's request for an order lifting the discovery stay, the order is affirmed.

Plaintiff Eagle Broadband, Inc. shall bear costs on appeal.

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McAdams, J.

I CONCUR:

_____

Duffy, J.

Mihara, Acting P.J., Concurring.

I concur in the judgment, but I write separately because I do not believe that the issues raised by the parties in this case compel the lengthy analysis undertaken in the majority opinion. The trial court properly granted Roy Thomas Mould's special motion to strike on the ground that Eagle Broadband, Inc. (Eagle) had failed to meet its burden of establishing that it had a probability of prevailing on its claim that Mould's statements were false.[1] On the other hand, the trial court erred in denying Richard Williams's special motion to strike because Eagle failed to meet its burden of establishing that it had a probability of prevailing on its claim that Williams's posting was a false statement of fact rather than an obvious parody.

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[1] The majority opinion understands Eagle to be claiming that the superior court erred in denying a discovery motion. Not so. Eagle asserts that the superior court abused its discretion in considering evidence submitted by Mould without allowing it additional time for discovery. Since Mould succeeded due to Eagle's failure to meet *its* burden, evidence submitted by Mould was irrelevant. Eagle, for obvious reasons, does not claim that it needed additional discovery to find out whether it was out of cash or in debt at the time of Mould's statements.

The majority opinion also understands Eagle to be claiming that there was some separate basis for its UCL cause of action that did not depend on the falsity of Mould's statements. Eagle provides no appellate argument in support of such a contention. It premised its UCL cause of action on the "same behavior" upon which it premised its defamation cause of action. In a single, unsupported sentence in its brief, Eagle asserts that "[a]lternatively, Eagle Broadband presented sufficient evidence of a market manipulation scheme" to support its UCL cause of action. In the absence of any citation to the record or any authority, this assertion does not merit analysis. (*People v. Allen* (1993) 20 Cal.App.4th 846, 858; *Tate v. Saratoga Savings & Loan Assn.* (1989) 216 Cal.App.3d 843, 855-856; *People v. Gordon* (1990) 50 Cal.3d 1223, 1244 fn. 3.)

I. Eagle's Burden and Our Standard of Review

Code of Civil Procedure section 425.16 provides that, where a defendant has satisfied the first prong, the burden shifts to the plaintiff and the special motion to strike will be granted "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) The parties agree that both Mould and Williams established the first prong, that the causes of action were based on protected speech, and that the dispositive issue is whether Eagle met its burden of establishing that it had a probability of prevailing.

"In order to establish a probability of prevailing on the claim (§ 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must . . . demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, internal citations and quotation marks omitted.) We exercise de novo review of the trial court's decision to grant or deny a special motion to strike. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

II. Mould's Motion

Eagle alleged that it had been defamed by Mould's January 24, 2005 post in which Mould stated that Eagle was "out of cash, sales, and time" and "must pay Aggregate back the $10mm which they do not have . . . ." The superior court found that Eagle had not

established a probability of prevailing because it had produced no evidence that Mould's posted statement was false.

A requisite element of defamation, including both libel and trade libel, is falsity. (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 384.) The only evidence that Eagle produced to support its claim of falsity was a January 19, 2006 declaration by Frederick Reynolds, Eagle's Vice President of Marketing, in which Reynolds asserted that Eagle "*is not* 'out of cash' and . . . *does not* owe 'Aggregate' any amount, $10 million or otherwise." (Italics added.) As the superior court correctly observed, Reynolds's carefully worded declaration did not establish that Eagle *had not been* "out of cash" and *had not been* in debt to Aggregate at the time of Mould's January 24, 2005 post, but only that Eagle was not out of cash or in debt to Aggregate *a full year later*. Eagle failed to produce evidence that Mould's statement was false *when it was made*. Since Eagle produced no other evidence of the alleged falsity of Mould's statement, it did not establish a probability of prevailing, and the superior court was obligated to grant Mould's special motion to strike.

III. Williams's Motion

Williams's posting was styled as a purported press release. It stated that Eagle had been deleted from the Russell 3000 and purported to record Eagle's reaction to this event. The post purported to quote Eagle's CEO as saying that the deletion was "a clear recognition of Eagle Broadband's continued failures in executing our business plan over the last year," "a reflection of our continued stagnation, worsening financials and decreased market capitalization," and "an indication of further customer rejection of Eagle's technology and services, the indifference of our employees and our continued focus on eroding shareholder value." The superior court concluded that "it cannot be said that the average reader, as a matter of law, would have recognized [Williams's posting] as a parody," and it denied Williams's motion.

"Whether published material is reasonably susceptible of an interpretation which implies a provably false assertion of fact—the dispositive question in a defamation action—is a question of law for the court. This question must be resolved by considering whether the reasonable or 'average' reader would so interpret the material. The 'average reader' is a reasonable member of the audience to which the material was originally addressed. [¶] Statements intended as humor or parody 'may in certain circumstances convey a defamatory meaning and be actionable even if the words used could not be understood in their literal sense or believed to be true.' However, if the reasonable reader or hearer of the statements would understand that they could not have been intended to convey a provably false assertion of fact, but were clearly a mere joke or parody, there is no defamation as a matter of law." (*Couch v. San Juan Unified School Dist.* (1995) 33 Cal.App.4th 1491, 1500-1501, internal citations omitted.)

The superior court reached the wrong conclusion in this case. Taken in context, Williams's posting was clearly a parody. The audience for Williams's posting was readers of an online message board devoted to discussion of investments in Eagle. Thus, the average reader of Williams's post was familiar with Eagle and its business. Such a reader would not have believed that Eagle would issue a press release to publicize quotes from its CEO (or that Eagle's CEO would make such public statements) about the company's "failures," its employees' "indifference" and its "continued focus on eroding shareholder value." An average reader of Williams's post in this forum would have clearly understood that the purported press release was a parody that did not purport to state facts, but instead was intended to ridicule Eagle's poor performance. Such statements cannot form the basis for a defamation action.

Williams's post also could not support a UCL cause of action. The alleged wrongfulness of his statements depended on those statements being comprehended as statements of fact. Since the average reader would have understood Williams's post as a

parody, Williams did not make any wrongful factual assertions. The superior court should have granted Williams's special motion to strike both of Eagle's causes of action.

IV. Conclusion

The superior court correctly granted Mould's motion, and that order should be affirmed. The superior court erred in denying Williams's motion, and that order should be reversed and remanded with directions for the court to grant Williams's motion and to award Williams his attorney's fees upon a proper motion.

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Mihara, Acting P.J.