

No. H030169

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

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EAGLE BROADBAND, INC.,  
Plaintiff and Respondent,

v.

RICHARD WILLIAMS, a/k/a Doe 4,  
Defendant and Appellant.

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Appeal from Order of the Santa Clara Superior Court  
Case No. 105CV050179  
The Honorable William J. Elfving

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION.

In reading Eagle Broadband's Respondent's Brief, one gets a distinct impression that appellant Richard Williams has been caught red-handed by Eagle in a stock fraud. However, the reality, as shown by the uncontroverted *evidence* in this case, is just the opposite.

Eagle's liability theory relies on its absolutely unsupported claim that Williams was a "short" seller who maliciously made false statements on the Yahoo! Finance message board in order to drive down the price of Eagle's stock, thus pocketing an illicit profit.

However, Williams was not a "short" seller at all, but a long term investor. He held onto his Eagle stock in the hopes that it would *gain* in value, not decrease. He could not have benefitted by driving down the value of the stock he already owned; he would have *lost* money. In fact, Williams *did* lose money on his investment in Eagle.

Troubled by the company's deteriorating financial condition, Williams posted an amusing, albeit critical, parody on a financial message board devoted to discussion of Eagle. It is the right of any person – especially an investor – to comment on the performance of a public company. Despite suggesting otherwise, Eagle has utterly failed to show that Williams tried to drive down Eagle's share price. Eagle has not shown any likelihood of prevailing on any claim against Williams.

As set forth in Williams' opening brief, Eagle's claims are subject to

the anti-SLAPP statute (which Eagle now concedes). More fundamentally, Williams' message is clearly protected under the First Amendment.

Eagle has failed to meet this burden by not showing a probability of prevailing on its claims against Williams. The trial court's order denying Williams' motion should be reversed and the Complaint should be dismissed as to Richard Williams.

**I. THE TRIAL COURT ERRED IN DENYING APPELLANT WILLIAMS' SPECIAL MOTION TO STRIKE.**

**A. Section 425.16 Applies to the Complaint Against Williams.**

Williams clearly established that his statements are covered by the anti-SLAPP law. (AOB 12-19.) Eagle now appears to concede this, as it does not discuss applicability in its Respondent's Brief, thus abandoning the position it took in the trial court. (See JA 168:15-172:12.)

**B. Eagle Has Not Shown a Probability of Prevailing on Its Claims Against Williams.**

Eagle's Complaint alleges causes of action against Williams for defamation and unfair business practices, based on a single allegedly actionable post. (See JA 5 ¶ 16, 8 ¶¶ 27-28; 10-11; 27.) Eagle has not shown that either of its causes of action has any merit.

**1. It Was Proper for Williams to Point Out in His Reply Papers That Eagle Had Not Established a Probability of Prevailing on Its Claims.**

Eagle asserts that the Court should not consider Williams' arguments that the fake press release he posted was a parody, was not a violation of Business and Professions Code section 17200, and other "new legal theories and arguments" in his reply papers. Eagle asserts that these arguments were not properly made because they were not made in his moving papers. (RB 9, 25-27, 35; See JA 493:12-495:13.) It was entirely proper for Williams to address all issues relating to Eagle's probability of prevailing in his reply papers, because it was Eagle's burden, in its opposition papers, to show that it had a probability of prevailing. Once Eagle attempted to meet that burden, Williams was entitled to reply. In *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 775 ("*Navellier II*") [citation omitted], the court of appeal rejected a similar argument by the plaintiff in that case, stating:

That defendant raised legal issues in his motion did not relieve plaintiffs of their burden of presenting a sufficient "showing of facts to sustain a favorable judgment," and after plaintiffs' opposition was filed defendant could properly point to the failure to meet that burden, regardless of any other theories he may have advanced in his original moving papers.

The authorities Eagle relies on (RB 26) are inapposite because they do not involve the anti-SLAPP law with its two-step process and shifting burdens. The cases address briefing on appeal, not in the trial court; and none of them contradict *Navellier II, supra*, by requiring a SLAPP

defendant to demonstrate in his *moving* papers that the plaintiff has not shown a probability of prevailing. Furthermore, appellate review here is *de novo* (*Roberts v. Los Angeles County Bar Association* (2003) 105 Cal.App.4th 604, 614), and Eagle has responded extensively to the parody argument on appeal. (See RB 27-34.) The arguments made by Williams in his reply papers regarding Eagle's failure to establish a probability of prevailing on its claims were properly considered by the trial court and are properly before this Court.

**2. The Post By Williams Is Parody Protected by the First Amendment.**

In his opening brief, Williams demonstrated that his post was a parody, protected under the First Amendment and that this defense applies to both of Eagle's claims. (AOB 20-27.) In response, Eagle does not dispute that parody is protected by the First Amendment, but argues instead that Williams never intended the post to be a parody and that the average reader would not – and did not – take it to be one. (RB 27-34.) Eagle's assertions are not supported by the record or the law.

Contrary to Eagle's assertions, it did not present any evidence "that the average reader was likely to believe that the fake press release was issued by Eagle," and it does not identify *any* such evidence. (See RB 34.)

**a. Williams' Post Is a Classic Parody Protected by the First Amendment.**

An average reader would have (and certainly *should have*, from any reasonable, objective standard) understood that this was a parody and not a real Eagle press release. This conclusion was inescapable given both the content and context of Williams' post.

**i. Based on the Content of Williams' Post, the Average Reader Would Understand That It Was a Parody.**

On the face of Williams' post, it was clearly a parody, not a real Eagle press release. The statements attributed to Eagle's CEO are clearly not statements that a CEO would make about his/her own company. A CEO would never refer to his/her firm's "continued failure in executing our business plan," its "continued stagnation," "further customer rejection of Eagle's technology and services," "the indifference of our employees," and "our continued focus on eroding shareholder value".<sup>1</sup> (JA 336.) These outlandish statements, "in addition to referencing the original, simultaneously convey[] the contradictory message 'that it is not the original.'" (*Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.* (2d Cir. 1989) 886 F.2d 490, 494.) The statements attributed to

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<sup>1</sup> Eagle contends that Williams' discussion in this regard is an attempt to improperly "dissect" his parody. (RB 28, fn. 4.) However, the discussion about the individual statements in the post was simply for the purpose of illustrating that it could not be reasonably viewed as an official Eagle press release. (See AOB 25-27.)

Eagle's CEO in Williams' parody clearly underscore that it is not a real press release.

Eagle argues that Williams' attempt to "mimic" an official Eagle press release "makes it more likely" that "someone" might take it seriously. (RB 29.) However, this ignores that mimicry is a fundamental attribute of parody itself. "The defining feature of a parody is that it simultaneously conveys two contradictory messages: 'that it is the original, but also that it is not the original and is instead a parody.'" (*New York Stock Exchange v. Gahary* (S.D.N.Y 2002) 196 F.Supp.2d 401, 412.) This should come as no surprise: "Virtually all parody 'depends upon association with the original' otherwise the parody would be incomprehensible." (*New York Stock Exchange, supra*, at p. 406.)

At first glance, Williams' post does have the same formatting and feel as Eagle's June 2004 press release. However, Williams' post distinguishes itself by including outlandish statements which are never present in official corporate press releases.

Further, the parody press release even contains a typographical error, quoting the CEO as saying "we are *very not very* pleased to be deleted from the Russell 3000. . ." (JA 336; emphasis added.) A press release by a publicity-conscious, publicly-traded corporation would be very unlikely to include such an obvious typo. This also sends the clear message that Williams' press release is a fake. Williams' jest did not have to be

understood or appreciated as a parody in order to be protected speech.

“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.” (*Yankee Publishing, Inc. v. News America Publishing, Inc.* (S.D.N.Y. 1992) 809 F.Supp. 267, 280.)

Finally, even if “some people” did believe that the parody press release was real, that does not mean that the average reader would so believe. (See, e.g., *San Francisco Bay Guardian v. Superior Court* (1993) 17 Cal.App.4th 655, 659 [holding letter to be a parody as a matter of law, even though five declarations stated that they did not recognize the letter as a parody].)

**ii. The Average Reader Would Also Know That the Post Was a Parody Because of Its Context.**

The context of Williams’ post also makes clear that the post was a parody. Williams posted the parody press release as a reply to his posting of Eagle’s June 2004 press release announcing the company’s addition to the Russell 3000, which Williams sarcastically titled, “Remember this golden oldie?” (JA 334, 336.) Williams posted the parody press release ten minutes after the June 2004 press release, and he linked it as a reply to his post of the June 2004 release. By comparing the press releases, the parodic nature of Williams’ post becomes even more apparent.

Williams’ subsequent posts also make clear that the post was not a

real Eagle press release. (JA 338, 340; see also JA 286 ¶ 12.) Contrary to Eagle’s assertion that Williams’ subsequent post belied his declaration under oath that he meant his post as a parody (RB 27-28, citing JA 338), Williams’ subsequent message, posted 34 minutes after the parody press release, makes clear just the opposite. Williams was not attempting to mislead readers to believe that his parody press release had actually been issued by Eagle, but instead essentially told them it was a gag: “By the way, if Eagle was a responsible company (e.g. updating shareholders on the company) I wouldn’t have to alter last year’s Russell inclusion PR to reflect our present situation.” (JA 338.)<sup>2</sup>

Eagle further argues that another post by Williams about a half hour later shows that the average reader was likely to mistake the post for an official Eagle release. (RB 27-28.) This post states: “Wow, if you thought that was a real press release (with the obvious typo) you really are stupid.” (JA 340.) This is a statement by Williams responding to a post that is not in the record, and there is no evidence that the poster he addresses actually believed that the press release was real, or that such a belief would be

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<sup>2</sup> Eagle argues that there is no indication that anyone would “look elsewhere on the Yahoo! message board to determine the legitimacy of the post.” (RB 30 fn. 6, 33.) However, if there were any doubt, a reasonable person would review the other messages on the board to see what other people were saying about the supposed “news.” And a reasonable person would also visit Eagle’s website – where it posts its real press releases – to determine whether the bizarre press release on the Yahoo! message board was actually from Eagle. (JA 128-30.)

reasonable. In fact, there is no evidence that *anyone* believed Williams' post was anything but a parody.

Additionally, viewed within the very specific context of Internet financial message boards, the average reader would be even less likely to view the parody press release as coming from Eagle. As the court stated in *Highfields Capital Management L.P. v. Doe* (N.D.Cal. 2005) 385 F.Supp.2d, 969, 978-79, speaking of the nature of Internet financial message boards:

There is so much obvious garbage in the messages that appear in this "venue," and there are so many "impersonations" that are so obviously and intentionally bogus on this and similar message boards, that it is highly unlikely that a reader of a message in this setting would approach it with anything but skepticism – as to both content and source. There is so much irreverence and jocularly 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.<sup>3</sup>

Viewed in the context of the timeline of the posts and the nature of Internet financial message board postings, a reasonable person would understand Williams' post as a parody.

**b. Applicable Case Law Supports Williams' Position.**

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<sup>3</sup> Indeed Yahoo!, at the bottom of each message and the index of messages, advises readers not to rely on information in message board posts. (See, e.g., JA 13, 17, 19, 21, 23, 25, 29, 31, 135.) Similarly, the SEC advises investors not to rely on message board posts (JA 342) in a discussion to which there is a link at the bottom of every Yahoo! message board post and the index of messages. (See, e.g., JA 13, 17, 19, 21, 23, 25, 29, 31, 135.)

As Williams set forth in his opening brief, parody is protected by the First Amendment. (AOB 20-25.) Eagle disputes that Williams' post is, in fact, a parody. (See RB 27-34.) However, as the following cases indicate, Eagle is simply wrong about this too.

***San Francisco Bay Guardian v. Superior Court.*** Eagle contends that *San Francisco Bay Guardian v. Superior Court* (1993) 17 Cal.App.4th 655, cited by Williams (AOB 22, 26, 27), is distinguishable because that case involved an "April Fool's" edition of the newspaper. (RB 31.) However, whether or not a work is specifically identified as parody is not dispositive with regard to a parody/First Amendment defense. "Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived)." (*Campbell v. Acuff-Rose Music, Inc.* (1994) 510 U.S. 569, 583, fn. 17.)

***Highfields Capital Management L.P. v. Doe.*** Eagle asserts that *Highfields, supra*, at p. 969, cited by Williams (AOB 23-26), is not persuasive because inter alia, it did not involve the anti-SLAPP statute and involved an action in the District of Massachusetts. (RB 33-34.) However, the portions of the opinion to which Williams cites were based on an analysis of the First Amendment implications on the plaintiff's case. (See *Highfields Capital Management, supra*, at 972-79.) The key issue was whether the posts upon which the plaintiff's claims were based were protected by the First Amendment. (*Id.* at p. 980-81.) It is of no import that

the opinion contains “no analysis under California’s anti-SLAPP statute and California’s defamation and unfair competition laws.” (See RB 33.) The First Amendment to the *United States Constitution* applies no matter what state’s laws are involved.

Eagle also attempts to distinguish *Highfields* because the court therein stated that “Highfields did not appear to suffer any damages.” (RB 34.) However, the court in *Highfields* reached this conclusion regarding damages because it had determined that the subject post *was a parody which no reasonable reader would believe was true.* (*Highfields Capital Management, supra*, at p. 979.) The same point holds true here.

Further, the court found that even though the author of the posts in *Highfields* made it appear as though the posts were being made by someone at Highfields Capital (the user name under which the posts were made was “highfieldscapital”), similar to Eagle’s argument here, it was apparent from the content and context of the posts that they were parodic and did not originate from Highfields Capital itself. (*Id.* at pp. 977-79.)

***Baker v. Los Angeles Herald Examiner.*** Eagle contends that *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d. 254, is inapplicable here because it discusses the protections afforded statements of opinion, not parody. (RB 30-31.) However, parody is opinion, and it is protected because it does not assert actionable facts. Eagle incorrectly asserts that *Baker* is undermined by *Franklin v. Dynamic Details, Inc.* (2004) 116

Cal.App.4th 375, 384, yet *Franklin* takes special care to note that it does “not change the rule that satirical, hyperbolic, imaginative, or figurative statements are protected because ‘the context and tenor of the statements negate the impression that the author seriously is maintaining an assertion of actual fact.’” (*Franklin, supra*, citing *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1000-1001.)

Eagle also argues that the “quoted material” in Williams’ parody necessarily purports to present an accurate account of statements attributed to its CEO. (RB 16, 21, 28-29.) However, just because quotes are attributed in a parody to a real person does not remove the parody from its protected status. “Writers often use quotation marks, yet no reasonable reader would assume that such punctuation automatically implies the truth of the quoted material.” (*Baker, supra*, 42 Cal.3d at p. 263.) *Baker* found that where the use of a hypothetical conversation serves to emphasize the message a critic is attempting to communicate, the use of quotation marks in employing caricature or rhetorical license is a protected exercise of literary style. (*Id.* at p. 264.)

### **3. Eagle Has Not Shown That Williams’ Post Was an Unfair Business Practice.**

Eagle’s analysis of its UCL claim fails to ground Williams’ alleged misdeed in any actionable UCL claim. It fails to demonstrate why Eagle is entitled to restitution (as distinct from compensatory damages, which are

not allowed under the UCL). And it fails to explain how Eagle showed any probability of prevailing on this claim.

**a. Williams' Post Is Not a Business Act or Practice or Advertising.**

Eagle is wrong in its assertion that Williams' post was a business act or practice. (RB 35-39.) The only evidence in the record is that Williams' post was not related to his business. (JA 283-285, ¶¶ 2-7.) Eagle did not submit any contrary evidence and does not identify any in its Respondent's Brief. (See RB 35-39.) Therefore, its argument that Williams' declaration can not be weighed against its evidence (RB 38-39) is disingenuous. There was no evidence against which it could be weighed. There is no evidence that Williams' post was commercial speech, rather than protected shareholder commentary.

**b. Securities Transactions Are Not Covered by Section 17200.**

Despite its own expert's testimony to the contrary (see JA 210-211 ¶¶ 7-8, AOB 29), Eagle contends that its UCL claim does not involve "securities transactions" and is therefore not pre-empted by federal law. (RB 39-40.) It refers to two cases which are distinguishable from the situation here – *Roskind v. Morgan Stanley Dean Witter & Co.* (2000) 80 Cal.App.4th 345, 348, and *Strigliabotti v. Franklin Resources, Inc.* 2005 WL 645529 (N.D. Cal. 2005 [which does not appear to be a published opinion] – both of which involved fraudulent practices in the treatment of

brokerage clients (the manner in which brokerage executed orders in *Roskind*, and the fees charged by brokers in *Strigliabotti*) not specifically securities transactions as is the case here. (See JA 4-5, ¶¶ 13-15; 9-10, ¶¶ 33-35, 38; 210-11 ¶¶ 7-8.)

However, contrast these inapposite cases to *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 779, cited by Williams (AOB 29.) In *Bowen*, the plaintiff’s claims – as Eagle’s here – arose from an alleged fraud in the securities transactions themselves. *Bowen* found, after detailed review and analysis of federal and out of state authority, as well as *Roskind*, that such claims could not be brought pursuant to the UCL. (*Bowen, supra*, at pp. 786-90.) The rule should apply here as well.

**c. Eagle Has Not Shown That It Suffered Any Damage as a Result of Williams’ Post.**

Eagle argues that it has shown sufficient evidence of damages to survive Williams’ anti-SLAPP motion, relying entirely on the testimony of its expert, Deirdre Flaherty,<sup>4</sup> and its Vice-President of Marketing, Frederick Reynolds. (RB 21-25, 40-42.) Again, Eagle is wrong. There are only two remedies available to plaintiffs under the UCL – injunctive and restitutionary relief. (*Feitelberg v. Credit Suisse Boston, LLC* (2005) 134 Cal.App.4th 997, 1011-1013; *Gravillis, JR. v. Coldwell Banker Residential*

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<sup>4</sup> Contrary to Eagle’s assertion that it hired its expert “in conjunction with its internal investigation” (RB 5), Eagle actually hired her after it filed its Complaint in this case. (JA 167:11-12.)

*Brokerage Company* (2006) 143 Cal.App.4th 761, 767, fn. 1 [also, compensatory damages are not available].) Eagle, even considering the Flaherty and Reynolds declarations in the light most favorable to Eagle, has not shown that it is entitled to either.

**i. Eagle Has Not Shown Entitlement to Injunctive Relief.**

Injunctive relief under the UCL is governed by Business & Professions Code section 17203, which provides, in pertinent part:

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Eagle did not address its purported right to injunctive relief in the trial court proceedings and does not do so now. Therefore, Eagle abandoned its claim for injunctive relief. Further, injunctive relief under the UCL “should not be exercised ‘in the absence of any evidence that the acts are likely to be repeated in the future.’” (*Feitelberg, supra*, at p. 1012.) Here, Williams has been sued for a *single* post. There is absolutely no evidence that he has repeated, or intends to repeat such a posting.

**ii. Eagle Has Not Shown Entitlement to Restitution.**

Restitution under the UCL compels a UCL defendant “to return

money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person.” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) Here, Eagle has sued only on its own behalf. Eagle has not shown that it is entitled to any *restitutionary* relief, but simply describes what appear to be *compensatory* damages, if any.

The ‘notion of restoring something to a victim of unfair competition includes two separate components. The offending party must have obtained something to which it is not entitled *and* the victim must have given up something which he or she is entitled to keep.’ . . . Restitution is thus available where ‘a defendant has wrongfully acquired funds or property in which a plaintiff has an ownership or vested interest.’ . . . In other words, ‘in the UCL context . . . restitution means the return of money to those persons from whom it was taken or who had an ownership interest in it.’

(*Feitelberg, supra*, at pp. 1012-13 [emphasis in original; citations omitted].)

Eagle has not shown that Williams wrongfully obtained any funds in which Eagle had a right of possession or ownership interest; indeed, its expert does not even speculate that Williams did so. The damages about which Eagle’s expert speculates are *compensatory*, not *restitutionary* in nature, because they relate to damages which allegedly result from a decrease in stock price, not to any funds wrongfully obtained from Eagle by Williams. (See JA 227:8-14.)

Also, Eagle’s own expert only *speculates* that a decrease in share price “could lead to a variety of losses for EAG.” (JA 227, ¶ 26.) She does

not conclude that it did. Here, Eagle's share price was actually *higher*, with the exception of a single day when it dropped 1¢ per share, for the six weeks following Williams' post (on June 10, 2005) than it was prior to his post. (JA 466-67.) Therefore, even applying Eagle's expert's theory regarding *potential* damages, Williams' post did not result in a share price drop and *could not* have resulted in damages to Eagle.

Further, contrary to Eagle's representations in its Respondent's Brief (RB 41), Williams never shorted Eagle's stock (see JA 227, ¶ 26; 229, ¶ 28; JA 284, ¶ 5) and there is no evidence that Williams was part of a conspiracy or scheme to manipulate Eagle's stock. The only evidence to which Eagle refers in this regard is Flaherty's declaration, which only discusses Eagle's conspiracy theory in broad theoretical terms. (JA 213:6-215:27, 222:21-227:1.) Eagle's failure to show any damages is also an indication that this is a meritless SLAPP. (*Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1176.)

#### **4. Eagle Did Not Show That Williams' Post Was Actionable Defamation.**

Eagle's second cause of action is for defamation. (JA 10-11 ¶¶ 41-45.) This claim is without merit as to Williams because his statement is a parody protected by the First Amendment, as discussed above. It is also without merit because Eagle has not shown that Williams' post was libel per se or trade libel or that it suffered any damages, let alone special

damages, as a result of Williams' post.

**a. Eagle's Opposition to Williams' Anti-SLAPP Motion Must Be Based Only on the Allegations of Its Complaint.**

A complaint for libel must specifically identify, if not plead verbatim, the words constituting the allegedly libelous statement. (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1612, fn. 5.) Eagle's libel argument may not be heard in opposition to Williams' anti-SLAPP motion because these allegations were not made in Eagle's Complaint. Eagle can not amend its allegations at this stage to avoid dismissal under the anti-SLAPP law. (*Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710 [in a special motion to strike, "the pleadings frame the issues to be decided"]; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 [*Navellier I*] [plaintiff must state and substantiate "a legally sufficient claim"]; *Navellier II, supra*, 106 Cal.App.4th at p. 772 ["a plaintiff cannot use an 11th-hour amendment to plead around a motion to strike under the anti-SLAPP statute"]; *Roberts v. Los Angeles County Bar Association, supra*, 105 Cal.App.4th at p. 613 [applying this principle to imply a stay, preventing plaintiff from filing an amended complaint, before defendant filed its appeal of the denial of anti-SLAPP motion].)

**b. Eagle Has Not Shown That Williams' Post Was Libel Per Se.**

Eagle argues that Williams' post constitutes libel per se. (RB 18.)

Libel per se requires that the defamation be apparent on the face of the statement, “without the necessity of explanatory matter such as an inducement, innuendo, or other extrinsic fact.” (Civ. Code, § 45a.) Eagle makes no allegations regarding libel per se in its Complaint. Libel per se must be expressly pleaded, because its claims must be examined as pleaded, as discussed above. The Complaint alleges that Williams’ post was false in that it states that Eagle had been deleted from the Russell 3000 and falsely attributes the statements in the parody press release to Eagle’s CEO. (JA 5, ¶ 16.)

Eagle has dramatically shifted positions on what it contends was false in Williams’ post. In the trial court, Eagle maintained that Williams’ post was false because Eagle had never been listed on the Russell 3000. (JA 172:23-173:1; 185, ¶ 9.) Eagle claimed so even though it had issued a press release *about one year earlier* in which it crowed about being listed in the Russell 3000, and even though Russell had announced that Eagle was being deleted from the list in 2005. (JA 119; 325-26.) Eagle now asserts that Williams’ post was false because Eagle had *not yet* been deleted from the Russell 3000 list at the time of his post, as the Russell announcement simply indicated which stocks Russell intended to delete. (RB 16; see JA 325.) The statement that Eagle was being deleted from the Russell 3000

Index was substantially true.<sup>5</sup>

Eagle also now argues that Williams’ post is libel per se because it falsely claims that the “alleged delisting was partially a result of continued failures in Eagle executing its business plan and employee indifference . . . .” (RB 18.) Eagle has not presented any evidence as to why it was deleted from the Russell 3000, despite its burden to show the falsity of Williams’ post. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 373-375 [defamation plaintiff must prove falsity when defendant’s statements relate to matters of public interest].) Therefore, Eagle has not established that Williams’ statements in that regard are false.

**c. Eagle Has Not Shown Any Damage as a Result of Williams’ Post.**

Eagle’s defamation claim against Williams is also without merit because Eagle has not shown any damages caused by Williams’ post. Eagle contends that it does not need to establish damages to prevail on its defamation claim because Williams’ post is libel per se. (RB 22.) Civil Code section 45a provides that “Defamatory language not libelous on its

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<sup>5</sup> To be libelous, a statement must be provably false. (Civil Code § 45; *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259.) However, libel law “overlooks minor inaccuracies and concentrates on substantial truth.” (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 516.) Therefore, a defendant’s statement is considered true “so long as the imputation is substantially true so as to justify the ‘gist or sting’ of the remark.” (*Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 582.) Here, Williams’ post is clearly substantially true as to the Russell deletion.

face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof.” (Civil Code § 45a.) As discussed in Williams’ opening brief (AOB 30-33) and above, Eagle has not shown that it suffered any damages as a result of Williams’ post. However, the failure by Eagle to establish damages is fatal to Eagle’s defamation claim against Williams, because the Complaint does not allege, and the allegations against Williams do not constitute, libel per se. Therefore, it can not prevail on its defamation cause.

**d. Eagle Has Not Shown That Williams’ Post Constituted Trade Libel.**

Eagle also contends that its cause of action for defamation is actually a cause of action for trade libel. (RB 18, JA 172:8.) However, in *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 549, cited by Eagle (RB 15), the court held that “‘trade libel’ is not true libel and is not actionable as defamation.”

“Trade libel is generally distinguished from common law defamation and is said to connote ‘an intentional disparagement of the quality of property, which results in pecuniary damage to plaintiff.’” (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 381.) A cause of action for trade libel requires a publication which induces others not to deal with the plaintiff. (*Nichols v. Great American Insurance Companies* (1985) 169 Cal.App.3d 766, 773.) Trade libel also requires a showing of special

damages. (*Leonardini v. Shell Oil* (1989) 216 Cal.App.3d 547, 572.)

Despite Eagle's characterization of its cause of action, Eagle's Complaint does not plead the essential elements of a cause of action for trade libel – that Williams intentionally disparaged the quality of Eagle's property, which disparagement caused others not to deal with Eagle and resulted in damage to Eagle. (See JA 5, ¶ 16; 10-11, ¶¶ 41-44.) Nor has Eagle shown that it can prevail on such a claim even if it had been pled.

Eagle appears to contend that it need not submit any evidence of damages to establish a probability of prevailing on its trade libel claim, but that allegations of damages are sufficient. (RB 15.) Although Eagle purports to cite a quote from *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, providing no pin cite, in support of this proposition, in fact, no such statement is in that opinion. The quote is actually from *Wright v. Coules* (1906) 4 Cal.App. 343, 347, which addressed the sufficiency of allegations in a complaint for purposes of ruling on a demurrer.

On the contrary, a mere allegation of damage is not enough to defeat an anti-SLAPP motion. (*Wilson v. Parker, Covert & Chidester* (2003) 28 Cal.4th 811, 821 [party opposing a special motion to strike must make “a sufficient prima facie showing of facts to sustain a favorable judgment”].)

Eagle has made no showing that Williams' post induced anyone not to do business with Eagle, either as a customer or shareholder. In this

regard, Eagle simply concludes that “[sic] claiming that the alleged delisting was partially a result of Eagle’s business was faltering due to ‘further customer rejection of its technology’ would have the obvious effect of deterring other potential customers from doing business with Eagle.” (RB 18.) Eagle does not even attempt to identify any evidence that this was the case, because there is none. Eagle’s expert makes no such claims and does not even so speculate. Eagle can not prevail on its trade libel claim for this reason alone.

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## **CONCLUSION.**

It is undisputed that Eagle's claims against Richard Williams are covered by the anti-SLAPP statute. Eagle has not successfully rebutted Williams' showing regarding its probability of prevailing. Therefore, the trial court erred in denying Williams' special motion to strike the Complaint and its order should be reversed. Williams should also be allowed to recover his fees and costs for work in the trial court and on appeal.

Dated: December 19, 2006

Respectfully submitted,

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Mark Goldowitz  
California Anti-SLAPP Project  
Special Counsel for Appellant  
Richard Williams, a/k/a Doe 4

**WORD COUNT CERTIFICATION**

I, Mark Goldowitz, hereby certify, pursuant to California Rules of Court, Rule 14(c)(1), that the word count of my office's WordPerfect computer program for this brief indicates that it contains 5,583 words.  
Executed this 19th day of December, 2006.

\_\_\_\_\_  
Mark Goldowitz

**PROOF OF SERVICE**

The undersigned hereby states under the penalty of perjury under the laws of the State of California:

I am employed in Alameda County; I am over the age of eighteen and not a party to the within cause; and my business address is 2903 Sacramento Street, Berkeley, California, 94702-5209.

On this day, I addressed envelopes to:

Karineh Khachatourian	District Attorney
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San Francisco, CA 94111	Attorney General - Consumer Affairs
(Counsel for Plaintiff and	Ronald A. Reiter
Respondent Eagle Broadband, Inc.)	Supervising Deputy Attorney General
	Office of the Attorney General
Supreme Court of California	Consumer Law Section
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San Francisco, CA 94102	San Francisco, CA 94102
(5 copies)	
Hon. William J. Elfving	
Santa Clara County Superior Court	
191 North First Street	
San Jose, CA 95113	

and I placed in said envelopes a copy of the following document:

APPELLANT'S REPLY BRIEF

and I deposited said envelopes in the U.S. Mail, postage fully prepaid, all on this day.

Dated: December 19, 2006

\_\_\_\_\_  
Jennie Romer