

COPY

No. H030169

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

EAGLE BROADBAND, INC.,
Plaintiff and Respondent,

v.

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

Court of Appeal - Sixth App. Dist.

FILED

JAN 17 2007

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By _____
DEPUTY

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

**APPELLANT'S RESPONSE TO AMICUS CURIAE BRIEF OF THE
ATTORNEY GENERAL**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION.	1
I. “Securities Transactions” Are Exempt From the UCL.	2
A. <i>Bowen</i> Properly Held That Securities Violations Are Outside the Scope of the UCL.	2
B. The UCL Parallels the FTC Act, Which Does Not Apply to Securities Transactions.	4
1. The Legislature Did Not Intend That the UCL Cover Securities Transactions.	5
2. The FTC’s De Facto Exemption for Securities Transactions Limits the Reach of the UCL.	6
3. Other States’ “Little FTC Acts” Reflect the FTC Act and the UCL.	8
II. Williams’ Statements Are Not Subject To Section 17500.	9
CONCLUSION.	10

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Lippitt v. Raymond James Financial Services, Inc.</i> (2003) 340 F.3d 1033	7
<i>Wafra Leasing Corp. v. Prime Capital Corp.</i> (N.D.Ill. 2002) 204 F.Supp.2d 1120	8

STATE CASES

<i>Bowen v. Ziasun Technologies</i> (2004) 116 Cal.App.4th 777	2, 3, 4, 5, 6, 9, 10
<i>Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.</i> (1999) 20 Cal.4th 163	5
<i>Feitelberg v. Credit Suisse First Boston, LLC</i> (2005) 134 Cal. App. 4th 997	5
<i>People ex rel. Scott v. Cardet International, Inc.</i> (1974) 24 Ill. App. 3d 740	8
<i>Roskind v. Morgan Stanley Dean Witter & Co.</i> (2000) 80 Cal.App.4th 345	2, 3, 4, 7
<i>Smith v. Wells Fargo Bank</i> (2006) 135 Cal.App.4th 1463	7

FEDERAL STATUTES

15 U.S.C.A. 45	7
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STATE STATUTES

Bus. & Prof. Code, § 17200	1, 4, 5
Bus. & Prof. Code, § 17500	1, 8, 9, 10
Cal. Rules of Court, rule 14 (c)	12

MISCELLANEOUS

815 ILCS 505/1 <i>et seq</i>	8
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INTRODUCTION.

The brief of the Attorney General as *amicus curiae* in this case discusses two issues regarding the Unfair Competition Law (UCL) (Business and Professions Code (B&P) section 17200 *et seq.*): whether securities transactions are exempt from the UCL, and whether a claim under B&P section 17500 may only be brought with respect to a “business act or practice” or advertising. However, the Court need not consider the issues discussed in the amicus brief because Williams’ post is protected by the First Amendment as parody, as discussed in his opening and reply briefs. (AOB 20-27; ARB 4-12.)

As to the first issue regarding coverage of securities transactions by the UCL, the only published California opinions hold that the UCL does not apply. Neither the Attorney General nor Eagle have cited any published opinion which establishes that it does. Contrary to the Attorney General’s argument, Williams does not seek to have this Court carve out an exemption to the UCL for securities transactions; rather, the Attorney General seeks to have the Court *expand* the breadth of the UCL as has no other California court.

As to the second issue, Williams does not dispute that B&P section 17500 may apply to false statements made in furtherance of a “short and distort” scheme, simply that he did not participate in any such scheme or

short Eagle's stock, that Eagle has failed to show that he did, and that his parody post is protected by the First Amendment and was not related to his business. Therefore, Williams cannot have committed "any unlawful, unfair or fraudulent business act or practice" under the UCL.

I. "Securities Transactions" Are Exempt From the UCL.

A. *Bowen* Properly Held That Securities Violations Are Outside the Scope of the UCL.

Williams cites *Bowen v. Ziasun Technologies* (2004) 116

Cal.App.4th 777, in support of his argument that securities transactions are exempt from the UCL. (AOB 29, ARB 14.) The Attorney General argues that *Bowen* was "wrongfully decided," and that Williams is attempting to wrongfully "extend *Bowen*." (AB 1-2, 9.) To rebut *Bowen*'s assertion that securities transactions are exempt from the UCL, the Attorney General relies on *Roskind v. Morgan Stanley Dean Witter & Co.* (2000) 80 Cal.App.4th 345. (AB 7-9.)

Here, Eagle alleges that Williams and the other defendants wrongfully induced its shareholders to sell their Eagle stock, depressing Eagle's share price, and causing it damage. (JA 1:24-28, 4:22-26, 9:10-14, 10:16-19.) Similarly, in *Bowen*, the plaintiffs alleged that they were damaged because they were wrongfully induced to purchase the defendants' stock. (*Bowen, supra*, at pp. 779-781.) The Attorney General attempts to

distinguish *Bowen* from the present case by arguing that in *Bowen* the claims involved a stock transaction between the parties to that lawsuit. (AB 9, 17-18.) However, in reaching its conclusion that securities transactions are exempt from the UCL, the court did not mention the capacities of the parties as an important factor. Rather, the court focused on the public policy issues and legislative intent in finding that securities transactions are exempt from the UCL, at least in part because the UCL was intended to mirror the FTC Act, rather than to duplicate the regulatory duties of the Securities and Exchange Commission. (*Bowen, supra*, at p. 789 n.9.)

In *Roskind*, by contrast, the plaintiff alleged that he was damaged because the defendant brokerage did not immediately execute his stock order; the eventually executed trades were simply a measure of damages. (*Roskind, supra*, at p. 348.) The wrongful actions were the brokerage's untimely processing of stock transactions (trading for its own account in a stock before executing its clients' orders related to the same stock), not the transactions themselves. (*Roskind, supra*, at pp. 259-60.) Here, the Attorney General is wrong in stating that "[t]he gravamen of this action is defamation, not the purchase or sale of securities." (AB 1, 18.) In reality, stock trades are a core element of Eagle's theory of liability, since it is the allegedly wrongfully-induced securities transactions themselves that allegedly reduced Eagle's share price and caused the company harm. (JA

1:24-28, 4:22-26, 9:10-14, 10:16-19.)

Further, *Bowen* explicitly considered *Roskind*'s discussion regarding whether federal securities laws *preempted* the UCL in certain circumstances and concluded that *Roskind* did not present any substantive analysis of the scope of the UCL itself:

In *Roskind*, the court only held that federal securities laws do not *preempt* section 17200 claims . . . However, we are not presented here with the question of whether federal securities law preempts section 17200, but rather whether that section and its federal counterpart apply to securities transactions at all. . . . The *Roskind* case is inapplicable and does not support a conclusion that section 17200 applies to securities

(*Bowen, supra*, at pp. 789-90.)

Just as in *Bowen*, securities transactions are central to Eagle's claim and the UCL does not apply.

B. The UCL Parallels the FTC Act, Which Does Not Apply to Securities Transactions.

Since its adoption of the UCL *73 years ago*, the California Legislature has declined to extend statutory liability under the UCL to securities transactions. The Federal Trade Commission ("FTC") Act, from which the UCL and all other state "Little FTC Acts" were created, does not extend to securities transactions, and in the absence of any UCL amendment to specifically address securities, *Bowen* properly found that the UCL was never intended to reach such transactions. Notably, although the Attorney General asserts that the UCL does apply to securities transactions, he cannot

cite even a single instance in which his office pursued such a UCL claim. *Bowen's* finding that securities transactions are beyond the reach of the UCL was cited approvingly in *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal. App. 4th 997, 1009.

1. The Legislature Did Not Intend That the UCL Cover Securities Transactions.

Bowen points out not only that “courts in this state have consistently treated section 17200 as a ‘Little FTC Act’ and have relied upon section 5 of the FTC Act to provide guidance as to its scope,” but that the Supreme Court of California has expressly called Section 5 of the FTC Act “parallel” to Section 17200. (*Bowen, supra*, at p. 790 n.10, citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 185.)

The Attorney General argues that the UCL was amended in 1963 to include “unlawful” as well as “unfair or fraudulent business practice(s)” in its definition of “unfair competition,” so there is no longer an exact match between the language of the UCL and the FTC Act or other states’ “Little FTC Acts.” (AB 10-11.) However, the Attorney General fails to acknowledge that after the amendment, cases interpreting Section 17200 and specifically its term “unlawful” *continued* to rely on the FTC Act for guidance. (*Bowen, supra*, at p. 789 n.9.) Further, since federal and out-of-state cases have consistently held that the FTC Act and similar state statutes

exempt securities transactions entirely, even though illicit securities transactions could be considered either “unfair” or “fraudulent” business practices, there is no plausible reason to believe that the addition of the word “unlawful” to California’s UCL was intended to bring claims arising from securities transactions under the UCL. (*Id.*)

Securities transactions are exempt from the UCL not because they do not meet the definition of “unfair” or “fraudulent” or “unlawful,” but because the FTC Act and the state statutes created from it were not intended to duplicate the “comprehensive regulatory umbrella of the Securities and Exchange Commission over such transactions.” (*Id.*) The Attorney General has not shown that the Legislature intended otherwise.

2. The FTC’s De Facto Exemption for Securities Transactions Limits the Reach of the UCL.

The Attorney General argues that because the Federal Trade Commission is not explicitly barred by its authorizing statute from adjudicating illicit securities transactions, it *might* choose to do so someday, giving no weight to the fact that the FTC has not attempted to regulate securities transactions over its 92-year history. (AB 12.) However, *Bowen* accurately notes that “Little FTC Acts” written to create state claims parallel to those established by the FTC Act were never intended to create out of whole cloth a securities oversight function that does not exist at the FTC. (*Bowen, supra*, at p. 789, n.9.)

The Attorney General also notes that the FTC Act expressly excludes various fields which, like securities, are superintended by other federal agencies, though securities themselves are not expressly excluded, and argues that the UCL governs claims against industries such as financial institutions, common carriers, and meat packers despite their express exemption from the FTC Act. (AB 11.) However, the Attorney General fails to point out that the specific exemptions from the FTC Act to which he refers were amendments enacted *after* the UCL was enacted in 1933 (1938 – air carriers, 1958 – meat packers, 1979 – savings and loans, 1987 – credit unions). (See amendments set forth at 15 U.S.C.A. 45.) The fact that Congress later eliminated certain claims from FTC jurisdiction is of little help in analyzing the California legislature’s intent in enacting the UCL years earlier.

Further, the two cases the Attorney General cites are totally inapposite: *Smith v. Wells Fargo Bank* (2006) 135 Cal.App.4th 1463, 1480-1481, just as *Roskind*, discussed only the issue of federal preemption rather than a substantive analysis of the UCL; *Lippitt v. Raymond James Financial Services, Inc.* (2003) 340 F.3d 1033, 1042-43, dealt with the limited issue of removal to federal court, finding only that plaintiff did not allege causes of action which were the exclusive jurisdiction of federal courts, and did not examine whether the claims were viable under the UCL. The Attorney

General cites no cases to substantiate his assertions as to UCL claims against common carriers or meat packers or to analogize such claims to those at issue here, which are based on securities transactions.

3. Other States' "Little FTC Acts" Reflect the FTC Act and the UCL.

The Attorney General argues that the fact that states' "Little FTC Acts" have the same genesis in the FTC Act does not wholly determine their respective scopes. (AB 15.) In the Illinois case that the Attorney General cites, *Wafra Leasing Corp. v. Prime Capital Corp.* (N.D.Ill. 2002) 204 F.Supp.2d 1120, 1123, the court upheld Illinois precedent dating to 1974 that securities fraud is actionable under the state's "Little FTC Act" since its statutory definition of "merchandise" specifically includes "intangibles" other than "services."¹ (AB 16.)² However, no California court has suggested that securities transactions fit under either of B&P section 17500's analogous categories of "property" or "services," and in fact Eagle has not even attempted to make that argument to this Court.

Illinois' specificity in its definitions is very much the exception

¹ See *People ex rel. Scott v. Cardet International, Inc.* (1974) 24 Ill. App. 3d 740, 743; Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*

² The Attorney General also cites a similar case decided under Minnesota law which includes "commodities" and "intangibles" in its definition of "merchandise." (AB 16.)

among the states, and does not undermine *Bowen*'s finding that the vast majority of "Little FTC Acts," including California's, have not incorporated such specific language as to indicate a substantively different legislative intent than that of the FTC Act, at least in terms of those items or transactions subject to unfair competition analysis. *Bowen*'s reference to out of state "Little FTC Act" jurisprudence and its conclusion that the FTC Act is integral to analysis of the UCL was thus both proper and instructive.

II. Williams' Statements Are Not Subject to Section 17500.

The Attorney General states that B&P section 17500 "could encompass false or misleading statements concerning the stock of a public company made by someone who intended to dispose of such stock." (AB 3, 20.) Here, the evidence shows that Williams never shorted Eagle's stock, but was a long-term shareholder interested in the stock *increasing* in value. (JA 284, ¶ 5.) Clearly, it would have been contrary to Williams' self-interest to make false statements with the intention of decreasing Eagle's share price, and he did not. (*Id.*) Further, parody is a defense to all of Eagle's UCL claims because Williams' parodic press release is protected speech *as a matter of law*.

Williams does not dispute that if he had done what Eagle alleges, i.e., made false statements with the intent of decreasing Eagle's share price

so that he could profit from short sales of the stock, that such could be subject to B&P section 17500. Williams' primary argument in this regard is that the evidence shows that he did not make the parody post with regard to his business, short Eagle's stock, or participate in any "short and distort" conspiracy, but that he only expressed his opinion about Eagle's performance, management and prospects. (JA 283-6, ¶¶ 3-12.) Therefore, there is no evidence that Williams' parody post was a business act or practice.

Whether or not Section 17500 applies to statements related to a "short and distort" scheme is irrelevant as to defendant Williams. *His* statement was simply protected shareholder commentary. (AOB 20-27; ARB 4-12.)

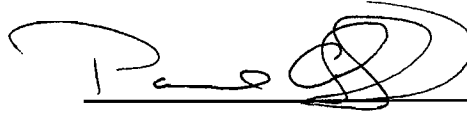
CONCLUSION.

The Court does not need to examine the issues discussed by the Attorney General because Williams' parody post is protected by the First Amendment. Nonetheless, the only published California opinion holds that claims such as Eagle's are exempt from the UCL. The Attorney General has cited no persuasive authority which leads to his conclusion that *Bowen* was "wrongfully decided" such that securities transactions would be covered by the UCL.

As set forth above and in his opening and reply briefs, Eagle cannot prevail on its UCL claim against Williams and this Court should grant his special motion to strike the complaint as a meritless SLAPP.

Dated: January 16, 2007

Respectfully submitted,

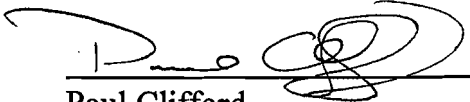
A handwritten signature in black ink, appearing to read "Paul Clifford", written over a horizontal line.

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WORD COUNT CERTIFICATION

I, Paul Clifford, 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 2, 230 words.

Executed this 16th day of January, 2007.


Paul Clifford

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:

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

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ATTORNEY GENERAL**

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

Dated: January 16, 2007

Jennie Romer

