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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **CITY AND COUNTY OF SAN FRANCISCO**
11 **UNLIMITED JURISDICTION**

12 BAY GUARDIAN COMPANY, INC.,

13 Plaintiff,

14 v.

15 NEW TIMES MEDIA LLC, SF WEEKLY LP,
16 EAST BAY EXPRESS PUBLISHING LP,
TROY LARKIN, DOES ONE through 10,
17 inclusive,

18 Defendants.

Case No. 04-435584

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY
ADJUDICATION OF SECTION 17043
(BELOW-COST SALES) CLAIM**

Case Filed: October 19, 2004

Date: September 14, 2007

Time: 11:00 a.m.

Courtroom: 304

Trial: October 15, 2007

HON. RICHARD A. KRAMER

1 **I. INTRODUCTION**

2 The Bay Guardian Company (“Bay Guardian”) alleges in its first cause of action that
3 defendants San Francisco Weekly (“SF Weekly”), its parent company New Times Media LLC
4 (“New Times”), one of its employees, Troy Larkin, and the East Bay Express concertedly
5 violated the Unfair Practices Act (Bus. & Prof. Code § 17043), by selling below-cost advertising
6 space for the purpose of putting the plaintiff out of business, and destroying competition. The
7 problem with these fanciful allegations is that they ignore the indisputable facts that defendants
8 acted with no such unlawful purpose and it is economically irrational for such a scheme to have
9 been attempted in the first place. Rather, like all media outlets, the Bay Guardian and the
10 defendants have been buffeted by a decrease in ad revenue caused by the emergence of the
11 Internet as a competitor and the post dot.com, post-9/11 Bay Area advertising market. Any
12 “below cost” sales, which are *de minimus* in any event, cannot be said to have been the result of
13 any conceivable anti-competitive purpose.

14 The Bay Guardian’s section 17043 “below cost” pricing claim fails for two
15 straightforward reasons. First, a violation of section 17043 requires that the product at issue be
16 sold for the “purpose of injuring competitors or destroying competition.” Bus. & Prof. Code §
17 17043. The California Supreme Court has held that this “purpose” means that the product was
18 sold with the “conscious desire” to injure competition, the highest culpable mental state under
19 the law. The undisputed evidence shows that defendants sold advertising at lower costs to build
20 a successful publication and respond to a severely declining market, not to injure competitors.
21 Competing with rivals does not equal a desire to destroy competition.

22 Second, there is no evidence that defendants injured competition because, as the Bay
23 Guardian admits, the Bay Area is one of the most competitive media markets in the country. No
24 single market actor, let alone the SF Weekly, has the power to injure competition or destroy
25 competition. In an effort to dodge this insurmountable hurdle, the Bay Guardian attempts
26 artificially to limit the product and market at issue to “alternative newsweekly advertising space”
27 and not “advertising” generally. Because no such product or market exists, the Bay Guardian’s
28 claim fails as a matter of law.

1 **II. BACKGROUND**

2 **A. THE HIGHLY COMPETITIVE BAY AREA MEDIA MARKET**

3 Because the Bay Guardian alleges that below-cost advertising in two small weekly
4 newspapers somehow resulted specifically in a reduction in its own advertising sales and fair
5 market rates (*Complaint ¶ 20*), it is critical to underscore the indisputable nature of the sprawling
6 Bay Area media market during the times in question. As recognized by the Bay Guardian’s
7 editor and publisher, Bruce Brugmann, the Bay Area is “one of the most media-rich markets in
8 the country,” which by definition is an advertising-rich market. (*Declaration of Ivo Labar*
9 (*“Labar Decl.”*) *Exh. I.*) One need only walk outside the courthouse doors to confirm Mr.
10 Brugmann’s observation. In addition to the *San Francisco Chronicle*, *San Jose Mercury-News*,
11 *Contra Costa Times*, *Oakland Tribune* and *Marin Independent Journal*, there are dozens of free
12 distribution newspapers (e.g., *the Bay Guardian*, *SF Weekly*, *the Onion*, *Noe Valley Voice*),
13 ethnic publications (e.g., *Sun Reporter*, *Nichi Bei Times*, *Irish Herald*) and special interest
14 publications (e.g., *San Francisco Business Times*, *Bay Area Reporter*, *The San Francisco*
15 *Sentinel*). (*Labar Decl. Exhs. E & F [Request for Admission No. 8-15]*; *Declaration of Joseph*
16 *Kalt (“Kalt Decl.”) Ex. A [Report].*) The Courts’ radio and television dials will reveals more
17 than 70 AM and FM stations and 30 broadcast television stations. (*Kalt Decl. Ex. A [Report pp.*
18 *13-21].*) Cable and satellite television imports an ever increasing amount of specialized
19 programming and advertising platforms. Each of these advertising platforms seeks advertising
20 dollars in competition with traditional media. (*Id.*)

21 And without doubt, the Bay Area marketplace for advertising space has undergone a
22 radical transformation in recent years as a result of the emergence of online advertising and the
23 Internet. As the Bay Guardian concedes (*Labar Decl. Exhs. E & F [Request for Admission No.*
24 *10]*), a notable and formidable source of competition is the free classified advertising available
25 online through Craigslist. Started in San Francisco in 1995, Craiglist has expanded to hundreds
26 of cities and plainly has reduced the demand for conventional print advertising space, while
27 increasing the supply of total advertising space available. (*Kalt Decl. Exh. A [Report pp. 13-*
28 *15].*) And, Craigslist is just one part of a greater trend under which Bay Area advertising is

1 shifting online. For example, in 1998, Internet advertising comprised 0.5% of the Bay Area
2 advertising market, and in 2006 it jumped to capture approximately 12% of the total United
3 States market. (*Kalt Decl. Exh. A [Report p. 15].*)

4 Far from the defendants, or even other print and broadcast entities being its only
5 competitors, the Bay Guardian admits that that it operates in a multi-competitor market and that
6 it competes for advertising dollars with “every person or entity who seeks to obtain advertising
7 dollars from advertisers.” (*Labar Decl. Exhs. E & F [Request for Admission No. 8-15].*)

8 Tellingly, the Bay Guardian admits to fierce competition in the San Francisco Bay Area media
9 market, from radio, cable television, print media, and of course, the Internet. (*Id.*)

10 The highly diverse and competitive Bay Area advertising landscape has not escaped
11 judicial attention. For example, seven years ago in *Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192
12 (N.D. Cal. 2000), a case seeking to enjoin the sale of San Francisco’s largest daily newspaper to
13 its second largest, Judge Walker surveyed a highly competitive Bay Area advertising
14 landscape—a market far less diffuse than today—and saw a staggering array of advertising
15 choices fundamentally different than had existed 35 years before. He found that *daily papers*
16 *compete with alternative newsweeklies for advertisers and he mentioned the Bay Guardian by*
17 *name.* *Id.* at 1200. And he didn’t stop there. He found that dailies and newsweeklies compete
18 for advertising revenues with AM and FM radio, television, the Internet, ethnic publications,
19 regional daily and weekly newspapers, and special interest publications. Were he writing today,
20 the judge undoubtedly would add Craigslist, glossy local magazines, a free-distribution daily *San*
21 *Francisco Examiner*, “event sponsorship, issue sponsorship, email advertising campaigns, give-
22 aways, contests, word-of-mouth campaigns”¹ and dozens of other available platforms to the roll
23 call of choices available to Bay Area advertisers.

24 In light of the foregoing facts, there is no evidence of a Bay Area advertising market
25 consisting of a duopoly of “alternative weeklies” as imagined by the plaintiff here. Rather, the
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27
28 ¹ Piety, FREE ADVERTISING: THE CASE FOR PUBLIC RELATIONS AS COMMERCIAL SPEECH, 10
Lewis & Clark L. Rev. 367 (Summer 2006).

1 soft demand and expanding supply of available advertising outlets has resulted in a buyer's
2 market in which sellers of advertising must lower their prices to levels above which
3 advertisements cannot be sold. (*Kalt Decl. ¶¶ 1-8 & Exh. A [Report pp. 13-21].*)

4 **B. OTHER ECONOMIC CONDITIONS AND CATASTROPHES DURING THE TIME PERIOD IN**
5 **QUESTION**

6 There can also be no dispute that there has been a sharp decline in the demand for
7 advertising as a result of well-recognized shocks in market conditions and the terrorist attacks of
8 September 11, 2001. Specifically, the Internet and other high technology applications burst on to
9 the technology scene in the early 1990's creating a "dot.com bubble" with the connected
10 expansion of jobs and the advertising market. (*Id. [Report pp. 15-17].*) Eventually, however,
11 the bubble burst and under the resulting economic conditions sharp declines in demand for
12 advertising space was unavoidable. (*Id.*)

13 The opening of the limitations window in this action (i.e., three years before October 25,
14 2004), occurred barely a month after all flights at San Francisco and Oakland International
15 Airports, and every other commercial airport in the country, were grounded as a result of the
16 9/11 terrorist attacks. Plainly, the events of 9/11 and its aftermath took a massive toll on the San
17 Francisco tourism industry and resulted in enormous losses in tourism revenues, which in turn
18 has led to a large and continuing drop in the demand for advertising. (*Id. pp.17-18.*)

19 Following the dot.com bust and combined with the tragic events of 9/11, media entities
20 such as the defendants were in no position to dictate prices for advertising given such market
21 conditions. In fact, the natural and plausible marketplace response to such conditions of
22 declining demand and rising supply was to reduce fair market prices. (*Id. pp. 22-34.*) The
23 response of defendant newspaper to reduce prices is precisely what one would expect in a well-
24 functioning, competitive marketplace devoid of any predatory purpose or desire. (*Id.*)

25 **C. THE BAY GUARDIAN'S PREDATORY PRICING ALLEGATIONS**

26 Among the players in this distressed and rapidly evolving media market are the parties to
27 this case, defendants SF Weekly, East Bay Express, and the parent company New Times. New
28

1 Times purchased SF Weekly in 1995 and the East Bay Express in 2001, and sold the latter paper
2 just months ago. (*Declaration of James Larkin (“J. Larkin Decl.”) ¶ 7.*)

3 The Bay Guardian was founded by Bruce Brugmann in 1966 and Mr. Brugmann remains
4 its publisher today. The Bay Guardian holds itself out as a dominant player in Bay Area print
5 media, and claims to be the second-most read print publication in this region. (*Labar Decl. Exh.*
6 *J.*)

7 On October 25, 2004 and almost a decade after the SF Weekly arrived on the scene, the
8 Bay Guardian filed this lawsuit alleging that defendants acted in concert to perpetrate a wide-
9 ranging predatory pricing scheme designed to leave the SF Weekly as a monopoly player in the
10 Bay Area advertising market. (*Compl. ¶¶ 9, 17-20.*) The Bay Guardian alleged that since 2001,
11 the same year as the nationwide media meltdown, defendants began selling newspaper
12 advertising space at below cost prices in an effort to force the Bay Guardian out of business, and
13 thereby eliminate any real competitive restraint on the prices defendants might charge for
14 advertising. (*Compl. ¶ 9.*)

15 In particular, the Bay Guardian alleged that defendants engaged in this predatory pricing
16 scheme for the purpose of “(a) *injuring and eliminating plaintiff as a competitor and (b)*
17 *destroying competition for the sale of advertising space in weekly alternative newspapers in the*
18 *Bay Area.”* (*Compl. ¶ 18*) (*emphasis added*). According to the complaint, defendants, by
19 offering below-cost advertising, “could cause the Guardian to lose money on its advertising
20 space and eventually be forced out of business, while defendants would be able to subsidize their
21 own losses caused by that practice through profits derived from other newspapers,” owned by
22 New Times. (*Compl. ¶ 18.*) Incredibly, despite the alleged scheme to destroy competition in the
23 Bay Area advertising market, the Bay Guardian now asserts it was the *only* victim of defendants’
24 predatory pricing conspiracy. (*Labar Decl. Exhs. C & D [Interrogatory No. 44].*)

25 **D. DISCOVERY HAS REVEALED NO EVIDENCE OF PREDATORY PRICING FOR THE**
26 **PURPOSE OF INJURING COMPETITORS OR DESTROYING COMPETITION**

27 Defendants immediately challenged the spartan allegations of the complaint as lacking
28 specificity by demurrer. In overruling the demurrer, the Court advised the parties that the

1 general allegations in the complaint could be fleshed out in discovery. (*Demurrer Hearing*
2 *2/15/05*).

3 After nearly three years of discovery and the exchange of thousands of pages of
4 documents, the Bay Guardian has not adduced any evidence that defendants set advertising
5 prices for the purpose of injuring competitors or destroying competition. Rather, the undisputed
6 evidence shows that the defendant newspapers' advertising rates were not set critically low in
7 order to injure the Bay Guardian or any other competitor. (*Declaration of Joshua Fromson*
8 (*"Fromson Decl."*) ¶¶ 6-7; *Declaration of Christopher Keating* (*"Keating Decl."*) ¶¶ 5-7;
9 *Declaration of Troy Larkin* (*"T. Larkin Decl."*) ¶ 2-4.)² The SF Weekly and the East Bay
10 Express sought the highest advertising price possible for their advertisements. (*Fromson Decl.* ¶
11 3; *Keating Decl.* ¶ 3; *T. Larkin Decl.* ¶ 2.) The publishers never planned or implemented a
12 scheme allowing a rate less than the customer was willing to pay, and discounts were only
13 provided for pro-competitive reasons, e.g. to generate new sales and increase or maintain
14 customer base in a severely depressed market. (*Fromson Decl.* ¶ 6; *Keating Decl.* ¶ 6; *T. Larkin*
15 *Decl.* ¶ 3.) None of the publishers acted to destroy competition by eliminating competitors or
16 any other such activity; indeed the bonus compensation of the publishers was based on
17 *increasing* advertising prices and revenues. (*Fromson Decl.* ¶ 3; *Keating Decl.* ¶ 3; *T. Larkin*
18 *Decl.* ¶ 2.)

19 The only evidence offered by the Bay Guardian in support of its allegation that
20 defendants acted with the requisite "purpose" of injuring competitors is the testimony of a former
21 SF Weekly salesperson, Jennifer Lopez, who left the paper in 1995 to go to work for the
22 plaintiff. (*See Lopez Deposition at pp. 34:21-35:25, attached to Labar Decl. as Exh. H.*) The
23 substance of her testimony was that in 1995, shortly after New Times purchased the SF Weekly,
24 she attended an orientation meeting at which the Executive Editor of New Times, Michael Lacey

25 _____
26 ² Indeed, the Bay Guardian's own pre-filing investigation confirms this information. In an
27 email to editor and publisher Brugmann, his sales director complains that a former publisher of
28 the SF Weekly informed her that New Times never directed him to engage in predatory pricing
conduct and felt that the competition between SF Weekly and the Bay Guardian was "friendly."
(*Labar Decl. Exh. K.*)

1 gave a speech to employees. Mr. Lacey supposedly used words to the effect that he wanted the
2 SF Weekly to be “the only game in town” and spoke in derogatory terms about the content of the
3 Bay Guardian. (*Id. at pp. 101:16-103:5.*) However, Ms. Lopez had no involvement with the SF
4 Weekly following her departure in 1995 and has no personal knowledge of any customers
5 allegedly “lost” by the Bay Guardian six years later. (*Id. at pp. 121:23-122:7.*)³ In any event,
6 Ms. Lopez’s testimony is irrelevant, because Michael Lacey, the executive editor of the 18
7 newspaper group, has never set an advertising price and never ordered that ads be sold at any
8 particular price, let alone below cost. (*Declaration of Michael Lacey (“Lacey Decl.”) ¶¶ 1-11.*)

9 The actual business necessities underlying the pricing of advertising in this market are
10 underscored by the Bay Guardian’s own activities. Indeed, the Bay Guardian admits to engaging
11 itself in “below-cost pricing” in order to win accounts from the SF Weekly. (*Labar Decl. Exhs.*
12 *E & F [Request for Admission No. 3].*) While it accuses the SF Weekly of predatory pricing, the
13 Bay Guardian admits that it specifically targets customers who advertise in New Times’ papers
14 for the purpose of soliciting advertising business for the Bay Guardian. (*Id. [Request for*
15 *Admission No. 18]; Labar Decl. Exhs. L & M.*)

16 The unsupported allegation that defendants are using below cost sales as a commercial
17 weapon to drive the Bay Guardian out of business and achieve a monopoly position in the Bay
18 Area market is economically implausible. More than 7,639 unique advertising customers that
19 appeared in the SF Weekly since 2001. (*Fromson Decl. ¶ 10.*) The Bay Guardian has identified
20 only 32 customers that no longer advertise with it, and 35 customers that advertised less, as a
21 result of purported predatory pricing scheme. (*Labar Decl. Exhs. A & B [Interrogatories No. 26-*
22 *27].*) Thus, despite the fact the that the Bay Guardian asserts it is a victim of its only competitor
23 trying to drive it out of business, it can point only to a total of 66 customers, over a three year

24
25 ³ To the extent that the Bay Guardian is relying on Lopez’s testimony to raise an issue of fact
26 regarding the “purpose” behind any below-cost sales, its claim is barred by the three year statute
27 of limitations applicable to UPA claims (*G.H.I.I. v. MTS, Inc.*, 147 Cal App. 3d 256, 276-77
28 (1983)) because she admittedly advised Mr. Brugmann of this alleged improper activity in 1997,
seven years before the complaint was filed in this action. (*Lopez depo at pp. 209:12-210:2.*) It
should also be noted that Lopez stated that she might have “dreamt” all of this. (*Id. at pp.*
101:16-103:5.)

1 period, that it claims to have lost. (*Id.*) That is less than a tenth of one percent of the total
2 number of advertisers that appeared in the SF Weekly over the same time period—hardly the
3 stuff of competitor destruction.⁴

4 **III. THE GOVERNING SUMMARY JUDGMENT STANDARD PROHIBITS**
5 **PLAINTIFF FROM RELYING UPON IMPERMISSIBLE OR IMPLAUSIBLE**
6 **INFERENCES UNDER THE SUBSTANTIVE LAW**

6 “The purpose of the law of summary judgment is to provide courts with a mechanism to
7 cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is
8 in fact necessary to resolve their dispute.” *Aguilar v. Atlantic Richfield Corp.*, 25 Cal. 4th 826,
9 843 (2001). The holding of the Supreme Court in *Aguilar* is particularly instructive in the
10 present case because the pivotal inquiry there was whether an inference of an anti-competitive
11 motive was reasonable when examined through the lens of inferences permitted under the
12 substantive price-fixing law. *Id.* at 856.

13 In *Aguilar*, the plaintiff brought claims under the Cartwright Act and Business and
14 Professions Code section 17200 alleging that nine oil companies had conspired to restrict output
15 and control pricing of legislatively-mandated CARB gasoline. On summary judgment, the
16 defendants offered evidence in the form of declarations from pricing and output decision-makers
17 to the effect that these pricing decisions were made independently, and without collusion. The
18 plaintiffs countered with evidence that the companies: (i) had collected and disseminated among
19 themselves capacity, production, and pricing information through an independently owned and
20 operated industry information service, (ii) used common consultants, and (iii) executed product
21 exchange agreements. In addition, the plaintiff’s expert opined that since the oil companies had
22 the motive, opportunity, and means to control prices—and prices did indeed rise, more or less in
23 lockstep—collusion could be inferred.

24
25
26 ⁴ There is no proof that any of the lost customers were actually lost to the SF Weekly, and
27 not to the other multitude of competitors. Moreover, some of these customers never advertised
28 in the SF Weekly or East Bay Express at all. Virtually all of these customers advertise on the
Internet. (*Request for Judicial Notice, Exhs. 1-42*).

1 The trial judge in Aguilar first granted the defendants’ motions for summary judgment,
2 and then reversed himself. The Supreme Court held that he got it right the first time, reasoning
3 that California summary judgment law is now closer to “its federal counterpart as clarified in
4 Celotex, Anderson, and Matsushita⁵, *in order to liberalize the granting of such motions*” Id. at
5 859-60 (emphasis added). Applying the holding of Matsushita, a case alleging predatory pricing
6 under the Sherman and Robinson-Patman Acts, the Court found that once a defendant has
7 presented evidence that there is no triable issue of material fact as to an element of the plaintiff’s
8 claim, the following occurs.

9 **First**, the plaintiff must come forward with evidence under which a reasonable trier of
10 fact could, by a preponderance of the evidence, “find an unlawful conspiracy more likely than
11 not” and “evidence that is as consistent with” independent action as with collusion “does not,
12 without more, support even an inference of conspiracy.” Id. at 858. **Second**, Matsushita limits
13 “the range of permissible inferences” that may be considered by a trial court in passing on a
14 defendant’s summary judgment motion and “the force of ambiguous evidence itself” because a
15 less exacting standard of evidentiary review “might effectively chill procompetitive conduct in
16 the world at large, the very thing it is designed to protect, by subjecting [a defendant] to undue
17 costs in the judicial sphere.” Id. **Third**, to avoid chilling procompetitive conduct, “the plaintiff
18 must present evidence that *tends to exclude*—although it need not actually exclude—the
19 possibility that alleged conspirators acted independently rather than collusively.” Id. (emphasis
20 added). **Fourth**, “[e]ven though the defendants’ state of mind is at issue and a trier of fact might
21 disbelieve their denial of conspiracy, the plaintiff may not make it to trial by merely asserting
22 that a reasonable trier of fact might, and legally could, disbelieve their denial without offering
23 any concrete evidence from which such trier of fact could find in his favor... .” Id. And **fifth**,
24 where lawful and unlawful conduct is equally plausible, the defendant’s motion must be granted.
25

27 ⁵ Celotex v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242
28 (1986); Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

1 “Equal plausibility means that neither interpretation is more likely than not” and the defendant
2 must prevail. *Id.* at 863.

3 Applying these principles, the Court ordered summary judgment, holding that it was not
4 enough that Aguilar presented evidence that the petroleum companies *may have* possessed the
5 motive, opportunity, and means to enter into an unlawful conspiracy. Such evidence, even if
6 combined with information showing conduct that is as consistent with an unlawful conspiracy as
7 with permissible competition, does not amount to evidence showing such a conspiracy more
8 likely than not, nor does it even support an inference implying as much. *Id.* at 873.

9 The Aguilar court’s exacting approach is reflective of the disfavored status of predatory
10 pricing suits in modern antitrust jurisprudence.⁶ This is so because “predatory pricing is a
11 paradoxical offense. Although Antitrust law values low prices and abhors high ones, the
12 ‘predator’ stands accused of charging too low a price – of doing too much of a good thing.
13 Crane, supra, at 3. It is inherent in this potential friction between predation law and the goals of
14 Antitrust that “private predatory pricing actions carry with them the seeds of protectionist
15 abuse.” Joskow & Klevorick, supra, at 221. Accordingly, the key to summary judgment is
16 “careful definition of the elements of substantive doctrine and the presumptions that guide their
17 application,” since there are “cases where the prerequisites for successful predation are obviously
18 absent.” Areeda & Hovenkamp, supra, at p. 89. In such a case, the court should reject the
19 predation claim as soon as the general character of the market appears, unless the claimant is
20 prepared to rebut the inferences of easy entry and insubstantial market power that would
21 normally be drawn from such a market. *Id.* at 299-300.

23 ⁶ See Trujillo, PREDATORY PRICING STANDARDS UNDER RECENT SUPREME COURT DECISIONS
24 AND THEIR FAILURE TO RECOGNIZE STRATEGIC BEHAVIOR AS A BARRIER TO ENTRY, 19 Iowa J.
25 Corp. L. 809 (Summer 1994); Freedman, PREDATORY PRICING AFTER BROOKE GROUP:
26 ECONOMIC GOALS PREVAIL, 58 Alb. L. Rev. 243 (Winter 1994); Crane, THE PARADOX OF
27 PREDATORY PRICING, 91 Cornell L. Rev. 1 (2005); R. Posner, ANTITRUST LAW, (2d ed. 2001)
28 (Univ. of Chicago Press); Joskow & Klevorick, A FRAMEWORK FOR ANALYZING PREDATORY
PRICING POLICY, 89 Yale L. J. 213 (1979); Easterbrook, ANTICIPATING ANTITRUST’S
CENTENNIAL, 75 Cal. L. Rev. 983 (May 1987); Areeda & Hovenkamp, ANTITRUST LAW, 2d Ed.
(2002).

1 Cal-Tech Communications, Inc., v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163,
2 189 (1999), the California Supreme Court underscored the same judicial admonition about
3 predatory pricing cases: “Courts must be particularly cautious in evaluating claims that a
4 competitor’s prices are too low. Pricing practices are not unfair merely because a competitor
5 may not be able to compete against them. Low prices often benefit consumers and may be the
6 very essence of competition.” Id. at p. 189.

7 Three modern predation opinions by the United States Supreme Court – Justice Powell’s
8 opinion in Matsushita (which played such a central role in informing the Aguilar Court’s
9 summary judgment thinking, see Trujillo, supra, at p. 814), Justice Brennan’s opinion in Cargill
10 Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) (which shaped the Cel-Tech Court’s view
11 that trial court caution is demanded in suits alleging predation), and Justice Kennedy’s opinion in
12 the seminal case of Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209
13 (1993) – led courts to “focus on the market circumstances that must exist for a claim of predatory
14 pricing to be plausible and to dispose summarily of cases in which those circumstances are
15 readily shown to be absent. Trujillo, supra, at p. 815.

16 In this regard, Matsushita “provided the lower courts with a clear, unified, and well-
17 developed approach to analyzing predatory pricing claims.” Freedman, supra at 258. Predators
18 are presumed to be rational people with rational objectives, motivated by the desire to make
19 money from their predation. Thus, a predation claim cannot proceed to jury – where there is the
20 risk of “chilling the very [procompetitive] conduct the antitrust laws are designed to protect,”
21 Matsushita, 475 U.S. at 594 – when the predation allegation “simply makes no economic sense.”
22 Id. at 587. And specifically what this means is that there must be proof it is economically
23 sensible to believe that *these defendants in this advertising market* will make monopoly profits
24 *after vanquishing this plaintiff*.

25 As will be shown below, the Bay Guardian neither has nor can it present any evidence
26 that there is any economic sense to the notion that the Bay Area advertising market — one in
27 which the San Francisco Chronicle has lost \$330 million in the last seven years while a newly
28 emergent Craigslist is sucking hundreds of millions more out of print advertising sales — can be

1 monopolized by a market actor much smaller than either. In fact, in this case defendants stand
2 on far stronger footing in summary judgment than even the Matsushita defendants who operated
3 in a highly concentrated oligopoly market far more susceptible to predation than the widely
4 diffuse Bay Area advertising market at issue in this case.

5 **IV. ANALYSIS**

6 **A. THE BAY GUARDIAN CANNOT SHOW WITH APPROPRIATE EVIDENCE THAT** 7 **DEFENDANTS MADE BELOW-COST SALES FOR THE PURPOSE OF INJURING** 8 **COMPETITORS OR DESTROYING COMPETITION**

8 The Unfair Practices Act (“UPA”) makes it illegal to engage in below cost sales only if
9 done for the “purpose” of injuring competitors or destroying competition. Specifically, Business
10 & Professions Code section 17043 states:

11 It is unlawful for any person engaged in business within this State
12 to sell any article or product at less than the cost thereof to such
13 vendor, or to give away any article or product, for the purpose of
14 injuring **competitors or destroying competition.**

14 Bus. & Prof. Code § 17043 (emphasis added).

15 The evidence set forth by Defendants conclusively demonstrates lawful pro-competitive
16 purposes in responding to the market. Specifically, advertising prices were set locally and as
17 part of a competitive strategy to generate new sales, increase the customer base in a severely
18 depressed market and at levels above which advertising simply would not sell. (*See J. Larkin*
19 *Decl.* ¶¶ 4-8; *T. Larkin Decl.* ¶ 3; *Keating Decl.* ¶¶ 3-10; *Fromson Decl.* ¶¶ 3-12.) Thus, the
20 Bay Guardian’s claim must fail unless it can produce credible evidence that defendants or any of
21 them made below-cost advertising sales for the required purpose of injuring competitors or
22 competition.

23 **1. The High Level of Evidence Required to Show Purposefulness**

24 In Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., the California
25 Supreme Court explained the rigorous standard that a plaintiff must meet to satisfy the
26 “purposeful” element of section 17043. Cel-Tech, 20 Cal. 4th at 175. In Cel-Tech, plaintiff cell
27 phone sellers sued a cell phone provider, alleging, *inter alia*, that the defendant had given away
28 or sold cell phones below costs to its customers. The defendant was one of two FCC-licensed

1 cellular service providers in the Los Angeles market and there was no dispute that its below costs
2 sales had injured the plaintiffs who were out of business. The central issue before the court was
3 whether defendant acted *purposefully* as used in the statute.

4 The plaintiffs contended that a below-cost selling defendant “. . . need not desire to injure
5 competitors or destroy competition to violate section 17043; instead, ‘plaintiffs need only show
6 defendant believed or knew that harm was substantially certain to result, or the manifest
7 probability of harm was very great.’” *Id.* at 172. The Supreme Court rejected plaintiffs’
8 interpretation and rejected any analogy to statutes that merely require *intentional* or even
9 *knowing* action. Rather, the Court held that “purpose” has a precise and more exacting meaning,
10 stating that “[p]ersons act ‘purposefully’ with respect to a result if it is their ‘conscious object’ to
11 cause that result.” *Id.* at 173.

12 Accordingly, a company “*must act with the purpose, i.e., the desire, of injuring*
13 *competitors or destroying competition*” in order for pricing decisions to be predatory. *Id.* at 174-
14 75 (emphasis added). It is not enough, therefore, that the defendant hope its pricing decisions
15 will cause competitive injury or even that it knows as a moral certainty such injury will result.
16 *Id.* at 173. To be actionable under section 17043, the defendant’s purpose in setting its prices
17 must be to injure competitors or destroy competition. Such evidence is lacking here.⁷

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19 _____
20 ⁷ Turnbull & Turnbull v. ARA Transportation, Inc., 219 Cal. App. 3d 811 (1990) illustrates the
21 high level of evidence necessary to show predatory purpose. There, the defendant bus company
22 secured a school district contract, previously held by the plaintiff, under an express policy of
23 bidding below cost as admitted by the company’s vice-president. *Id.* at 817. The defendant’s
24 successful scheme was to “low ball” its bid, deliberately using below cost numbers, then
25 approach school districts after the bids were won to ask for more money using the excuse that a
26 mistake had been made in preparing the bid. The evidence of purposefulness included: (i)
27 statements by a senior VP made at a meeting that the company would “bid below cost, secure
28 contracts and eliminate the competition;” (ii) proof that losses would simply be allocated to other
divisions of the company; (iii) statements from another company insider who “...explained the
process that was used in bidding below cost;” and (iv) the deliberate alteration of documents to
show low profit margins and then “increase its bid when it came time to renew these contracts.”
Id. at 817-18. The existence of such hard evidence of a predatory plan or scheme is precisely
what is missing in this case.

1 **2. There is No Presumption of Purposefulness Here**

2 Proof that a defendant sold products below cost, together with proof of the injurious
3 effect of such acts, raises a presumption that the purpose of the sale was to injure competitors.
4 Bus. & Prof. Code § 17071.⁸ However, evidence that a plaintiff lost business is not sufficient to
5 trigger the presumption of section 17071. There must be some evidence that the Bay Guardian
6 *actually* lost business specifically as a result of defendants’ below costs pricing in order to raise
7 the presumption. Co-Opportunities, Inc. v. NBC, Inc., 510 F. Supp. 43, 50 (N.D. Cal. 1981); E
8 & H Wholesale, Inc. v. Glaser Bros., 158 Cal. App. 2d 728, 735 (1984) (injurious effect
9 established where customer declarations expressly showed they purchased from defendant based
10 on the lower prices and not for any other reason). Here, the Bay Guardian has provided no
11 evidence, other than its own self-serving speculation, that any customer who decided not to
12 advertise in the Bay Guardian was lost as a result of defendants’ alleged “below cost” pricing or
13 that the Bay Guardian would have received any of the “lost” advertisements. Accordingly, there
14 is no evidence to raise the section 17071 presumption here.

15 In any event, evidence proffered by a defendant, as here, of a lawful purpose in pricing its
16 goods “renders the presumption embodied in section 17071 of little evidentiary value.” Tri-Q,
17 Inc. v. Sta-Hi Corp., 63 Cal. 2d 199, 209 (1969); Western Union Financial Svcs., Inc. v. First
18 Data Corp., 20 Cal. App. 4th 1530, 1540 (1993). In Western Union Financial Services, for
19 example, the defendant market challenger attempted to increase its market share by selling one
20 of three segments of its money transfers below fully allocated cost and aiming its promotional
21 materials directly at the plaintiff. Like the instant case, the plaintiff there had a decades-long
22 head start on the defendant in the marketplace. A showing that the defendant’s pricing and
23 promotions were intended to “generate broad appeal, improve its name recognition, and attract

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25 ⁸ The Supreme Court has held that: “[t]he obvious and only effect of this provision is to require
26 the defendants to go forward with such proof as would bring them within one of the exceptions
27 or which would negate the prima facie showing of wrongful intent.” People v. Pay Less Drug
28 Store, 25 Cal. 2d 108, 114 (1944). The presumption “does not withdraw from the accuser the
burden of proving a violation, nor does it deprive the defendant of the benefit of the presumption
of innocence.” Id. (emphasis added).

1 new and repeat customers” served to rebut the section 17071 presumption. *Id.* at 1533. “The
2 fact that First Data’s advertising targeted Western Union by name does not prove an intent to
3 injure ... [s]imilarly, the fact that First Data’s internal documents show the promotion was
4 intended to capture a customer base from Western Union is immaterial because that is something
5 First Data was entitled to do.” *Id.* Competitors are allowed to target each other’s customers.
6 That is what competition is all about.

7 Similarly, in Tri-Q, Inc. v. Sta-Hi Corp., 63 Cal. 2d 199 (1969) the parties were
8 manufacturers and distributors of newspaper printing equipment in a two-competitor market. *Id.*
9 The plaintiff alleged that defendant sold printing equipment below cost. In order to rebut a
10 presumption of injurious purpose, the president of the defendant company testified that he knew
11 of no company policy or decision to sell products below cost, that management had not intended
12 to sell products below cost, and that he was unaware of any attempt to destroy the plaintiff’s
13 business. *Id.* at 209. The court concluded that this testimony was more than sufficient to rebut
14 the presumption of intent to injure competition. *Id.*

15 Here, as in Tri-Q and Western Union, the undisputed evidence shows that defendants had
16 a procompetitive purpose in selling to other customers, namely to maintain and grow its
17 customer base, retain its sales force and editorial staff in a severely depleted market, and “ride
18 out the storm” as best as possible. (*See J. Larkin Decl.* ¶¶ 4-10; *T. Larkin Decl.* ¶ 3; *Keating*
19 *Decl.* ¶¶ 3-12; *Fromson Decl.* ¶¶ 3-12.) As a less established actor in a bad market, this is a
20 permissible, even laudable, competitive purpose. It is not predation.

21 **B. THE INFERENCE OF PURPOSEFULNESS ASSERTED BY PLAINTIFF IS IMPLAUSIBLE**
22 **AND CANNOT WITHSTAND SUMMARY ADJUDICATION**

23 As shown above, a plaintiff in a predation case cannot escape summary judgment simply
24 by raising as a supposed “triable issue of fact” inferences that are either implausible or
25 economically irrational. Rather, the purposeful prong is not a question of fact where the
26 inference in support thereof is not reasonable. *See Pan Asia Venture Capital Corp. v. Hearst*
27 *Corp.*, 74 Cal. App. 4th 424, 433 (1999) (issue of fact “becomes an issue of law when reasonable
28 minds can draw only one conclusion from the evidence”).

1 The Bay Guardian has framed its section 17043 claim as one based on defendants’
2 supposed purpose to eliminate it as a competitor and to destroy competition “by offering and
3 selling advertising at below cost prices” that could cause it “to lose money on its advertising
4 space and eventually be forced out of business, while defendants would be able to subsidize their
5 own losses caused by that practice through profits derived from other newspapers” in the parent
6 publishing chain. (*Complaint* ¶ 18.) However, the evidence demonstrates that the inferences
7 underlying these factual conclusions are economically implausible. See Bailey v. Allgas, Inc.,
8 284 F.3d 1237, 1244 (11th Cir. 2002) (summary judgment upheld since defendant lacked
9 sufficient market power when due consideration given to the number of reasonable substitute
10 products available to consumer).⁹

11 The defendants as well as the Bay Guardian are facing extraordinary and widespread
12 competition for advertising dollars in a multi-player market. When firms face such conditions of
13 soft demand and rising numbers and types of substitutes, softening prices and losses relative to
14 fully allocated costs, the lowering of prices below cost does not support a coherent inference of
15 anticompetitive, predatory purpose. AD/SAT, a Div. of Skylight, Inc. v. Associated Press, 920
16 F. Supp. 1287, 1299-1300 (S.D.N.Y. 1996) (market for transmitting advertising to newspapers
17 by electronic means served by multiple competitors, and any ability by defendant to dominate
18 market was figment of plaintiff’s imagination). In fact, such responses are precisely expected in
19 a well-functioning, competitive marketplace devoid of predatory purpose and desire, *i.e.*, in a
20 declining market “the seller would incur greater losses if it attempted to charge a higher price.”
21 Areeda & Turner, PREDATORY PRICING AND RELATED PRACTICES UNDER SECTION 2 OF THE
22 SHERMAN ACT, 88 Harv. L. Rev. 697, 698 (1974-75).

23 _____
24 ⁹ While the Bay Guardian likely will argue that neither market strength nor a recoupment motive
25 are elements of a section 17043 claim, that is precisely what it has alleged as the basis for a
26 conclusion of purposeful behavior in this case. Having chosen to frame the case in these terms,
27 the Bay Guardian also frames the summary judgment analysis here. See Aguilar v. Atlantic
28 Richfield Corp., 25 Cal. 4th at 867 (while conspiracy is not an element of a section 17200 claim,
fact that plaintiffs framed such claim in terms of a conspiracy means that it “is indeed a
component of the unfair competition law cause of action in this case as a matter of fact” and
summary judgment compelled).

1 Even if one were to assume that the defendants' pricing strategies could cause or
2 substantially contribute to the exit of plaintiff as a competitor, there is no plausible prospect that
3 such exit would result in harm to the competitive vigor of the Bay Area market for advertising
4 space. The marketplace is characterized by such a multitude of competitors that it is not
5 plausible that the loss of one market player would destroy competition in the market generally.
6 Furthermore, it would be economically senseless for defendants to drive a single competitor out
7 of business in a buyer-driven, multi-competitor market with the irrational prospect of being able
8 to recoup its investment of predatory losses by subsequently exercising market power with raised
9 prices. For whether or not the Bay Guardian is present in the marketplace, such a strategy would
10 be constrained necessarily by the ubiquitous new and old media competitors.

11 The absence of any plausible or economically rational purpose in this case contrasts
12 strikingly with the circumstances facing the court in Fisherman's Wharf Bay Cruise Corp. v.
13 Superior Court, 114 Cal. App. 4th 309 (2003). There, the plaintiff competed against its sole and
14 dominant competitor for sightseeing tours on the bay. Furthermore, the defendant systematically
15 charged below-cost prices and entered into tying arrangements to wholesale customers who
16 refrained from patronizing the plaintiff. Id. at 316-17. In reversing the grant of summary
17 judgment on the section 17043 claim, the court underscored that the alleged facts were the
18 "hallmark of predatory pricing as anticompetitive conduct" since they involved "a single firm,
19 having a dominant share of the relevant market, (that) cuts its prices in order to force competitors
20 out of the market, or perhaps to deter potential entrants from coming in" with an obvious and
21 achievable recoupment motive. Id. at 322, citing Matsushita, 475 U.S. at 584-585, fn. 8.

22 The predatory conduct alleged in Fisherman's Wharf Bay Cruise Corp. was quite
23 plausible. The defendant was willing to "engage in such conduct with the intent of 'foregoing
24 present profits in order to create a market position in which [it] could charge enough to obtain
25 supranormal profits and recoup [its] present losses.'" Id. at 322. In contrast, the defendants here
26 are part of a multi-player and buyer's market, and are facing such competition that recoupment is
27 essentially impossible. In the words of the Matsushita court, predatory pricing in such a situation
28 simply "makes no economic sense."

1 **1. The Bay Guardian’s Thimble-Like Definition of the Affected Market is**
2 **Senseless and Factually Unsupportable**

3 Recognizing implicitly that there is no plausible way that the defendants could
4 purposefully harm the media and related advertising market, the Bay Guardian tries to
5 circumvent this impossible hurdle by its artful allegation that the “product” at issue here is
6 “weekly alternative newspaper advertising space;” “alternative newsweekly advertising space”
7 and “advertising space in weekly alternative newspapers.” (*Compl. ¶¶ 17, 18.*) “Alternative
8 newsweekly advertising space,” however, is not the market at issue, but rather advertising
9 generally—a conclusion recognized by the Bay Guardian itself throughout discovery.¹⁰

10 The Bay Guardian has long admitted that it competes for advertiser dollars against the
11 entire pastiche of advertisers in the Bay Area. As Mr. Brugmann stated, “[w]e compete head-to-
12 head against [other news weeklies], against America On-Line, Microsoft Citysearch , the dailies,
13 and we do just fine.” (*Labar Decl. Exh. N, p. 4.*) In its press release trumpeting the lawsuit,
14 plaintiff stated: “The Bay Guardian was founded in 1966 specifically to be competitive with (and
15 alternative to) the daily newspapers, and we have had competition every day of our existence,
16 from dailies, weeklies, community papers and other publications in one of the most media-rich
17 markets in the country.” (*Labar Decl. Exh. I.*) Of course, there is also Mr. Brugmann’s
18 “alternative” newsweekly label. By definition, “alternative” means that other choices exist.¹¹
19 The Bay Guardian cannot backtrack now, and argue that the only competition is the SF Weekly.
20 For, at bottom, it is *the consumer*, not the market competitor-plaintiff trying to stay in court on
21 summary judgment, who defines the relevant market in predation cases. Rebel Oil Co., Inv. v.
22 Atlantic Richfield Co., Inc., 51 F.3d 142 (9th Cir. 1995).¹²

23 _____
24 ¹⁰ As discussed in the companion motion, “advertising” is not even a “product” within the
25 meaning of section 17043.

26 ¹¹ “Alternative: alternate; offering or expressing a choice; different from the usual or
27 conventional.” Merriam Webster (2007).

28 ¹² A previous effort to define, as here, a newspaper as a separate market based solely on its
alleged readership demographic was found to be nothing more than “an awkward attempt to
conform [the plaintiff’s] theory to the facts [it] alleges; this market definition does not reflect any

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V. CONCLUSION

For the reasons explained above, defendants respectfully request that the Court grant summary adjudication in their favor on the section 17043 claim.

DATED: June 29, 2007

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