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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KEVIN CAMMARATA, Plaintiff and Appellant, v. BRIGHT IMPERIAL LIMITED, Defendant and Appellant, BANGBROS.COM et al., Defendants and Respondents.	B218226 (Los Angeles County Super. Ct. No. BC 410599)

APPEAL from orders of the Superior Court of Los Angeles County. Maureen Duffy-Lewis, Judge. Affirmed in part; reversed in part with directions.

Spillane Weingarten and Jay M. Spillane for Plaintiff and Appellant.

Sheppard Mullin Richter & Hampton, James M. Chadwick and Valerie E. Alter for Defendant and Appellant.

Bostwick & Jassy, Gary L. Bostwick, Jean-Paul Jassy and Kevin L. Vick for Defendants and Respondents Generation Financial, Ltd., Bangbros.com, Inc., Fling.com, LLC, Utherverse, Inc., Mansef Productions, Inc., Brazzers Technology, Inc., LALIB Limitada and Stallion.com FSC Limited.

Mitchell, Silberberg & Knupp, David A. Steinberg and Mark E. Mayer for Defendants and Respondents Mansef Productions, Inc. and Brazzers Technology, Inc.

Rothken Law Firm and Ira P. Rothken for Defendants and Respondents Friendfinder California, Inc., Friendfinder Networks, Inc., and Various, Inc.

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In the 21st century, businesses of all kinds are having to adapt to a constantly changing commercial landscape. The business that the parties describe as the "adult entertainment" industry is no exception. Websites that originally made their money by offering such material on a subscription or pay-per-view basis are being replaced by "tube" websites which offer their content for free and make their money through advertising. According to one adult entertainment executive, the formerly profitable subscription-based websites "have been brought to their knees" by the tube-based sites.

In this case the former proprietor of a subscription-based website brought an action against the proprietor of a tube-based website and the website's advertisers alleging they were engaged in unlawful and unfair business practices. All defendants moved to strike the complaint as a SLAPP under Code of Civil Procedure section 425.16).[1] The trial court granted the defendant website owner's motion in part and granted the advertisers' motion in full. The plaintiff and the defendant website owner appeal.

We conclude that the plaintiff's complaint was subject to a SLAPP motion because it arose from the defendants' conduct in furtherance of their right of free speech on a public issue. We further conclude that the defendants' motions should have been granted as to the entire complaint because the plaintiff failed to show a reasonable probability of success on any cause of action.

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1 SLAPP is an acronym for Strategic Lawsuit Against Public Participation. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn.1.)

FACTS AND PROCEEDINGS BELOW

Plaintiff Kevin Cammarata alleges that he is the former owner of several subscription-based adult entertainment websites who, "under pressure from and as a result of the unlawful practices of the [d]efendants . . . sold his business at an unfavorable price." Defendant Bright Imperial Limited is the owner of a tube-based adult entertainment website called Redtube.com. The other defendants are advertisers on Redtube. We will refer to the latter as the "advertising defendants." We will refer to Bright and the advertising defendants collectively as "the defendants."

Cammarata contends that Bright's unlawful activities consist of (1) allowing customers to view adult entertainment videos on its website below cost for the purpose of injuring Cammarata's business and destroying his competition in violation of Business and Professions Code section 17043; (2) unlawfully using its videos as "loss leaders" in violation of Business and Professions Code section 17044; and (3) engaging in "unlawful, unfair, or fraudulent business practices or acts" in violation of Business and Professions Code section 17200. The advertising defendants are allegedly aiding and abetting Bright in accomplishing the tortious conduct described above.

Bright and the advertising defendants filed separate SLAPP motions under Code of Civil Procedure section 425.16, subdivision (b)(1)[2] which states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

In support of its motion, Bright submitted the declaration of its executive officer, Bernard Bergemar, who described Bright's business model for Redtube. Bright provides the site's content for free and generates revenue from charging for advertising on the site.

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2 All future statutory references are to the Code of Civil Procedure.

Bergemar explained that Redtube contains "adult videos" that Internet users can view free of charge. Bright allows viewers to watch the videos for free because that attracts people to the site and because advertisers pay Bright to run the videos which contain their ads. According to Bergemar, Bright principally earns money in three ways. Advertisers supply the videos to Bright at no charge and pay Bright to display their videos containing their advertising. Companies pay Bright a commission each time that a Redtube user signs up for services the company has advertised on Redtube. In addition, some advertisers pay Bright to display "banner" advertising on Redtube that is not connected to a video.

The advertising defendants submitted the declaration of Kristopher Hinson, "one of the founders of . . . BangBros.com, Inc." who described a tube website as one which provides videos for free and earns its revenue from the sale of advertising space on the site. According to Hinson, Redtube was the 60th most visited website on the Internet as of April 21, 2009. The advertising defendants also relied on Bergemar's declarations.

In a declaration later submitted in opposition to the defendants' SLAPP motion, Cammarata described the business model for his websites. He stated that his sites were run on a "subscription" basis in which the customer purchased access to the secure content on the sites. If a customer wanted to access the website's content he would use his mouse to click on the "join" button on the site's public page. This would transport the customer to a payment processing site where he would authorize a payment or a series of payments from his credit or debit card. The typical charge was $29.95 per month. Once the customer's payment transaction was complete he received an authorized user name and password for the site. The customer would then log on to the site with his user name and password and view the content. Cammarata stated that revenues from his websites "grew significantly through about 2006 and into 2007." Since that time, however, "revenues declined substantially." According to Cammarata, this decline "correlates directly to the advent of massively popular websites offering thousands of adult videos for free, prominently Red[t]ube."

The trial court granted Bright's SLAPP motion as to Cammarata's causes of action for below cost competition and unlawful loss leaders and denied the motion as to Cammarata's cause of action for unfair competition. It struck on non-SLAPP grounds Cammarata's purported cause of action for injunctive relief noting that an injunction is a remedy, not a cause of action. The court granted the motions of the advertising defendants as to the cause of action for aiding and abetting, the only cause of action in which they were named.

Cammarata and Bright filed timely appeals.

DISCUSSION

In 1992, responding to the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," the California Legislature enacted section 425.16, known as the SLAPP statute. The statute is intended to "encourage continued participation in matters of public significance" and to prevent the chilling of such participation "through abuse of the judicial process." To that end, the statute directs courts to construe the statute "broadly." (§ 425.16, subd. (a).)

California's SLAPP statute states in relevant part: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: . . . (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)[3]

As interpreted by our Supreme Court: "[S]ection 425.16 requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP

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3 Because clause (4) of section 425.16, subdivision (e) swallows clause (3) we will only analyze defendants' SLAPP motion under clause (4).

motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) On appeal, we independently review whether the defendant has made a threshold showing that the plaintiff's lawsuit is one "arising from" the defendant's exercise of the right of petition or free speech and, if so, whether the plaintiff has demonstrated a probability of success on the merits. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

I. DEFENDANTS' THRESHOLD SHOWING

In order to strike Cammarata's complaint under the SLAPP statute, the defendants must show that Cammarata's causes of action "aris[e] from" acts of the defendants in furtherance of their right of free speech on a public issue. (§ 425.16, subd. (b)(1).)

In *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92, our high court explained the concept of a cause of action "arising from" an act in furtherance of the right of free speech. "The anti-SLAPP statute's definitional focus is [on] the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (Italics in original.) The court went on to explain that the mere fact an action was filed "after protected activity took place" or "may have been 'triggered' by protected activity" does not mean that the action is one "arising from" the protected activity. "In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected speech or petitioning activity." (*Id.* at p. 89; italics in original.)

Cammarata does not argue that adult entertainment is not protected speech under the First Amendment. Cammarata contends, however, that his causes of action are not based on defendants' speech. Rather, he argues, his claims "arise from" the defendants' anti-competitive conduct, e.g., selling goods below cost, which would be just as actionable if it arose from selling dog food as selling adult entertainment. (Cf. *Graffiti*

Protective Coatings, Inc. v. City of Pico Rivera (2010) 181 Cal.App.4th 1207, 1224 [SLAPP motion not applicable because plaintiff's action to invalidate city's contract not based on city's communications with anyone].) Therefore, he concludes, the SLAPP statute does not apply.

Bright concedes that Cammarata's causes of action do not arise from the content of the Redtube site. But it maintains SLAPP motions are not restricted to causes of action arising out of the *content* of the defendant's speech, e.g., defamatory accusations. Rather, Bright maintains, for purposes of the SLAPP motion its placing of videos on the Internet where they can be viewed by the public for free is a paradigm of "conduct in furtherance of the exercise of . . . free speech . . . ." Cammarata's causes of action arose from that conduct.

We agree with Bright that the publication of a video on the Internet, whether it depicts teenagers playing football or adult entertainment qualifies as "conduct in furtherance of . . . free speech . . . ." (§ 425.16, subd. (e)(4).) The act of Internet publication constitutes "conduct," (see *Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 715), and, here, the conduct furthers Bright's right of free speech because it is the means of disseminating that speech. As Bright points out, the right of free speech has long been held to include the right "to 'distribute,' 'pass out,' 'circulate,' or otherwise disseminate ideas." (*Van Nuys Pub. Co. v. City of Thousand Oaks* (1971) 5 Cal.3d 817, 821.) We reject Cammarata's argument that his causes of action arise from Bright's predatory pricing, not its speech, because here the product being priced is speech, not dog food. All of Cammarata's causes of action arise from Bright's conduct of placing speech on the Internet where it can be viewed for free by the public. This is the "predatory pricing" that Cammarata complains of.

Not all speech protected by the First Amendment is protected by the SLAPP statute, however. Bright's speech is protected by the statute only if it is "in connection

with a public issue or an issue of public interest" (§ 425.16, subd. (e) (4)).[4] The term "issue of public interest" has been given a very broad interpretation. Indeed, in *Nygord, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042, the court stated that for purposes of the SLAPP statute an issue of public interest is "*any issue in which the public is interested*." The requirement that the speech be of "public" interest is satisfied if the speech is of concern to a substantial number of people. (*Rivera v. First DataBank, Inc.*, *supra*, 187 Cal.App.4th at p. 716.) Cammarata and Bright agree that there is a substantial public interest in the kind of sexually explicit videos shown on tube-sites such as Redtube.

Our conclusion that Bright may invoke the SLAPP statute applies to the advertising defendants as well. Because the advertising defendants are charged with aiding and abetting Bright in its conduct in furtherance of its right of free speech on a public issue it stands to reason the advertising defendants too may invoke the SLAPP statute.

Defendants having successfully invoked the SLAPP statute, we turn to the question whether Cammarata has shown a reasonable probability of succeeding on the merits of any of his causes of action.

II. CAMMARATA'S PROBABILITY OF PREVAILING ON THE MERITS

Plaintiffs can satisfy the requirement of showing a reasonable probability of success on the merits by showing their actions have at least "minimal merit." (*Navellier v. Sletten*, *supra*, 29 Cal.4th 82, 89.) Even by that lax standard, the trial court found that Cammarata failed to establish a probability of success on the merits of his causes of action against Bright for below-cost sales (Bus. & Prof. Code, § 17043) and loss leaders

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4 The parties do not contend that the terms "public issue" and "issue of public interest" have different meanings and courts have treated the two terms alike. (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 420 & fn. 5; *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 119.)

(Bus. & Prof. Code, § 17044) and against the advertising defendants for aiding and abetting Bright's tortious conduct or a breach of duty toward Cammarata. The court found that Cammarata did establish a probability of success on the merits of his cause of action against Bright for unfair competition (Bus. & Prof. Code, § 17200).[5]

A. Below Cost Sales And Loss Leaders

Business and Professions Code section 17043 states: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition." Business and Professions Code section 17044 states: "It is unlawful for any person engaged in business within this State to sell or use any article or product as a 'loss leader' as defined in section 17030 of [the Business and Professions Code]. Section 17030 defines a "loss leader" in relevant part as "any article or product sold at less than cost: . . . (c) Where the effect is to divert trade from or otherwise injure competitors."

Our Supreme Court has held that to establish a violation of either of these statutes the plaintiff must prove the defendant committed one or more acts of giving away or selling a product below cost with the purpose of injuring competitors or destroying competition. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 174-175.) There is no reasonable probability that Cammarata can establish Bright gave away or sold products below cost by proving that Bright attracts viewers to its website with free entertainment and earns its revenue from selling advertising. Nor is it reasonably probable that Cammarata can prove that Bright undertook its business model for the purpose of injuring its competitors or destroying competition.

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5 The court struck Cammarata's purported cause of action for injunctive relief on the non-SLAPP ground that injunctive relief is an equitable remedy, not a cause of action. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1360, fn. 2.)

Cammarata argues that because the price Bright charges to watch a video—zero—is less than what it costs Bright to maintain the video on its server Bright is selling or giving away the viewing of the video "at less than the cost thereof" in violation of Business and Professions Code section 17043 notwithstanding the undisputed evidence that Bright makes a net profit by selling advertising that appears on and accompanies the videos.[6]

In support of his argument Cammarata relies on *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309 in which the court held the defendant could not avoid liability for below-cost sales by selling one product at a loss and another product at a profit and averaging the revenue from the two sales to show a net profit. In *Fisherman's Wharf*, the plaintiff and defendant were competitors in selling cruises of the San Francisco Bay. The plaintiff accused the defendant of violating the prohibition on below-cost sales by selling tickets in the wholesale market—to tour operators, travel agents and the like—below the cost of providing those cruises. In its motion for summary adjudication defendant produced undisputed evidence that it sold its retail tickets at a profit and that its total revenues exceeded its total costs. (*Id*. at pp. 322-323.) Reversing the trial court's order granting the defendant's motion the Court of Appeal held the below cost sales prohibition was violated if "the defendant sold '*any article or product*' at less than cost . . . without regard to whether other above-cost sales on identical or similar products made the overall enterprise profitable." (*Id*. at p. 326.) The key to the court's decision was the defendant's concession that "the wholesale and retail bay cruise markets are separate." (*Id*. at p. 329.)

Fisherman's Wharf is distinguishable from the case before us because Bright does not sell two separate products. Therefore, unlike the defendant in *Fisherman's Wharf*, Bright does not offset losses from the sale of one product against the profit from the sale

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6 Cammarata quotes a confidential memorandum prepared by Bright which claims that in the first year of its existence Redtube's profit margin rose to between 80 and 90 percent.

of another product thereby making "the overall enterprise profitable." (*Fisherman's Wharf*, *supra*, 114 Cal.App.4th at p. 326.) Accordingly, the rationale in *Fisherman's Wharf* for ignoring the enterprise's overall profit is not applicable to this case.

Furthermore, it is not reasonably probable that Cammarata can prove that Bright undertook the tube-based business model "for the purpose of injuring" Cammarata or any of Bright's other competitors or destroying its competition.

If Bright's business model sounds familiar it's because it's the business model typical of broadcast radio and television stations in the United States not to mention thousands of local newspapers and, more recently, tens of thousands of Internet websites including Youtube, CNN and Video.Yahoo.

The undisputed evidence showed that Bright obtains most of the videos it shows on Redtube free of charge from advertisers who pay Bright to display their videos containing their ads. Fundamentally, there is no difference between Redtube and a radio station in the early 1900's that broadcasted records it obtained for free from a music store and, in return, told its listeners where the records could be purchased. (See www. oldradio.com/current/bc_spots.htm; last visited Dec. 7, 2010.) In both cases the broadcaster's purpose is not to destroy competition or a competitor but to attract patrons to its broadcast site where they will, hopefully, respond to its advertisers' messages.

Finally, if Bright's purpose in adopting the tube-based business model was to destroy competition it has failed. The unchallenged declaration of one of Bright's attorneys states that in the interest of representing his client he visited 101 tube-based adult entertainment sites between May 14 and May 16, 2009 and was able to access adult videos free of charge on every one of them. This declaration shows that the business of providing adult entertainment over the Internet is alive and well and has not been adversely affected by Bright. If Cammarata's subscription-based website lost revenue after Redtube and other tube-based websites came on the scene it was because the tube-based business model is more efficient, not because of alleged predatory pricing by Bright.

B. Unfair Competition

Cammarata sought restitution and injunctive relief under Business and Professions Code section 17200 that prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."

The trial court found that Cammarata failed to produce sufficient evidence to show a probability of obtaining restitution of money or property from Bright. Cammarata does not challenge this finding on appeal.

The court also found, however, that there was at least "minimal merit" to Cammarata's prayer for injunctive relief based on his allegation that Bright subscribed to Cammarata's website, downloaded its content and then uploaded the content to Redtube. On that basis, the court denied Bright's SLAPP motion as to the unfair competition cause of action.

The trial court erred. Business and Professions Code section 17204 provides that a person may pursue a cause of action for unfair competition only if the person has "suffered injury in fact and has lost money or property as a result of the unfair competition." As Cammarata could not make a minimal showing that he suffered losses which would entitle him to restitution he lacked standing to pursue injunctive relief. (*Citizens of Humanity, LLC v. Costco Wholesale Corp.* (2009) 171 Cal.App.4th 1, 22.) Therefore, the court should have stricken the unfair competition cause of action.

DISPOSITION

The order on Bright's motion to strike the complaint as a SLAPP is reversed insofar as it denies the motion with respect to the cause of action for unfair competition and the case is remanded to the trial court with directions to grant the motion as to that cause of action. In all other respects the order on Bright's motion to strike the complaint is affirmed.

The order on the motion by BangBros.com, Inc., et al., to strike the complaint is affirmed.

Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.