

CERTIFIED FOR PARTIAL PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

BAY GUARDIAN COMPANY,
Plaintiff and Respondent,
v.
NEW TIMES MEDIA LLC et al.,
Defendants and Appellants.

A122448
(Super. Ct. No. CGC-04-435584)
**ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on August 11, 2010, and modified on August 11, 2010, be further modified in the following particulars:

1. On page 2, footnote 2, the second sentence beginning with “Settlement of” is deleted. The following sentence will be inserted:

Settlement of the case would of course render the appeal moot, but not require that we dismiss the appeal.

2. On page 2, footnote 2, the fourth sentence beginning with “Because this action” is modified to add the word “potential” following the words “issues despite the.” The sentence will now read:

Because this action presents issues of continuing public interest which are likely to recur, we exercise our inherent discretion to resolve those issues despite the potential settlement.

3. On page 3, in the first sentence of the second paragraph following the words “did not” the word “primarily” is added. The sentence will now read:

Over the years the Guardian did not primarily compete with the radio or “even the daily” newspapers, but rather with other “non-daily papers” which also had “alternative” editorial content.

4. On page 12, in the first sentence of the paragraph commencing “The issue of recoupment” the citation and footnote 10 are both modified. The sentence will now read:

The issue of recoupment ability as an element of an action for below-cost pricing under the Unfair Practices Act (§ 17000 et seq.)^[10] has not yet been resolved, and requires that we undertake an interpretation of section 17043.

Footnote 10 will now read:

For convenience, we will refer to the Unfair Practices Act as the UPA, to distinguish it from related but separate statutory schemes which have been referred to as the Unfair Competition Law and the Unfair Business Practices Act (§§ 17200 et seq; 17500 et seq.). (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 168–169 [83 Cal.Rptr.2d 548, 973 P.2d 527]; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1258 [10 Cal.Rptr.2d 538, 833 P.2d 545]; *Klein v. Earth Elements, Inc.* (1997) 59 Cal.App.4th 965, 968 [69 Cal.Rptr.2d 623].)

There is no change in the judgment.

The petition for rehearing is denied.

Date: September 8, 2010

Marchiano, P. J.

Trial Court

San Francisco County Superior Court

Trial Judge

Honorable Marla Miller

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