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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

BUDGET VAN LINES, INC., Plaintiff and Respondent, v. BETTER BUSINESS BUREAU OF THE SOUTHLAND, INC., Defendant and Appellant.	B235338 (Los Angeles County Super. Ct. No. BC452006)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Solner, Judge. Affirmed.

Leopold, Petrich & Smith and Walter R. Sadler for Defendant and Appellant.

Law Office of Adrianos Facchetti, Adrianos Facchetti; Tedford & Associates and James R. Tedford II for Plaintiff and Respondent.

INTRODUCTION

Defendant Better Business Bureau of the Southland, Inc. appeals from an order denying its special motion to strike the complaint of plaintiff Budget Van Lines, Inc. pursuant to Code of Civil Procedure section 425.16.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Parties*

Budget Van Lines, Inc. (Budget) is a relocation services broker that has been in business since 2005 and maintains its principal place of business in New York. According to Budget's president, Sheri Katz, "[m]oving companies move Household Goods whereas Brokers arrange for moving companies to do the actual moves," and Budget "is a 'Household Goods Broker.'"

Better Business Bureau of the Southland, Inc. doing business as The Better Business Bureau (the BBB) is a nonprofit voluntary membership organization. According to the BBB's president, William Mitchell, the "goals of the BBB are to advocate truth in advertising as well as to promote integrity in the performance of business services" and "to enhance public trust and confidence in business through voluntary self-regulation and monitoring activities." The BBB provides free information to consumers by telephone, mail, and the Internet about a particular company in what the BBB calls a Reliability Report. The Reliability Report includes a record of consumer complaints made to the company and the company's responses, any governmental action against the company, any licensing or advertising issues that the BBB has learned about

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[1] Code of Civil Procedure section 425.16 authorizes a special motion to strike, also known as an anti-SLAPP motion. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, 66.) All further statutory references are to the Code of Civil Procedure, unless otherwise stated.

the company, and a BBB Rating, generally "A+" to "F," reflecting the extent to which the company is in compliance with the BBB's standards for operating in a trustworthy manner and making good faith efforts to resolve consumer complaints or concerns filed with the BBB.

B. *The Complaint*

On December 27, 2010 Budget filed a complaint against the BBB based on the BBB's disparaging statements about Budget and the "F" grade that the BBB gave Budget on the BBB's website. Budget alleged causes of action for (1) trade libel, (2) libel per se, (3) unfair competition in violation of Business and Professions Code section 17200 (the UCL), (4) permanent injunction, and (5) declaratory relief. Budget alleged that the BBB "published a number of damaging statements about" Budget, including that Budget was "not in compliance with the law's licensing or registration requirements," Budget's advertising was "grossly misleading," and Budget deserved a grade of "F." Budget alleged that "[t]hese statements are all false and defamatory" because Budget is a moving broker not a moving company, Budget "is in compliance with all Department of Transportation and Federal Motor Carrier Safety Administration laws and regulations," and Budget's "advertising is not misleading in any way." Budget alleged that the statement that Budget was "not in compliance with the law's licensing or registration requirements" is libelous because it charged Budget with violating the law, and the statement that Budget's advertising is "grossly misleading" is libelous because it charged Budget with dishonesty. Finally, Budget alleged that the BBB knew the statements were false or acted with reckless disregard of their truth when the BBB published the statements on its website, knew that existing or potential Budget customers would view the statements, and published the false statements with malice and the intent to destroy Budget's business.

In its unfair competition cause of action, Budget alleged that the BBB's publication of false statements about Budget, as well as the BBB's repeated attempts to compel Better Business Bureaus in other locations to give Budget an "F" or to direct

consumers to the BBB's website constituted an unlawful, unfair, or fraudulent business practice in violation of the UCL. Budget claimed that the BBB caused and will continue to cause Budget monetary damages and irreparable injury. In its fourth and fifth causes of action, Budget sought injunctive and declaratory relief.

C. *The BBB's Special Motion To Strike*

The BBB filed a special motion to strike pursuant to section 425.16. Budget conceded that the BBB's acts were in furtherance of its right of petition or free speech, but argued that it had a reasonable probability of prevailing on the merits of its claims. In support of its opposition to the motion, Budget presented two computer printouts from the BBB's website entitled "BBB Reliability Report for Budget Van Lines, Inc." Katz attached to her declaration a Reliability Report about Budget that she had printed from the BBB's website on September 10, 2010. Adrianos Facchetti, head of Budget's legal division, attached to his declaration a slightly different undated version of a Reliability Report about Budget.[2]

Both Reliability Reports prominently displayed "BBB Rating F" next to the title "Rating Explanation." The "Rating Explanation" stated: "Company Rating F [¶] Our opinion of what this rating means: [¶] We strongly question the company's reliability for reasons such as that they have failed to respond to complaints, their advertising is grossly misleading, they are not in compliance with the law's licensing or registration requirements, their complaints contain especially serious allegations, or the company's industry is known for its fraudulent business practices." Near the lower right corner of the undated Reliability Report attached to Facchetti's declaration, under the title "Rating

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[2] The trial court overruled the BBB's objections to these exhibits. The BBB does not challenge the trial court's evidentiary rulings on appeal.

Reasons," the Reliability Report states: "Factors that lowered this business's rating include: [¶] Failure to have a required competency license."[3]

The Reliability Report also stated, "This company's business is providing moving and storage services." Under the heading "Licensing," the entries labeled "Agency," "License Number" and "Status" were blank. The next paragraph advised the consumer that for the most up-to-date information regarding license status, the consumer should contact two governmental agencies that license or register moving companies: the California Public Utilities Commission (PUC) and the Federal Motor Carrier Safety Administration (FMCSA). In the "Complaint Experience" section, the Reliability Report stated: "Bureau Summary and Analysis of customer complaints and company responses: [¶] Complaints allege failure to honor moving quotes, failure to notify customers that their move will be subcontracted out to another carrier, damage and loss claims, delivery issues and failure to assist in resolving disputes. The company generally responds to complaints by referring customers to . . . ," followed by an option to read "More." Under "Complaint Closing Statistics" appeared a list of the number of complaints by type of response "over the last 36 months," for a total of 128 complaints.

Budget argued that the three allegedly defamatory statements—that it "was not in compliance with the law or licensing requirements," that Budget's advertising was "grossly misleading," and the "F" rating—were provably false assertions of fact and therefore were defamatory. Budget argued that the BBB's statements did not constitute

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[3] The Reliability Report printed by Facchetti contains the complete version of the statement as follows: "Rating Reasons [¶] BBB rating is based on 16 factors. Click here for details about the factors considered. [¶] Factors that lowered this business's rating include: [¶] Failure to have a required competency license [¶] Length of time business has been operating [¶] 128 complaint(s) filed against business [¶] Failure to respond to 2 complaint(s) filed against business [¶] 7 complaints(s) filed against business that were not resolved [¶] 11 serious complaint(s) filed against business [¶] Overall complaint history with BBB[.]" The Reliability Report printed by Katz also had a section entitled "Rating Reasons," but it did not list all of the reasons. The section in Katz's version stated, "Significant reasons for this rating: Unanswered Complaints," and provided what appeared to be a computer link to other information.

"privileged statements of opinions" but rather were declarations or conveyed implications that "'a reasonable fact finder could conclude [were] provably false assertion[s] of fact.' (*Overstock*[*.com*]*, Inc. v. Gradient* [*Analytics, Inc.* (2007) 151 Cal.App.4th 688,] 701." Budget also argued that it had shown a probability of success on the merits of its unfair competition cause of action with the evidence that "under the guise of providing consumer information" the BBB "defames certain companies and then endorses others, misleading the public, damaging otherwise reputable businesses, and diverting money to itself."[4] (Italics and bold omitted.)

D. *The Trial Court's Ruling*

The trial court denied the special motion to strike. The court first acknowledged that Budget conceded the first prong of section 425.16; namely, the BBB's acts were in furtherance of its right of petition or free speech. The trial court ruled, however, that Budget met its burden on the second prong of showing a probability of prevailing on each cause of action. The court determined that the BBB's statement that Budget was not in compliance with licensing laws implied a provably false factual statement, and that Budget had presented admissible evidence showing the implied fact was false. The court ruled, however, that the BBB's statements about "grossly misleading" advertising and the "F" rating were opinions that were not actionable as defamatory statements. The trial court then relied on the court's statement in *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90 that, under section 425.16, "once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire cause of action stands." (*Mann*, *supra*, at p. 106, italics omitted.) The court also ruled that Budget had shown a probability of prevailing on its unfair competition cause of action because Budget had shown that the BBB committed an act forbidden by law: libel per se. In response to arguments made by

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[4] Budget dismissed its first cause of action for trade libel before the BBB filed its special motion to strike.

the BBB, the court also found that Budget was not a public figure and that the Reliability Reports on the BBB's website were commercial speech.

DISCUSSION

The BBB contends that the trial court erred in denying its special motion to strike under section 425.16 because Budget did not carry its burden of proving a probability of prevailing on any of its causes of action. The BBB also argues that its constitutional defenses bar Budget's causes of action. We conclude that the trial court properly denied the BBB's special motion to strike.

A. *Special Motion To Strike Burdens of Proof and Standard of Review*

"Section 425.16, subdivision (b)(1), provides: '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.' The analysis of an anti-SLAPP motion thus involves two steps. '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.' [Citation.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820; see *Scalzo v. Baker* (2010) 185 Cal.App.4th 91, 97-98.) The defendant has the burden of proof on the first issue; the plaintiff has the burden on the second issue. (*Chodos v. Cole* (2012) 210 Cal.App.4th 692, 701.)

As noted above, Budget conceded that the BBB had satisfied the first prong.[5] (See § 425.16, subd. (b)(1); *Oasis West Realty, LLC v. Goldman*, *supra*, 51 Cal.4th at p. 819.) "To satisfy the second prong, 'a plaintiff responding to an anti-SLAPP motion must "'state[] and substantiate[] a legally sufficient claim.'" [Citation.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citation.] 'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law."' [Citation.] If the plaintiff 'can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless' and will not be stricken; 'once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands.' [Citation.]" (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at p. 820; see *Scalzo v. Baker, supra,* 185 Cal.App.4th at p. 98, fn. 10.)

A plaintiff's burden of showing a probability of prevailing "is not high." (*Overstock.com, Inc. v. Gradient Analytics, Inc., supra*, 151 Cal.App.4th at p. 699.) A plaintiff can meet its burden and defeat a special motion to strike by showing the cause of action has "even minimal merit." (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at pp. 819-820; *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928.) "A plaintiff is not required 'to *prove* the specified claim to the trial court'; rather, so as to not deprive the plaintiff of a jury trial, the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim." (*Mann v. Quality Old Time Service, Inc., supra*, 120 Cal.App.4th at p. 105, quoting *Rosenthal v.*

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[5] Budget does not argue that the commercial speech exception in section 425.17 applies in this case. (See *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12.)

Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 412.) We review a trial court's order granting or denying a special motion to strike under section 425.16 de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326; *Bleavins v. Demarest* (2011) 196 Cal.App.4th 1533, 1539; *Kajima Engineering & Construction, Inc.*, *supra*, at p. 929.)

B. *Libel Per Se*

Libel is a form of defamation. (*Overstock.com, Inc. v. Gradient Analytics, Inc.*, *supra*, 151 Cal.App.4th at p. 700.) "The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369; see *Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) Civil Code section 45 defines libel as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." "In general, . . . a written communication that is false, that is not protected by any privilege, and that exposes a person to contempt or ridicule or certain other reputational injuries, constitutes libel." (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242.) Budget's claim is for libel per se, which Civil Code section 45a defines as a "libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact . . . ."

Because a defamatory statement """must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability."""" (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 695.) The First Amendment protections of freedom of speech and press create a constitutional privilege that limits liability for defamation under state law for some, but not all, types of opinions. (See *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 14, 20 [110 S.Ct. 2695, 111 L.Ed.2d 1] [full constitutional protection for statements of opinion on matters of public concern that do not contain or imply a provably false factual assertion]; *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600-601 ["courts apply the

Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse"].) "Though mere opinions are generally not actionable [citation], a statement of opinion that implies a false assertion of fact is . . . ." (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 289.) The "inquiry is not merely whether the statements are fact or opinion, but '"whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact."' [Citation.]" (*Ibid.;* see *Summit Bank, supra,* at p. 696 ["where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation"]; *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385 ["the question is not strictly whether the published statement is fact or opinion," but "[r]ather, the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact"].)

The court looks at the totality of the circumstances "to determine both whether (a) a statement is fact or opinion, and (b) a statement declares or implies a provably false factual assertion; that is, courts look to the words of the statement itself and the context in which the statement was made." (*Hawran v. Hixson, supra,* 209 Cal.App.4th at p. 289.) "'This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.' [Citation.]" (*Franklin v. Dynamic Details, Inc., supra,* 116 Cal.App.4th at p. 389; see *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1147.)

"Whether a statement declares or implies a provably false assertion of fact is a question of law for the court to decide [citations], unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood." (*Franklin v. Dynamic Details, Inc., supra,* 116 Cal.App.4th at p. 385; see *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260; *Chaker v. Mateo, supra,* 209 Cal.App.4th p. 1147 ["'critical determination of whether the allegedly defamatory statement constitutes fact or opinion *is a question of law*'"]; *Summit Bank v. Rogers, supra,* 206 Cal.App.4th at p. 696 ["'crucial question of whether

challenged statements convey the requisite factual imputation is ordinarily a question of law for the court'"].) The principle that the "distinction between fact and opinion is a question of law . . . remains the rule if the statement unambiguously constitutes either fact or opinion. Where, . . . however, the allegedly libelous remarks could have been understood by the average reader [in the target audience] in either sense, the issue must be left to the jury's determination." (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 682; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [if a statement is ambiguous, the question of law for the court is "whether [the] statement is reasonably susceptible to a defamatory interpretation"].) "The question is '"whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact. . . ." [Citation.]' [Citation.]" (*Summit Bank, supra,* at p. 696.)

1. Legally Sufficient Complaint

The BBB first argues that Budget cannot prevail on its cause of action for libel per se because Budget did not properly plead libel. "'The general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint. [Citations.]' [Citation.]" (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1017, fn. 3; see *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 31.) The BBB argues Budget alleged in its complaint that it received an "F" rating but failed to identify any other specific words or statements by the BBB as defamatory.

The BBB misreads Budget's complaint. It is true that Budget alleges that there are defamatory statements on the BBB's website in addition to the three allegedly defamatory statements in the complaint. But Budget identifies the specific words in those three statements that it alleges are libelous. In addition to the "F" rating, Budget alleged that the "BBB published a number of damaging statements about [Budget] including but not limited to" the statements that Budget's "advertising is 'grossly misleading'" and that Budget "is 'not in compliance with the law's licensing or registration requirement.'" Budget properly pleaded libel. (*Gilbert v. Sykes, supra,* 147 Cal.App.4th at p. 31.)

The BBB also argues that Budget failed to allege "any special damages as required by Civil Code [section] 45a." Section 45a, however, requires a plaintiff to plead and prove special damages only if the challenged statement is not libelous per se. (See Civ. Code, § 45a ["[d]efamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof"]; *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 382 ["[w]here a libelous statement 'is defamatory *on its face*, it is said to be libelous per se, and actionable without proof of special damage'"]; *Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1135 [plaintiff is "relieved of the [Civil Code] section 45a requirement of pleading special damages in order to state a cause of action for libel" where the "publication . . . is reasonably susceptible of a defamatory meaning on its face"].) The defamatory language on which Budget bases its claims is libelous on its face. (See *Bates v. Campbell* (1931) 213 Cal. 438, 441 [statutory definition of libel per see "is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation"]; *Burrill*, *supra*, at pp. 382-383 [statements charging the commission of a crime or tending to injure the plaintiff's profession, trade or business are libel per se]; *Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 386 [accusations of dishonesty or questionable business methods are libel per se].)

2. "Not in Compliance with the Law's Licensing . . . Requirement"

The BBB's first argument is that it did not make the statements about Budget. The BBB asserts that it "never reported that [Budget] was 'not in compliance with licensing or registration requirements.'"[6] The BBB claims that the statement about Budget's

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6 The BBB submitted an undated document that Mitchell said was a January 12, 2011 report for Budget. This report was entitled "Company Report" but contained virtually the same information as the Reliability Reports printed out by Katz and Facchetti, except that the Company Report did not include the "Rating Explanation." In its opening brief, the BBB asserts that the January 12, 2011 Company Report printout

licensing status is not defamatory because it is part of the explanation for an "F rating" and is not necessarily a statement about Budget. According to the BBB, the explanation indicates that the statement is part of a list of illustrative hypothetical examples of conduct, prefaces the list of examples with the words "such as," and concludes the list with the disjunctive "or" before the last example.

The BBB asks us to limit our review to the precise language of the words in the "Company Rating F" section of the report. To determine whether a statement is susceptible of a defamatory meaning, however, we must consider """not only the actual language used, but the sense and meaning which may have been fairly presumed to have been conveyed to those who read it."""" (*Baker v. Los Angeles Herald Examiner*, *supra*, 42 Cal.3d at p. 261; see *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1354.) """That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader."' [Citation.]" (*Baker*, *supra*, at p. 260; see *Carver v. Bond* (2005) 135 Cal.App.4th 328, 346; *Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 67.) We must consider the context in which the alleged defamatory statement appears, "construed in the light of the whole scope and apparent object of the writer, considering not only the actual language used, but the sense and meaning which may have been fairly presumed to have been conveyed to those who read it." (*Baker*, *supra*, at p. 261; *Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325, 1338.) "This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed." (*Baker*, *supra*, at p. 261; *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608.)

Considering the context of the Reliability Report on the BBB's website, and the "'natural and probable effect upon the mind of the average reader'" (*MacLeod v. Tribune*

"said 'we know of no licensing or registration requirement for companies engaged in the company's stated type of business.'" This statement, however, does not appear on the document.

Publishing Co. (1959) 52 Cal.2d 536, 547), we agree with the trial court that the average consumer could easily overlook the words "such as" and "or" and focus instead on the statements about noncompliance with licensing laws and grossly misleading advertising, with the understanding that each statement applied to Budget and supported Budget's "F" rating. (See *Baker v. Los Angeles Herald Examiner*, *supra*, 42 Cal.3d at p. 260; *MacLeod*, *supra*, at p. 547 [a "'defendant is liable for what is insinuated, as well as for what is stated explicitly'"]; *Bentley Reserve L.P. v. Papaliolios* (July 30, 2013, A136191) ___ Cal.App.4th ___ [2013 WL 3949029 at p. 5] ["[h]edging his statements with the word 'likely' does not insulate them from examination"]; *Carver v. Bonds*, *supra*, 135 Cal.App.4th at p. 346; *Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1181 ["[i]f a statement of opinion implies a knowledge of *facts* which may lead to a defamatory conclusion, the implied facts must themselves be true"].)

In addition to the statements by the BBB explaining its "Company Rating F" for Budget, the Reliability Report stated or strongly implied that Budget was not licensed. The Reliability Report printed by Facchetti, under the heading "Rating Reasons," stated that the "[f]actors that lowered this business's rating include: [¶] Failure to have a required competency license . . . ." Another provision on both Reliability Reports, under the heading "Licensing," implied Budget was not licensed by leaving blank spaces under the "Licensing" heading and providing no information in the spaces marked "Agency," "License Number," and "Status." The Reports then directed the consumer to telephone numbers and Internet addresses for the PUC and FMCSA from which, according to the BBB, "[c]ompanies offering to move household goods" are required to obtain a license or registration. Because Budget is a moving broker, however, neither of the agencies could reasonably have been expected to report that Budget had the license or registration required lawfully to operate a moving company.

Budget also provided evidence that the alleged statements were provably false, in part because the statements are based on the BBB's inaccurate assessment that Budget is a moving company rather than a moving broker and the misleading statement in the

Reliability Report that Budget's "business is providing moving and storage services."[7] Theodore Clapp, one of Budget's in-house attorneys, explained that Budget is a moving broker not a moving company and therefore is subject to different laws and regulations than a moving company. Budget submitted pages from its website prominently identifying Budget as a "Household Goods Transportation Broker for Interstate Moves" and explaining how Budget coordinates with trucking companies to place a customer with a moving company. Budget also presented evidence that it was in compliance with licensing and other laws applicable to a moving broker. Katz stated in her declaration that "Moving Brokers, like [Budget], are regulated by the Surface Transportation Board and [FMCSA]," and, because Budget has no trucks and is not a motor carrier, it is not required to "have a Department of Transportation number." Katz further stated that during its annual review by the Department of Transportation [DOT], Budget "has been found to be in compliance and exemplary in each instance," and that Budget "is in compliance with the DOT/FMCSA regulations for relocation services brokers." Katz explained that as a moving broker, Budget is required to "utilize only DOT licensed and insured Household [Goods] carriers . . . [and] runs a daily license check to insure each of its carriers is licensed." Jasmine Medina, a Budget employee, stated in her declaration that each morning she "verifies that each and every carrier in the Budget Van Lines network has an active [DOT/FMCSA]" license.

Finally, the BBB argues that because it "was able to prove that [Budget] is a limited public figure" Budget was required to but did not "prove actual malice in order to recover in a defamation action." (See *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 253.) The BBB does not cite to anything in the record reflecting any finding by the trial court that Budget is a limited public figure. Nor did the BBB cite the trial

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[7] On appeal, the BBB does not differentiate between requirements applicable to a household goods moving broker like Budget and those applicable to a household goods moving company. For example, when arguing that Budget did not conduct business in accordance with law, BBB refers to statutes and regulations that govern "household goods carriers."

court to any evidence that Budget is a limited public figure. The BBB, not Budget, had the burden on this issue. (See *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676 [under § 425.16 "a defendant that advances an affirmative defense . . . properly bears the burden of proof on the defense"].) The BBB cites to excerpts of cases, but does not relate them to any specific facts concerning Budget. The BBB cites to the entire 153-page declaration of its attorney, Nicholas Morgan, but does not identify any specific portion that contains facts purportedly proving that Budget is a limited public figure. We therefore deem this argument waived. (See *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 384 ["'reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment,'" and it "'is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant's contentions on appeal'"]; *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301 ["[s]ince this argument is made without [adequate] citation to the record, it is deemed waived"].) In any event, contrary to the BBB's contention, the fact that Budget has an extensive advertising campaign does not make Budget a limited public figure. A "person in the business world advertising his wares does not necessarily become part of an existing public controversy." (*Vegod Corp. v. American Broadcasting Companies, Inc.* (1979) 25 Cal.3d 763, 770; see *Carver v. Bonds*, *supra*, 135 Cal.App.4th at p. 354 [plaintiff not a public figure for purposes of statements accusing him of false advertising]; *Melaleuca, Inc. v. Clark*, *supra*, 66 Cal.App.4th at p. 1363 [plaintiff's "marketing activities did not make it a public figure or create a public controversy such that [the plaintiff] was required to show that defamatory statements about it were made with actual malice"].)

Considering the totality of the circumstances (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1471), we conclude that Budget met its burden of presenting evidence that the statement that the company is "not in compliance with the law's licensing or registration requirement" is provably false, and showing that the statement is reasonably susceptible to the defamatory interpretation that Budget operates

its business in violation of the law. Therefore, Budget made a sufficient showing of a probability of prevailing on its claim that the BBB's statements that Budget is "not in compliance with the law's licensing or registration requirement" constitutes libel per se. The trial court properly denied the BBB's special motion to strike on this ground. (See *Oasis West Realty, LLC v. Goldman*, *supra*, 51 Cal.4th at p. 820 [under § 425.16, "'once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands'"]; accord, *Burrill v. Nair*, *supra*, 217 Cal.App.4th at p. 379; *Mann v. Quality Old Time Service, Inc.*, *supra*, 120 Cal.App.4th at p. 106.)

3. Grossly Misleading Advertising

The BBB's argument that its statement Budget's advertising was "grossly misleading" is not defamatory parallels its argument that its statement Budget was not in compliance with licensing requirements is not defamatory. The BBB argues that it never stated that Budget's advertising was "grossly misleading." The BBB again asserts that this statement appears in the "Rating Explanation" for a "Company Rating F," and that the statement applied not to Budget but only to a hypothetical company that might receive an "F" rating. The BBB maintains that the only statement it made about Budget's advertising was, "Advertising Review: No questions about the truth of this company's advertising [have] come to our attention," and that this additional statement or qualification demonstrates that the "grossly misleading" advertising hypothetical did not apply to Budget.

We reject the BBB's argument that the "grossly misleading" advertising statement was only a hypothetical example for the same reasons that we reject the same argument with respect to the licensing noncompliance statement. As with the licensing noncompliance statement, in the context of the Reliability Report, the average reader could reasonably be expected to focus on the words "BBB Rating F" for Budget and "Company Rating F, Our opinion of what this rating means," which appear prominently near the top of the website page. The average member of the BBB's website reading

audience would naturally and probably understand that the statement about "grossly misleading" advertising applied to the company that had received an "F" rating, and that company was Budget.

It is true, as the BBB suggests, that the phrase "grossly misleading" may in some contexts connote a privileged opinion rather than an actionable provably false statement of fact. (See *Summit Bank v. Rogers*, *supra*, 206 Cal.App.4th at pp. 695-696.) However, "where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation." (*Id.* at p. 696; see *Wong v. Jing*, *supra*, 189 Cal.App.4th at p. 1370; *Overstock, Inc. v. Gradient Analytics, Inc.*, *supra*, 151 Cal.App.4th at p. 701.) The actual or imputed expertise of the defendant regarding the subject matter of a statement may reasonably lead the target audience to understand or believe that the statement is a factual one. Although some accusations "when made by laymen might indeed constitute mere opinion, similar accusations by" certain professionals "carry a ring of authenticity and reasonably might be understood as being based on fact." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 154.)

For example, in *Slaughter* the court held that statements by a dental insurance company and its director to patients that a dentist was performing "'unnecessary'" work and "'overcharging'" were defamatory statements about the dentist and not protected opinions because the defendants were professional dental plan administrators, which gave their statements "a ring of authenticity." (*Slaughter v. Friedman*, *supra*, 32 Cal.3d at pp. 153, 154.) Similarly, in *Gill v. Hughes* (1991) 227 Cal.App.3d 1299, the court concluded that the statement by a committee of medical professionals "that plaintiff 'is an incompetent surgeon . . .' implies a knowledge of facts which lead to this conclusion and further is susceptible of being proved true or false. The fact that an evidentiary hearing was held regarding plaintiff's surgical technique and judgment supports this conclusion. Since the statement implies that plaintiff is generally disqualified for his profession, it is defamatory if it is false." (*Id.* at p. 1309.) And in *Kahn v. Bower*, *supra*, 232 Cal.App.3d 1599, the court concluded that the statement by the director of a private psychological testing and counseling facility that referred to the plaintiff as an incompetent social

worker was not a privileged opinion but was actionable as a provably false factual assertion. (*Id.* at pp. 1604, 1608-1609.) The court stated that, because of the defendant's "professional status and that of the person to whom she wrote, [the] plaintiff's supervisor, the letter is susceptible of the interpretation that [the] plaintiff's incompetence is asserted as an 'actual' condition, a matter of fact." (*Id.* at p. 1609.)

The BBB holds itself out as an expert on the professionalism and trustworthiness of businesses. The BBB states that it evaluates companies and their advertising, advocates for "truth in advertising," and promotes business integrity. As described by Mitchell, the "BBB monitors advertising and works to correct abuses of truth in advertising," "keeps track of the people and companies who perpetrate . . . scams," and "issues public warnings" to consumers through BBB publications. The BBB also investigates and acts on complaints of deceptive or unethical business practices about a company and governmental action against the company and then assigns "letter grade ratings to the company's business record based upon a proprietary formula" that analyzes data about the company. The "Mission and Values" section of the BBB's website states: The "BBB is the resource to turn to for objective, unbiased information on businesses. Our network of national and local BBB operations allows us to monitor and take action on thousands of business issues affecting consumers at any given time. [¶] BBB is your key advisor, most reliable evaluator and most objective expert on the topic of trust in the marketplace." Because of the BBB's self-proclaimed expertise in evaluating companies and the claims in their advertising, a consumer reading a statement by the BBB that Budget's advertising was "grossly misleading" can reasonably be expected to interpret the statement as factual. (See *Chaker v. Mateo*, *supra*, 209 Cal.App.4th at p. 1147; *Franklin v. Dynamic Details, Inc.*, *supra*, 116 Cal.App.4th at p. 389; see also *Antwerp Diamond Exchange of America, Inc. v. Better Business Bureau* (Ariz. 1981) 637 P.2d 733, 738 ["'[u]sers of reports of mercantile agencies usually have utmost confidence in the accuracy of such reports and act accordingly'"].) As the court recently stated in *Bentley Reserve L.P. v. Papaliolios*: "Internet posts where the 'tone and content is serious,' where the poster represents himself as 'unbiased' and 'having specialized

knowledge,' or where the poster claims his posts are 'Research Reports' or 'bulletins' or 'alerts,' may indeed be reasonably perceived as containing actionable assertions of fact." (*Bentley Reserve L.P. v. Papaliolios, supra,* ___ Cal.App.4th at p. ___ [2013 WL 3949029 at p. 8].)[8]

Contrary to the BBB's assertion, the appearance of the statement, "Advertising Review: No questions about the truth of this company's advertising [have] come to our attention" in a less conspicuous place in the Reliability Report does not necessarily neutralize the defamatory nature of the "grossly misleading" advertising statement. To the extent the "Advertising Review" may create an ambiguity regarding whether the "grossly misleading" advertising statement is actionable, as noted above, the legal question for us is "whether [the] statement is reasonably susceptible to a defamatory interpretation." (*Smith v. Maldonado*, *supra*, 72 Cal.App.4th at p. 647; see *Summit Bank v. Rogers*, *supra*, 206 Cal.App.4th at p. 696.) We conclude that the "grossly misleading" advertising statement is reasonably susceptible to a defamatory interpretation, and therefore whether the statement is defamatory is a question for the trier of fact.

4. "F" Rating

Whether the BBB's grade of "F" for Budget is defamatory is a closer question. Those cases that have considered whether grading and rating systems are opinions or provably false statements of fact have generally concluded that they are nonactionable opinions. (See, e.g., *Aviation Charter, Inc. v. Aviation Research Group/US* (8th Cir. 2005) 416 F.3d 864, 870 [system that rated air charter service providers "on a scale of 1 [to] 10" based on safety and other data was "ultimately a subjective assessment not an objectively verifiable fact" and therefore not actionable as defamation]; *ZL Technologies, Inc. v. Gartner, Inc.* (N.D.Cal. 2010) 709 F.Supp.2d 789, 796-801 [rating the plaintiff in the defendant's lowest ranking, "Niche Player," was subjective opinion not objective

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[8] Budget does not dispute that such a statement would be injurious to Budget's reputation. (See *Shively v. Bozanich*, *supra*, 31 Cal.4th at p. 1242.)

fact]; *Browne v. Avvo Inc.* (W.D.Wash. 2007) 525 F.Supp.2d 1249, 1252 [comparative numerical ratings for attorneys were opinions and not actionable because "a reasonable person would understand that two people looking at the same underlying data could come up with vastly different ratings depending on their subjective views of what is relevant and what is important"]; *Castle Rock Remodeling, LLC v. Better Business Bureau of Greater St. Louis, Inc.* (Mo.App. 2011) 354 S.W.3d 234, 243 [the "BBB's 'C' rating of [the plaintiff] is not sufficiently factual to be susceptible of being proved true or false," and "[a]lthough one may disagree with BBB's evaluation of the underlying objective facts, the rating itself cannot be proved true or false"]; *Better Business Bureau of Metropolitan Houston, Inc. v. John Moore Services, Inc.* (Tex.Ct.App. July 16, 2013) ___ S.W.3d ___, ___ [2013 WL 3716693 at p. 8] ["the 'F' rating itself cannot be defamatory because it is the Bureau's self-described 'opinion' of the quality of [the plaintiff's] services, which lacks a high degree of verifiability"].)

We need not resolve this issue to decide this appeal. Budget made the required showing of a probability of prevailing on part of its cause of action for libel per se (actually, two parts: the licensing noncompliance statement and the grossly misleading advertising statement). Therefore, the trial court properly denied the BBB's special motion to strike that cause of action. (See *Oasis West Realty, LLC v. Goldman*, *supra*, 51 Cal.4th at p. 820; *Mann v. Quality Old Time Service, Inc.*, *supra*, 120 Cal.App.4th at p. 106.)

C. *Unfair Competition*

The BBB argues that Budget "did not produce any evidence, let alone admissible evidence, to support its allegation that the BBB had done anything 'unlawful, unfair, or fraudulent,'" and that Budget "submitted no evidence that the BBB committed any unlawful act or practice, committed pursuant to a business activity that is forbidden by law." The BBB argues that Budget "utterly failed to even plead, let alone prove that the

BBB engaged in any 'unethical, oppressive, unscrupulous or injurious acts to consumers.'"[9]

The UCL """establishes three varieties of unfair competition—[business] acts or practices which are *unlawful, or unfair, or fraudulent*." [Citation.]' [Citation.]" (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 351.) The UCL also prohibits false or misleading advertising. (Bus. & Prof. Code, § 17200.) The scope of the UCL is "'sweeping, embracing "'anything that can properly be called a business practice and that at the same time is forbidden by law.'"' [Citations.]" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; *Bernardo, supra*, at p. 351.)

Budget alleged in its UCL cause of action that the "BBB's actions in publishing false statements about [Budget and] its [other] competitors . . . constitute an unlawful, unfair, or fraudulent business practice and amount to unfair competition under the UCL."[10] Budget's UCL claim is derivative of its cause of action for libel per se. (See *Hawran v. Hixson*, *supra*, 209 Cal.App.4th 256.) The UCL "'borrows' violations from other laws by making them independently actionable as unfair competitive practices. [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143;

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[9] The BBB does not argue that Budget failed to show a reasonable probability of prevailing by not making a sufficient showing that it had suffered injury in fact or lost money or property as a result of the unfair competition. (See *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 690.) Budget submitted a declaration from an individual who had cancelled her contract with Budget because of the statements about Budget on the BBB's website, after reading that "the website said that the 'F' [rating] was due to the fact that Budget Van Lines' advertising was 'grossly misleading' and that it was not [in] compliance with certain laws and regulations." Budget also submitted evidence that it had lost "tens of thousands of dollars in revenue weekly as a result of the BBB's actions."

[10] On appeal, Budget also argues that the BBB's business scheme constitutes unfair competition. The trial court, however, sustained objections to portions of the record cited by Budget as supporting evidence, and Budget does not challenge these evidentiary rulings on appeal.

Arce v. Kaiser Foundation Health Plan, Inc. (2010) 181 Cal.App.4th 471, 486; *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1335.) Because Budget made a sufficient showing of a probability of prevailing on its libel per se claim, Budget made a sufficient showing on its UCL claim. Therefore, the trial court properly denied the BBB's special motion to strike the UCL cause of action.[11]

D. *Injunction and Declaratory Relief*

The BBB contends that issuing the injunction requested by Budget would violate the First Amendment's prohibition against prior restraints. Budget, however, seeks a post-trial permanent injunction, and such an injunction is constitutional. "An order prohibiting a party from making or publishing false statements is a classic type of an unconstitutional prior restraint. . . . [¶] The California Supreme Court recently recognized this fundamental principle, but held the rule does not apply to an order issued after a trial prohibiting the defendant from repeating specific statements found at trial to be defamatory." (*Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1167-1168, italics omitted.) In *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, the case cited by *Evans*, the Supreme Court held that "following a trial at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the

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[11] Citing *Bernardo v. Planned Parenthood, supra*, 115 Cal.App.4th 322, the BBB argues that, because its rating system is not commercial speech, it is absolutely protected by the First Amendment and cannot be the basis for a cause of action for unfair competition. The BBB, however, does not attempt to define what commercial speech is or explain why its rating system and its website were not commercial speech. The BBB quotes an excerpt from the hearing on Budget's special motion to strike where, in response to counsel for the BBB's question whether the trial court had concluded that the Reliability Report is commercial speech, the court replied, "Yes," but the BBB does not explain the significance of this exchange. Because the BBB has not presented a cogent legal argument on this issue, we treat the contention as forfeited. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830; see *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [""""[w]hen an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived""""]; see also Cal. Rules of Court, rule 8.204(a)(1).)

defendant from repeating the statements determined to be defamatory. [Citation.] Such an injunction, issued only following a determination at trial that the enjoined statements are defamatory, does not constitute a prohibited prior restraint of expression." (*Id.* at pp. 1155-1156.) Budget's request for a permanent injunction does not violate the Constitutional ban on prior restraints.

In addition, Budget may seek injunctive relief under its UCL cause of action. (See *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312.) Because Budget made a sufficient showing of a probability of prevailing on its UCL cause of action to defeat the BBB's special motion to strike, Budget made a sufficient showing on its claim for an injunction against the BBB's alleged unfair business practices.[12]

Finally, the BBB contends that Budget's cause of action for declaratory relief fails because Budget failed to allege or prove "a judicial case or controversy." Again, the BBB has not provided any legal argument or authority in support of this contention, which we therefore treat as forfeited. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793; *In re Marriage of Falcone & Fyke*, *supra*, 164 Cal.App.4th at p. 830.)

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[12] Although Budget conceded the first prong, we note that "[a]n injunction is a remedy, not a cause of action," and section 425.16 "does not apply where it is the prayer for an injunction which arises from an act in furtherance of a person's right of petition or free speech." (*Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 162, fn. omitted; see *Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1392 ["the remedy sought does not affect whether the claim is based on protected activity"].)

DISPOSITION

The trial court's order denying defendant's special motion to strike under section 425.16 is affirmed. Budget is to recover its costs on appeal.

SEGAL, J.*

We concur:

PERLUSS, P. J.

WOODS, J.

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.