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9 Thomas Mould, sued herein as  
10 DOE 5 a/k/a benderanddudat

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF SANTA CLARA

13 EAGLE BROADBAND, INC.,  
14 Plaintiff,  
15 v.  
16 DOES 1 through 25, inclusive,  
17 Defendants.

CASE NO.: 1-05-CV050179

DEFENDANT DOE 5'S OPPOSITION TO  
PLAINTIFF'S MOTION TO FILE  
DOCUMENTS UNDER SEAL;  
DECLARATION OF PAUL CLIFFORD

Date: August 8, 2006

Time: 9:00 a.m.

Dept.: 2

Judge: Hon. William J. Elfving

Complaint Filed: October 5, 2005

Trial Date: None Set

Special Motion to Strike Complaint Granted:  
March 7, 2006

1 **INTRODUCTION.**

2 Plaintiff Eagle Broadband (“plaintiff” or “Eagle”) seeks to have this Court permit it to file  
3 documents under seal in opposition to Thomas Mould’s motion for attorneys fees. Plaintiff’s  
4 motion is untimely, fails to establish good cause, and should be denied. Plaintiff is simply  
5 attempting to increase the attorneys fees incurred by Mould and further harass him.  
6

7 **I. PLAINTIFF’S MOTION IS UNTIMELY.**

8 On July 26, 2006, plaintiff filed and served a motion to file documents under seal,  
9 purporting to set the hearing of said motion for August 8, 2006. Code of Civil Procedure § 1005  
10 provides that “all moving and supporting papers shall be served and filed 16 court days before  
11 the hearing.” Plaintiff served said motion and supporting papers by overnight delivery service,  
12 which requires the addition of two calendar days. (C.C.P. § 1005(b).) Plaintiff ignored said  
13 requirement, without an application for order shortening time or consultation with defendant’s  
14 attorney, and filed and served its motion only 9 court days prior to the hearing. Plaintiff’s  
15 motion is therefore untimely and should be denied.  
16

17 **II. PLAINTIFF DOES NOT STATE GOOD CAUSE FOR FILING ITS DOCUMENTS  
UNDER SEAL.**

18 Public policy favors open access to court records. In *NBC Subsidiary, Inc. v. Superior*  
19 *Court* (1999) 20 Cal.4th 1178, 1219, our Supreme Court stated:

20 Public access to civil proceedings serves to (i) demonstrate that justice is meted out  
21 fairly, thereby promoting public confidence in such governmental proceedings; (ii)  
22 provide a means by which citizens scrutinize and check the use and possible abuse of  
judicial power; and (iii) enhance the truth-finding function of the proceeding.

23 [Citation omitted.] Therefore, “[a]s a general rule, ‘ . . . court records are public records,  
24 available to the public in general, including news reporters, unless a specific exception makes  
25 specific records nonpublic.’” (*Gilbert v. National Enquirer* (1996) 43 Cal.App.4th 1135, 1149  
26 [citation omitted].)

27 Plaintiff has failed to satisfy the requirements for filing documents under seal, specifically  
28 that there exists an overriding interest that overcomes the right of public access to the record,

1 that the overriding interest supports sealing the record, that a substantial probability exists that  
2 the overriding interest will be prejudiced if the record is not sealed, and that the proposed sealing  
3 is narrowly tailored. (Cal. Rules of Court, Rule 243.1(d)(1)-(3).)

4 Here, contrary to public policy, plaintiff seeks to seal its memorandum in opposition to  
5 Mould's motion for attorneys fees, portions of a declaration which discuss plaintiff's counsel's  
6 experience, hourly rates, billing practices, the amount which plaintiff's counsel has billed in this  
7 action, the confidentiality agreement entered into by the parties, plaintiff's "counter-offer," and  
8 details of certain telephone conversations regarding the negotiations. Plaintiff states that these  
9 records should be filed under seal "[to honor] a settlement negotiation agreement that requires all  
10 information relevant to these negotiations [sic] be filed under seal and Eagle Broadband will  
11 suffer prejudice if the above mentioned papers are not sealed because it relied on the protections  
12 of this agreement in engaging in good faith settlement negotiations." (Plaintiff's Notice of  
13 Motion, 2:10-13.)

14 First, plaintiff has waived any claim which it may have to the confidentiality of the  
15 information which it seeks to protect, as it has breached the confidentiality agreement by  
16 publicly filing defendant's settlement communications. (See Khachatourian Decl., Exhibits D  
17 and G.)

18 Further, plaintiff misrepresents that the confidentiality agreement covers the information  
19 which plaintiff seeks to have filed under seal. Of the information which plaintiff seeks to seal,  
20 only the confidentiality agreement, the various telephone calls related to the negotiations, and  
21 plaintiff's "counter-offer" were exchanged during the settlement negotiations. In fact, plaintiff  
22 refused to provide the rate and hour information to defendant in the course of the negotiations.<sup>1</sup>  
23 (Khachatourian Fee Motion Opp.Decl., ¶3:15-19; Clifford Decl., ¶ 2.) If the confidentiality  
24 agreement means what plaintiff contends, then why has it openly filed defendant's fee demand  
25 letter which is obviously covered by the agreement? (See Khachatourian Decl., Exhibit D.)  
26

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27 <sup>1</sup> Plaintiff's counsel did provide a vague verbal estimate of the fees and costs which it  
28 had billed. (Clifford Decl., ¶ 2.)

1 Additionally, much of the information which plaintiff seeks to file under seal is irrelevant to  
2 defendant's motion for attorneys fees, such as the settlement discussions themselves.

3 It is unclear why plaintiff's memorandum of points and authorities should be sealed. If  
4 plaintiff truly believed that the information which it seeks to seal was covered by the  
5 confidentiality agreement and that it was "bound" to file it under seal, then why did plaintiff's  
6 attorneys not contact defendant's attorneys and inquire about a stipulation to do so? (Clifford  
7 Decl., ¶ 3.) The answer is because the confidentiality agreement clearly does not so provide and  
8 there is no valid basis for filing the documents under seal.

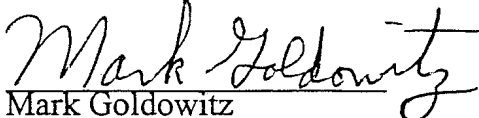
9 Further, plaintiff fails to coherently explain what prejudice it will suffer if the documents  
10 are not filed under seal. Plaintiff's discussion of the prejudice it will suffer is simply  
11 nonsensical. (Plaintiff's memo, 3:7-4:10.)

12 Plaintiff's motion is groundless and should be denied.

13  
14 **CONCLUSION.**

15 Plaintiff's attempt to harass defendant Mould and force him to incur additional,  
16 unnecessary fees is typical of its course in this SLAPP litigation. There is absolutely no reason  
17 for the documents at issue to be filed under seal and plaintiff's untimely motion should be  
18 denied.

19  
20 Dated: August 1, 2006

  
21 Mark Goldowitz  
22 California Anti-SLAPP Project  
23 Counsel for Defendant  
24 Doe 5 a/k/a benderanddundat  
25  
26  
27  
28



PROOF OF SERVICE

1 The undersigned hereby states under the penalty of perjury under the laws of the State of  
2 California:

3 I am employed in Alameda County; I am over the age of eighteen and not a party to the  
4 within cause; and my business address is 2903 Sacramento Street, Berkeley, California 94702.

5 On this day, I caused envelopes to be addressed to:

6 KARINEH KHACHATOURIAN  
7 JEFFREY M. RATINOFF  
8 GORDON & REES LLP  
9 Embarcadero Center West  
10 275 Battery Street, Suite 2000  
11 San Francisco, CA 94111

12 SHELLEY MACK  
13 Fish & Richardson PC  
14 500 Arguello St #500  
15 Redwood City, CA 94063

16 and I enclosed in said envelope a copy of the following document:

17 **DEFENDANT DOE 5'S OPPOSITION TO PLAINTIFF'S MOTION TO FILE**  
18 **DOCUMENTS UNDER SEAL; DECLARATION OF PAUL CLIFFORD**

19 and I deposited said envelope, postage prepaid fully thereon, in a U.S. mail depository, in  
20 Berkeley, California;  
21 all on this day.

22 Dated: August 1, 2006

23 \_\_\_\_\_  
24 Geoffrey King  
25  
26  
27  
28