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

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

17 CASE NO.: 1-05-CV050179

18 DANIEL BERGER'S EX PARTE
19 APPLICATION FOR LEAVE TO FILE
20 SUPPLEMENTAL EVIDENCE AND
21 ARGUMENT IN SUPPORT OF HIS
22 SPECIAL MOTION TO STRIKE THE
23 COMPLAINT AS A MERITLESS SLAPP;
24 SUPPORTING MEMORANDUM

25 Date: August 25, 2006
26 Time: 8:30 a.m.
27 Dept.: 2
28 Judge: Hon. William J. Elfving

Complaint Filed: October 5, 2005
Trial Date: None Set

[Filed in conjunction with declarations of
Daniel Berger and Paul Clifford]

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08/25/06 8:20am
Kiri Torre
Chief Executive Office
By: yvonneh dtscala
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TL \$40.00
OR# 1-05-CV-050179

1 **DANIEL BERGER'S EX PARTE APPLICATION FOR LEAVE TO FILE**
2 **SUPPLEMENTAL EVIDENCE AND ARGUMENT IN SUPPORT OF HIS SPECIAL**
3 **MOTION TO STRIKE THE COMPLAINT AS A MERITLESS SLAPP**

4 In the interests of justice, defendant Berger hereby requests permission to file a short
5 supplemental memorandum of points and authorities and a declaration in support of his motion
6 to strike the Complaint under section 425.16. (See Clifford Decl., ¶ 8, Exhibits E and F.) As
7 discussed in the attached memorandum of points and authorities in support of this application,
8 allowing Berger to file the supplemental memorandum and declaration would advance the stated
9 purposes of section 425.16, prevent plaintiff from unfairly circumventing the purposes of the
10 anti-SLAPP statute due to the failures of an attorney who thereafter abandoned his client, further
11 the public policy that matters be determined on the merits, and promote judicial economy. As
12 the Court has given Eagle the right to file supplemental papers in opposition to Berger's special
13 motion to strike, and Eagle has received detailed information pursuant to the Court's Order
14 granting discovery, Eagle will not suffer any prejudice as a result of Berger filing supplemental
15 papers in support of his special motion to strike.

16 Dated: August 24, 2006

Respectfully submitted,

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19 Paul Clifford
20 Special Counsel for
21 Defendant Doe 3 a/k/a Daniel Berger
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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DANIEL**
2 **BERGER'S EX PARTE APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL**
3 **EVIDENCE AND ARGUMENT**

4 **I. INTRODUCTION AND PROCEDURAL HISTORY.**

5 On or about November 23, 2005, defendant Doe 3, identified as Daniel Berger,
6 filed a special motion to strike under Code of Civil Procedure section 425.16.¹ At that time
7 Berger was represented by attorney Gregory Broiles. After the hearing on Berger's motion, in its
8 Order of March 7, 2006, the Court implicitly found that the anti-SLAPP statute applies to the
9 claims of plaintiff Eagle Broadband, Inc. (Eagle or plaintiff) and that Eagle was a public figure.
10 The Court stated, "... The information posted to the Eagle MB was thus in several aspects
11 correct, but was incorrect with respect to the date of the filing. In this context, Plaintiff will
12 have to provide substantial evidence of actual malice to rebut a reasonable inference that the
13 erroneous posting was the result, not of mistake, but of a desire to mislead or misinform."
(Order [dated March 7, 2006], 6:26-28.)

14 Because defendant Berger, through Broiles, failed to file a sworn declaration that would
15 give the Court guidance as to the context of his post, the Court allowed plaintiff to conduct
16 limited discovery concerning possible actual malice by Berger. (Order, 6:5-14.)

17 Plaintiff eventually served discovery on Berger. However, Broiles did not respond to the
18 discovery and did not notify Berger that discovery had been served. Berger only learned of the
19 discovery when he personally went to Broiles' office to inquire about the status of this case.
20 (Berger Decl., ¶ 6.) Berger subsequently learned from Paul Clifford that plaintiff had filed
21 motions compelling his responses to Eagle's discovery requests. Broiles never notified Berger
22 about that motion either. (Berger Decl., ¶ 8.)

23 Upon learning of the motion and discovery, Berger consulted the California Anti-SLAPP
24 Project (CASP) about assisting him and responded as best he could concerning the motion to
25 compel. (Berger Decl., ¶ 9.) Upon being hired by Berger, CASP promptly responded to the
26 discovery propounded by Eagle. (Berger Decl., ¶¶ 9-10; Clifford Decl., ¶ 4.) In response to
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28 ¹ All statutory references herein are to this Code unless otherwise indicated.

1 Eagle's discovery requests, Berger produced, inter alia, his trading records for Eagle stock,
2 communications between him and the Securities and Exchange Commission, communications
3 between him and EDGAR Online, and communications between him and Vickers Stock
4 Research Corporation. Mr. Berger also answered interrogatories which answers, inter alia,
5 provided Eagle with his employment history. (Berger Decl., ¶ 9.) Eagle has not sought any
6 further discovery, including Berger's deposition.² (Clifford Decl., ¶ 4.)

7 Upon review of the file and evidence by CASP, it became apparent that Broiles had failed
8 to raise a valid defense that the defamation claim was barred by the statute of limitations
9 pursuant to section 340(c). Moreover, it also became apparent that a declaration by Berger, the
10 absence of which was one of the factors which led the Court to allow limited discovery, would
11 have clearly shown that plaintiff could not show actual malice, that Berger's post was not an
12 unfair business act, and thus the Complaint would have to be dismissed on these bases as well.
13 (Clifford Decl., ¶ 7.)

14 Berger now seeks permission to file a brief supplemental memorandum and his
15 declaration to supplement the arguments and evidence which his former attorney already
16 submitted in support of his special motion to strike. (Clifford Decl., ¶ 8, Exhibits E and F.)
17

18 **II. BERGER'S APPLICATION TO FILE SUPPLEMENTAL PAPERS IN SUPPORT** 19 **OF HIS SPECIAL MOTION TO STRIKE SHOULD BE GRANTED.**

20 **A. The California Anti-SLAPP Law Was Enacted to Protect the Fundamental** 21 **Constitutional Rights of Petition and Speech and Is To Be Construed Broadly.**

22 SLAPPs have been defined as "civil lawsuits . . . aimed at preventing citizens from
23 exercising their political rights or punishing those who have done so." (*Monterey Plaza Hotel v.*
24 *Hotel Employees & Restaurant Employees Local 483* (1999) 69 Cal.App.4th 1057, 1063

25 ² Eagle withdrew its motions to compel discovery responses and for sanctions
26 from Berger, but preserved its request for sanctions as to Berger's former counsel. At the
27 hearing of said request, the Honorable Judge Socrates Manoukian of this Court, learning
28 of the abandonment of Berger by his former attorney, awarded sanctions only against
Broiles and referred the matter to the State Bar for investigation with respect to Broiles.
(Clifford Decl., ¶¶ 5-6, Exhibits C__ and D.)

1 [citation omitted].) In 1992, in response to the “disturbing increase” in meritless lawsuits
2 brought “to chill the valid exercise of the constitutional rights of freedom of speech and petition
3 for the redress of grievances,” the Legislature overwhelmingly enacted Code of Civil Procedure
4 section 425.16, California’s anti-SLAPP law. (Stats. 1992, ch. 726, § 2.) The anti-SLAPP law
5 is intended to provide a mechanism for “a fast and inexpensive unmasking and dismissal of
6 SLAPP’s.” (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823, disapproved on another
7 point in *Equilon v. Superior Court* (2002) 29 Cal.4th 53, 68, fn. 5.)

8 In 1997, the Legislature unanimously amended the statute to expressly state that it “shall
9 be construed broadly.” (Stats. 1997, ch. 271, §1; amending § 425.16(a).)³ In 1999, the
10 California Supreme Court underscored this requirement of broad construction, directing that
11 courts, “whenever possible, should interpret the First Amendment and section 425.16 in a
12 manner ‘favorable to the exercise of freedom of speech, not to its curtailment.’” (*Briggs v. Eden*
13 *Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1119, quoting *Bradbury v. Superior*
14 *Court* (1996) 49 Cal.App.4th 1170, 1176.)

15 **B. Allowing Berger to File Supplemental Authorities and Evidence Will Promote**
16 **the Intent of Section 425.16.**

17 In its March 7, 2006, Order, this Court determined that the anti-SLAPP statute applies to
18 plaintiff’s claims. The Court indicated that additional information would have been helpful for it
19 to determine whether plaintiff showed a probability of prevailing on its claims against Berger,
20 specifically a declaration. The Court stated:

21 The only significant issue is Doe 3’s malice. Doe 3 is the principal, if not the only, source
22 of evidence concerning such matters as whether he/she knew the statement published was
23 false, or published the statement in reckless disregard of the truth. Doe 3 has not filed a
24 declaration explaining the circumstances under which he/she wrote and published the
25 post.

26 ³ Subdivision (a) of section 425.16 provides: “The Legislature finds and declares
27 that there has been a disturbing increase in lawsuits brought primarily to chill the valid
28 exercise of the constitutional rights of freedom of speech. The Legislature finds and
declares that it is in the public interest to encourage continued participation in matters of
public significance, and this participation should not be chilled through abuse of the
judicial process. *To this end, this section shall be construed broadly.*” (Emphasis added.)

1 (Order, 3/7/06, 7:1-5.) That is why the Court allowed plaintiff to conduct discovery into the
2 issue of malice on Berger's part.

3 In this case, allowing defendant Berger to file a supplemental memorandum and
4 supporting declaration would effectuate the Legislature's intent that the anti-SLAPP statute be
5 construed broadly so as to promote First Amendment rights. If Berger's previous attorney had
6 presented a statute of limitation defense, and/or provided a declaration demonstrating that Berger
7 did not post his message with actual malice, defendant Berger would likely have had the
8 Complaint against him dismissed as it was against defendant Doe 5 a/k/a Thomas Mould.
9 Plaintiff should not be allowed to prolong this meritless SLAPP against Berger merely because
10 Berger was abandoned by his previous attorney.

11 The proposed supplemental memorandum and declaration primarily address the issue of
12 malice, and an important defense not recognized by Berger's former counsel – that the statute of
13 limitations bars plaintiff's defamation claim. The memorandum also briefly discusses plaintiff's
14 failure to show that it suffered any damages from Berger's post, that the post was not
15 defamatory, and that Berger did not commit any unfair business act or practice.

16 Further, there is a strong public policy favoring disposition on the merits. (See *Maynard*
17 *v. Brandon* (2005) 36 Cal.4th 795, 798.)

18 The broad construction mandated for the anti-SLAPP statute and the intention of the
19 Legislature of providing a means by which SLAPPs can be identified and dismissed at an early
20 stage in the litigation, as well as the public policy of determining cases on their merits, require
21 that Berger be allowed to supplement the documentation supporting his special motion to strike.

22 **C. Eagle Will Not Suffer Any Prejudice from the Granting of Berger's**
23 **Application.**

24 Berger promptly responded to the discovery requests which Eagle propounded, after he
25 retained CASP. (Berger Decl., ¶ 10; Clifford Decl., ¶ 4.) The declaration which Berger seeks to
26 file simply summarizes and explains the information which was produced to Eagle by way of
27 said discovery, as well as explains his state of mind in making the post and the context of his
28 post. (Berger Decl., ¶ 12.) Eagle has had sufficient time to examine said responses and conduct

1 further investigation based on said information, and has not sought any further discovery,
2 including Berger's deposition. (Clifford Decl., ¶ 4.)

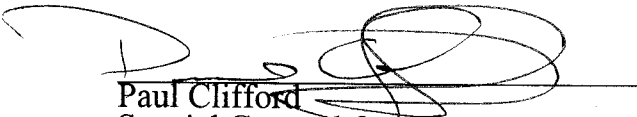
3 In its March 7, 2006, Order, the Court gave Eagle permission to file supplemental papers
4 in opposition to Berger's special motion to strike, so Eagle can address Berger's supplemental
5 papers in its supplemental opposition. (Order, dated March 7, 2006, p. 9.) Therefore, Eagle will
6 not suffer any prejudice as a result of Berger's supplemental filings in support of his special
7 motion to strike.

8
9 **III. CONCLUSION.**

10 If defendant Berger's former attorney submitted this supplemental evidence and
11 argument, this SLAPP would likely have been dismissed. Berger's moving, reply and
12 supplemental papers show that the anti-SLAPP statute applies to plaintiff's claims and that
13 plaintiff cannot prevail on its claims against him, and that his motion should be granted. It is in
14 the interest of the furtherance of justice and the effectuation of the Legislature's intent in
15 enacting the anti-SLAPP statute that Berger be given leave to file his declaration and
16 supplemental memorandum in support of his special motion to strike plaintiff's Complaint as a
17 meritless SLAPP.

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19 Dated: August 24, 2006

Respectfully submitted,

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22 Paul Clifford
23 Special Counsel for
24 Defendant Doe 3 a/k/a "upanddown100"
25 a/k/a Daniel Berger
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