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8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF SANTA CLARA  
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11 EAGLE BROADBAND, INC.,	)	CASE NO. 1-05-CV-050179
	)	
12 Plaintiff,	)	<b>MEMORANDUM OF POINTS AND</b>
	)	<b>AUTHORITIES IN SUPPORT OF</b>
13 vs.	)	<b>PLAINTIFF EAGLE BROADBAND'S</b>
	)	<b>MOTION FOR AN ORDER RECALLING</b>
14 DOES 1 through 25, inclusive,	)	<b>AND QUASHING, OR IN THE</b>
	)	<b>ALTERNATIVE, STAYING THE WRIT</b>
15 Defendants.	)	<b>OF EXECUTION OBTAINED BY</b>
	)	<b>DEFENDANT THOMAS MOULD</b>
16	)	
17	)	Date: January 5, 2007
	)	Time: 9:00 a.m.
18	)	Dept: 2
	)	Judge: Hon. William J. Elfving
19	)	
20	)	Complaint filed: October 5, 2005

21 **I. INTRODUCTION.**

22 This motion is not about the dispute between Plaintiff Eagle Broadband, Inc. ("Eagle")  
23 and Defendant Thomas Mould ("Mould"). This motion is about protecting the rights of a third  
24 party creditor that have been violated by Mould's willful failure to provide notice of his intent to  
25 levy property that is already subject to a superior security interest. In that regard, an order  
26 recalling and quashing, or in the alternative, staying the Writ Of Execution obtained by Mould is  
27 necessary to afford Dutchess Private Equities ("Dutchess") the opportunity to assert its rights that  
28 are expressly provided for by California law.

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If the Court does issue such an order and restore the equities, Mould will have effectively subverted well-established rules governing secured creditors and improperly interfered with the security agreement between Eagle and Dutchess. Accordingly, Eagle respectfully requests that the Court grant this motion and allow Dutchess sufficient time to appear and take the necessary steps to protect its superior security interest.

**II. PROCEDURAL AND FACTUAL BACKGROUND.**

**A. The Underlying Action.**

Eagle is a leading provider of advanced broadband, Internet Protocol and communications technology and services that create new revenue opportunities for broadband providers and enhance communications for government, military and enterprise customers. Defendants have used the Eagle message board on Yahoo! Finance to deliberately engage in relentless misinformation campaigns in an effort to denigrate Eagle's business in order to reap profits for themselves.

In short, Eagle has fallen victim to organized, Internet-based stock market manipulation schemes, which have included, among other activities, posting false and misleading information about the financial health and corporate activities of Eagle on Yahoo! Finance's widely visited financial message board in order to deflate the price of Eagle's stock and reap illegal gains from short sales. The Yahoo! Finance message board for Eagle contains many specific incidences of postings of false information that have had a negative impact on Eagle's business. These defamatory posts are attributable to several posters on the message board known only by their Yahoo! user names, including, DOE 5 a/k/a "benderanddundat" a/k/a Mould.<sup>1</sup>

**B. Mould's Anti-SLAPP Motion and Motion for Attorney's Fees.**

On November 16, 2005, Mould filed and served a special motion to strike, pursuant Code of Civil Procedure section 425.16, the anti-SLAPP statute ("Anti-SLAPP motion"). Ultimately, the parties agreed on an extended briefing schedule and set the hearing for February 23, 2006. In

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<sup>1</sup> In February 2006, Eagle Broadband amended its complaint to add Thomas Mould, the true name of DOE 5.

1 conjunction with its opposition to the Anti-SLAPP motion. On March 7, 2006, the Court issued  
2 its order, granted Mould's Anti-SLAPP motion ("March 7 Order").

3 On May 4, 2006, Eagle Broadband filed its notice of appeal of the March 7 Order. As of  
4 the time of this Application, the parties have completed briefing and are awaiting the assignment  
5 of a date for oral argument.

6 On or about July 3, 2006, as a prevailing defendant on an Anti-SLAPP motion, Mould  
7 filed a motion for attorney's fees purportedly incurred in conjunction with filing his motion  
8 pursuant to Cal. Civ. Proc. Code § 425.16(c). On August 9, 2006, the Court issued an order  
9 granting Mould's motion for attorney's fees in the amount of \$66,476.68 ("August 9 Order").

10 On October 6, 2006, Eagle Broadband filed its notice of appeal of the August 9 Order.  
11 As of the time of this Motion, the briefing process has just commenced.

12 **C. Mould Obtains A Writ Of Execution And Attempts To Improperly Levy**  
13 **Eagle's Accounts Receivables And Monies Due And Owing.**

14 As a result of Eagle's pending appeals, there is a high probability that the Court of  
15 Appeals will reverse or modify one or both of these orders thereby negating Mould's right to  
16 seek attorney's fees. In that regard, during discussions to resolve the underlying matter, one of  
17 the attorneys representing Mould represented that his office would notify Eagle before taking  
18 any steps to collect attorney's fees on behalf of Mould. Declaration of Jeffrey M. Ratinoff in  
19 Support of Eagle's Motion for an Order Recalling and Quashing the Writ of Execution Obtained  
20 by Mould ("Ratinoff Decl."), ¶ 10.

21 Notwithstanding this representation and unbeknownst to Eagle, in late November 2006  
22 and early December 2006, counsel for Mould began to aggressively pursue collection activities.  
23 Ratinoff Decl., ¶ 11. On or about November 30, 2006, Mould obtained a Writ of Execution from  
24 the Clerk of the Court. Ratinoff Decl., Exhs. A-B. On or about December 11, 2006, Mould  
25 served Eagle, and not its attorneys, with two Notices of Levy under Writ of Execution ("Notices  
26 of Levy"). Ratinoff Decl., ¶ 11, Exhs. A-B. The Notices of Levy stated that Mould sought to  
27 levy from Hewlett-Packard Co. ("HP") and Calpine Corporation ("Calpine")

28 ANY & ALL accounts, accounts receivable, rights to payment of  
money, contingent rights, contract rights, deposit accounts, monies

1 due from third parties, due in favor of and for the benefit of  
2 judgment debtor EAGLE BROADBAND, INC., or any of the  
3 judgment debtor's business associations, partners, assignees, and  
4 other persons acting on their behalf to satisfy the sum specified in  
5 the accompanying Writ of Execution.

6 Ratinoff Decl., Exhs. A-B.

7 In Mould's haste to levy Eagle's accounts receivable and rights of payment of money,  
8 however, Mould failed to conduct a UCC search to determine whether any superior security  
9 interests existed at that time. *See* Ratinoff Decl., ¶¶ 12-13. Had Mould either contacted Eagle or  
10 conducted a simple UCC search, which only takes minutes through Westlaw, it would have  
11 "discovered" that Dutchess had a superior security interest. *See* Ratinoff Decl., ¶¶ 7-8; Exhs. C-  
12 E. In fact, the collateral subject to the underlying security agreement between Eagle and  
13 Dutchess included exactly the same contract rights and general intangibles, such as Eagle's  
14 accounts receivable and rights of payment from third parties, that Mould sought to Levy. *See*  
15 Ratinoff Decl., Exh. C.

16 As a result of Mould's failure to conduct any due diligence, Mould made no effort to  
17 notify Dutchess of his intent to levy monies due and owing to Eagle. *See* Ratinoff Decl., ¶¶ 12-  
18 16. Consequently, Dutchess had no notice and no time to exercise its rights as a third party  
19 secured creditor prior to the December 26, 2006 deadline for HP and Calpine to respond to the  
20 Notices of Levy.<sup>2</sup> *Id.*

#### 21 **D. The Court Grants A Temporary Stay.**

22 With a December 26, 2006 deadline for HP and Calpine to respond to the Notices of  
23 Levy and the fact that counsel for Eagle did not learn of the Notices until right before the long  
24 holiday weekend, Eagle had no other choice than to seek emergency relief from the Court. On  
25 December 26, 2006, due to the Honorable William J. Elfving's unavailability, the Honorable  
26 Kevin E. McKenney heard Eagle's Ex Parte Application. Ratinoff Decl., ¶ 14. Since Judge  
27 Elfving was more familiar with underlying case, Judge McKenney believed that Eagle's  
28 Application should ultimately heard in Department 2. *Id.* As such, Judge McKenney issued an

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<sup>2</sup> Normally, a third party garnishee has ten days to respond to a notice of levy. *See* Cal. Civ. Proc. Code § 701.030(a). However, where such a notice is mailed, the third party has an additional five days to respond. *See* Cal. Civ. Proc. Code § 684.120(b)(1).

1 order temporarily staying the Writ of Execution through January 5, 2007 and set a hearing in  
2 Department 2 for 9:00 a.m. on that same day. *See* Ratinoff Decl., Exh. F. Since Dutchess still  
3 has not received adequate notice and had a fair opportunity to assert its rights as a superior third  
4 party creditor, it is still necessary that the Court quash and recall the Writ, or at minimum extend  
5 the stay until such a time that Dutchess is able to appear.

6 **III. LEGAL ARGUMENT.**

7 **A. The Court Has The Inherent Power To Recall And Quash An Improper Writ**  
8 **Of Execution.**

9 In general, courts have inherent equity, supervisory, and administrative powers to control  
10 litigation before them. Cal. Civ. Proc. Code § 128. In particular, courts have the inherent power  
11 to recall and quash a writ of execution improperly issued. 8 Witkin, Cal. Proc. 4th (1997);  
12 *Enforcing Judgments*, § 154, p. 176; *see also Evans v. Sup. Ct.*, 20 Cal.2d 186, 188 (1942)  
13 (courts have the power and it is their duty to recall a writ of execution that is improvidently  
14 issued). Here, ample grounds exist for the Court to recall and quash Mould's Writ of Execution  
15 and resulting Notices of Levy.<sup>3</sup>

16 The portion of the Code of Civil Procedure governing the enforcement of judgments (the  
17 "EJL") makes clear that a writ of execution should not interfere with a superior security interest  
18 to the judgment creditor's levy. Pursuant to Code of Civil Procedure section 701.040(a), "if  
19 property levied upon is subject to a security interest that attached prior to levy, the property or  
20 obligation is subject to enforcement of the security interest without regard to the levy." The  
21 drafters' comments to this section also reflect that a judgment creditor's efforts to enforce a  
22 judgment under EJL should not disrupt a prior security arrangement between a judgment debtor  
23 and a third party creditor with a superior security interest:

24 an execution levy should not affect the right of a prior secured  
25 party to resort to collateral and should not disrupt ongoing business  
relations between account debtors and secured parties in the

26 <sup>3</sup> An order recalling a writ of execution is appropriate where the levying officer has yet to receive  
27 the property in question. An order quashing the levy may be made where the officer has already  
28 levied on such property. At the time of this Motion, it is unclear whether the Santa Clara County  
Sherriff has received any monies from either Calpine or HP. Thus, in the interest of caution, any  
order issued by this Court should both recall and quash the writ of execution.

1 absence of a determination or an admission that the judgment  
2 creditor's lien has priority.

3 Leg. Com. Comment--Senate to Cal. Civ. Proc. Code § 701.040(a). However, a third party  
4 creditor's right to freely enforce its security interest is limited to where property in question is not  
5 yet in the custody of the levying officer. Cal. Civ. Proc. Code § 701.040(a).

6 The EJM also includes special procedures for determining the claims of third party  
7 creditors. See Cal. Civ. Proc. Code §§ 720.010 *et seq.* These procedures provide a "quick and  
8 effectual remedy" to third parties that have a security interest on the levied property superior to  
9 that of the judgment creditor. See *Rubin v. Barasch*, 275 Cal.App.2d 835, 836-37(1969)  
10 (discussing former statute); see also Cal. Civ. Proc. Code § 720.210(a). However, the third party  
11 claim procedures are limited to where the levying officer has taken possession of property  
12 subject to a superior security interest, but has yet to turn it over to the judgment creditor. See  
13 Cal. Civ. Proc. Code §§ 720.210(a), 720.220.

14 If a judgment creditor fails to notify a superior secured creditor of its intent to levy  
15 property subject to that security interest, it therefore follows that the secured creditor cannot: (1)  
16 take advantage of its right to freely enforce that interest prior to the levying officer taking  
17 possession of that property; or (2) after the levying officer takes possession, take advantage of  
18 summary proceedings provided by the EJM. In the present case, Mould knowingly - or at least  
19 with reckless disregard for his obligations as a judgment creditor - failed to conduct a basic UCC  
20 search to determine whether a superior secured creditor had an interest in any accounts  
21 receivable or monies owed to Eagle. Due to Mould's willful failure to conduct a UCC search,  
22 Dutchess has now been deprived of the opportunity to exercise its rights under EJM.

23 It is well established that a secured creditor, who pursuant to UCC-1 financing statement  
24 had a perfected security interest in debtor's accounts receivable and monies owing, has by  
25 operation of law a perfected security interest superior to a subsequent levy obtained by a  
26 judgment creditor on such property. See *Cassel v. Kolb*, 72 Cal.App.4th 568 (1999). The very  
27 purpose of a UCC-1 filing is to "place[] third parties on notice that another party may have a  
28 security interest in the collateral *and that further inquiry is required.*" *Cassel v. Kolb*, 72

1 Cal.App.4th 568, 575 (1999) (emphasis added); *see also* Cal. U. Com. Code, § 9402; In that  
2 regard, the filing of a UCC-1 financing statement places parties *on constructive notice* that there  
3 is a lien in effect on the subject property. *T & O Mobile Homes, Inc. v. United Cal. Bank*, 40  
4 Cal. 3d 441, 448 (1985); *accord Recorded Picture Co. Ltd. v. Nelson Entm't, Inc.*, 53 Cal. App.  
5 4th 350, 365-66 (1997) (“[n]o doubt, the recording of the UCC-1” puts a creditor “on  
6 constructive notice of the information contained in those documents”).

7 Here, Mould's failure to conduct a simple UCC-1 search and notify Dutchess of Mould's  
8 Writ of Execution is inexcusable. Not only did Mould have constructive notice of Dutchess'  
9 superior security interest, but had *actual notice* of the lien through prior briefing in this and  
10 through various public sources that he has relied upon such as the SEC and Yahoo! Finance. *See*  
11 *Ratinoff Decl.*, ¶¶ 6-8, 12-16. Indeed, Eagle even pointed out Dutchess' \$5.5 Million loan to in a  
12 brief filed in August 2006. *Id.* at ¶ 7. Thus, Mould's turning a blind-eye to the existence of  
13 Dutchess' UCC-1 can only be described as a purposeful attempt to prejudice the interests of a  
14 secured creditor with superior interests and to frustrate Eagle's relationship with that creditor.  
15 Clearly, an order quashing and recalling the Writ of Execution is necessary under the  
16 circumstance since Mould recklessly, if not purposefully, failed to provide notice to Dutchess of  
17 the Writ and the Notices of Levies. Without such an order from this Court, Mould's Notices of  
18 Levy will inflict irreparable harm by interfering with the security agreement between Eagle and  
19 Dutchess. *See id.* at ¶ 18. Such an order is also necessary to allow Dutchess to exercise its rights  
20 as a third party creditor under the EJM. *See id.* Thus, the Court should immediately quash and  
21 recall the Writ of Execution to restore the equities in this instance.

22 **B. A Stay Of Mould's Writ Of Execution Is Also Appropriate.**

23 To the extent that the Court is not inclined to quash and recall Mould's Writ of Execution,  
24 the Court should stay the Writ for at least 30 days and order the levying officer to retain any  
25 monies obtained from HP or Calpine so that Dutchess has sufficient time to take the necessary  
26 steps to protect its superior security interest in Eagle's accounts receivable and monies owed to  
27 Eagle by Calpine and HP. Under Code of Civil Procedure Section 128, the trial court has the  
28 “broad power to grant a continuance or stay proceedings.” *Ehrhart & Associates, Inc. v. Sup.*

1 Ct., 185 Cal.App.2d 1, 4-6 (1960); see also *Calif. Cotton Credit Corp. v. Sup. Ct.*, 127 Cal.App.  
2 472, 475 (1932) (courts "have inherent discretionary power to grant a stay of execution"). Thus,  
3 for the same reasons stated above, the Court should grant a stay of Mould's Writ of Execution.

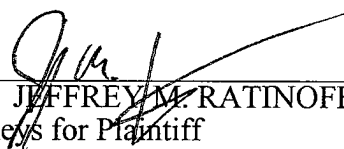
4 **IV. CONCLUSION.**

5 For the reasons set forth in herein, Plaintiff respectfully requests that this Court grant this  
6 Motion and issue an order quashing and recalling Mould's Writ of Execution. If the Court is not  
7 inclined to grant such an order, Plaintiff respectfully requests that this Court stay the Writ of  
8 Execution until Dutchess is able to take the necessary steps to preserve its third party rights as a  
9 superior secured creditor.

10 Dated: December 27, 2006

BUCHANAN INGERSOLL & ROONEY LLP

11  
12 By

  
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