

1 KARINEH KHACHATOURIAN (SBN 202634)
JEFFREY M. RATINOFF (SBN 197241)
2 BUCHANAN INGERSOLL & ROONEY LLP
333 Twin Dolphin Dr., Suite 700
3 Redwood Shores, CA 94065
Telephone: (650) 622-2300
4 Facsimile: (650) 622-2499

5 Attorneys For Plaintiff
EAGLE BROADBAND, INC.
6
7

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SANTA CLARA

11 EAGLE BROADBAND, INC.,) CASE NO. 1-05-CV-050179
12)
13 Plaintiff,)
14 vs.)
15 DOES 1 through 25, inclusive,)
16 Defendants.)
17)
18)
19)
20)

Date: January 5, 2007
Time: 10:00 a.m.
Dept: 2
Judge: Hon. William J. Elfving
Complaint filed: October 5, 2005

21
22
23
24
25
26
27
28

1 **I. INTRODUCTION.**

2 The opposition filed by Defendant Thomas Mould ("Mould") does not justify his
3 improper attempt to subvert the interests of an unrepresented third party creditor. In that regard,
4 Mould makes no apologies for the suspect timing of his collection acts, which were clearly
5 designed to frustrate any attempt by Dutchess Private Equities ("Dutchess") to assert its rights as
6 a superior third party creditor.

7 Now that Plaintiff Eagle Broadband, Inc. ("Eagle") has been able to inform Dutchess of
8 Mould's attempted end-around of its superior rights, Dutchess fully intends to assert its rights
9 that are expressly provided for by California law. All Dutchess needs from this Court is
10 sufficient equitable relief so that it can retain California counsel and file a third party claim to the
11 property subject to Mould's Writ of Execution and notices of levy to HP and Calpine.

12 An order quashing and recalling, or at least staying, the writs of execution issued to
13 Mould, is especially appropriate in light of Mould's intent to file a motion for an order of
14 assignment. By seeking such an order from the Court, Mould has effectively conceded he has a
15 subordinate interest to the property subject to the writs of execution and notices of levy served on
16 Hewlett-Packard ("HP") and Calpine. Accordingly, Eagle respectfully requests that the Court
17 grant this motion so that Dutchess not only has a reasonable amount of time to retain counsel and
18 file a third party claim, but also time to file an opposition to Mould's motion for an order of
19 assignment.

20 **II. LEGAL ARGUMENT.**

21 **A. It Is Undisputed That The Court Has The Inherent Power To Recall And**
22 **Quash, And/Or Stay An Improper Writ Of Execution.**

23 Mould does not dispute that under the Court's inherent equity, supervisory, and
24 administrative powers, the Court may recall and quash the writs of execution. *See* Cal. Civ.
25 Proc. Code § 128; *see also Evans v. Sup. Ct.*, 20 Cal.2d 186, 188 (1942); 8 Witkin, Cal. Proc. 4th
26 (1997); *Enforcing Judgments*, § 154, p. 176. Mould also does not dispute that the Court has the
27 inherent equitable power to stay the writs of execution so that Dutchess has sufficient time to
28 take the necessary steps to protect its superior security interest in any monies owed by Calpine

1 and HP to Eagle. *See Ehrhart & Associates, Inc. v. Sup. Ct.*, 185 Cal.App.2d 1, 4-6 (1960); *see*
2 *also Calif. Cotton Credit Corp. v. Sup. Ct.*, 127 Cal.App. 472, 475 (1932). Thus, there is no
3 question that the Court has the authority to grant the relief requested by Eagle.

4 **B. Eagle Has Standing To Seek An Order Recalling, Quashing And/Or Staying**
5 **the Writs of Execution.**

6 Mould argues that Eagle does not have standing to assert the rights of a third party
7 creditor or seek the requested relief. Mould's position is untenable for at least three reasons.

8 First, Eagle is not attempting to assert the rights of a third party creditor under Code of
9 Civil Procedure Section 720.010 et seq. Rather, Eagle is simply seeking an order that preserves
10 the status quo and rectifies Mould's willful failure to notify Dutchess of the writs of execution
11 and notices of levy. As discussed above, the Court's power to quash, recall and stay the writs of
12 execution is one of equity. It would be unjust to deny a third party the reasonable opportunity to
13 obtain counsel and assert its rights under Section 720.010 et seq. where the third party was not
14 given proper notice - particularly where the failure to provide notice was willful.

15 Second, Eagle has standing via privity of contract with Dutchess. Under the security
16 agreement between Dutchess and Eagle, Dutchess has a lien on monies owed to Eagle by third
17 parties. Mould has attempted to improperly interfere with that agreement by obtaining a
18 subordinate lien and attempting to levy that same property without regard to Dutchess' superior
19 interest. Since Mould only provided Eagle with notice, it would be remiss for Eagle to not seek
20 an order that would allow Dutchess to take the appropriate steps to assert its statutory rights over
21 monies due and owing that are subject to the superior lien created by the Security Agreement. In
22 fact, Eagle is contractually bound to notify Dutchess and allow it an opportunity to intervene.
23 Declaration of Jeffrey Adams in Support of Eagle's Motion for an Order Recalling and Quashing,
24 or in the Alternative, Staying the Writ of Execution Obtained by Defendant Thomas Mould
25 ("Adams Decl."), ¶ 2.

26 Lastly, while Eagle has cited to authority authorizing the Court to hear Eagle's motion,
27 Mould cites to no contrary statutory authority or case law that precludes Eagle from obtaining
28 the requested relief. Therefore, the Court should disregard Mould's meritless standing argument.

1 **C. Mould Concedes That A Stay Of His Writs Of Execution Is Appropriate.**

2 Mould has recently made several tacit admissions Dutchess has a superior lien on the
3 property subject to his writs of execution. Mould did not deny that Dutchess had a superior
4 interest when Eagle raised this issue at the December 26, 2006 hearing on its ex parte
5 application. *See* Supplemental Declaration of Jeffrey M. Ratinoff in Support of Eagle's Motion
6 for an Order Recalling and Quashing, or in the Alternative, Staying the Writ of Execution
7 Obtained by Defendant Thomas Mould ("Supp. Ratinoff Decl."), Exh. C. Likewise, Mould's
8 opposition to this motion does not dispute Dutchess' superior interest.

9 Perhaps the most striking admission is Mould's expressed intent to file a motion for an
10 assignment order. *See* Supp. Ratinoff Decl., ¶¶ 7-9, Exhs. A-B. By seeking such an order from
11 the Court, Mould effectively concedes that Dutchess has a superior interest over the property that
12 is subject to Mould's writs of execution and notices of levy and that Mould must obtain an order
13 from this Court establishing priority over that superior interest. *See id.* Mould has also conceded
14 that a stay of his writs of execution pending a ruling on this motion would not prejudice him
15 since he has an admittedly subordinate interest. *See id.*

16 Accordingly, this Court should disregard Mould's frivolous opposition and, at minimum,
17 impose a stay of Mould's writs of execution and notices of levy to maintain the status quo until:
18 (1) Dutchess has a reasonable opportunity to assert its statutory rights as a third party creditor;
19 and (2) Mould's motion for an order of assignment is heard.

20 **D. Because Dutchess Intends To Assert Its Rights As A Superior Creditor, The**
21 **Court Should Provide Dutchess With A Reasonable Opportunity To File A**
22 **Third Party Claim.**

23 Mould argues that since Dutchess has had over 23 days since the service of the writs of
24 execution and notices of levy to appear and has yet to do so, the Court should deny Eagle's
25 motion. Mould's position is absurd given that he *never* provided notice to Dutchess.

26 Furthermore, with the full knowledge that Dutchess is a superior secured creditor, Mould
27 engaged in a series of delay tactics designed to preclude Dutchess from protecting its superior
28 interests. First, Mould chose to serve the writs of execution and notices of levy by mail on only
Eagle, HP and Calpine. Second, Mould served them on December 11, 2006 so that the deadline

1 to respond would be December 26, 2006 - a day where no one would likely be around due to the
2 Christmas and New Years holidays. Third, Eagle did not even receive the writs of execution and
3 notices of levy until December 20, 2006. Adams Decl., ¶ 2. Lastly, Mould failed to serve
4 Eagle's counsel thereby creating a lag-time during a relatively short response period during the
5 holidays. See Supp. Ratinoff Decl., Exh. C at 2:9-3:6, 5:25-7:1.

6 As a result of Mould's obvious delay tactics, Eagle was unable to confirm that Dutchess
7 intended to assert its rights as a superior third party creditor until after the holidays. See Adams
8 Decl., ¶ 3. Once Eagle was able to do so, however, Dutchess made clear that it intended to retain
9 California counsel¹ and file a third party claim pursuant to Code of Civil Procedure Section
10 720.010 et seq. *Id.* Given that Dutchess has now communicated its intent to assert a third party
11 claim and it is undisputed that it has a superior interest in the property subject to Mould's writs of
12 execution and notices of levy, it would be unjust to not quash and recall them, or at minimum,
13 stay the writs of execution and notices of levy.

14 **E. Mould's Failure To Provide Dutchess With Notice Of His Writs Of Execution**
15 **And Notices Of Levy Is Improper And Inexcusable.**

16 Mould claims that he was under no duty to perform a UCC search for potential secured
17 creditors with superior interests and provide such creditors with notice of his writs of execution
18 and notices of levies. Mould's position is contrary to California law.

19 As discussed in detail in Eagle's moving papers, Dutchess' UCC-1 financing statement
20 placed Mould *on constructive notice* that there is a lien in effect on any monies owed by HP and
21 Calpine "*and that further inquiry is required.*" See *Cassel v. Kolb*, 72 Cal.App.4th 568, 575
22 (1999) (emphasis added); accord *T & O Mobile Homes, Inc. v. United Cal. Bank*, 40 Cal. 3d 441,
23 448 (1985); *Recorded Picture Co. Ltd. v. Nelson Entm't, Inc.*, 53 Cal. App. 4th 350, 365-66
24 (1997). Here, Mould's failure to conduct a simple UCC-1 search and notify Dutchess is
25 particularly egregious given that he does not deny that he had *actual notice* of Dutchess' superior
26 security interest.

27 _____
28 ¹ Dutchess' offices are in Massachusetts and New York. Therefore, it will need a reasonable
amount of time to retain local counsel that is familiar with California law.

1 Moreover, as discussed in Eagle's moving papers, the EJM has specific provisions to take
2 into account the rights of superior third party creditors. *See, e.g.*, Cal. Civ. Proc. Code §§
3 701.040(a); 702.010 et seq.; *see also* Cal. Civ. Leg. Com. Comment--Senate to Cal. Civ. Proc.
4 Code § 701.040(a). It would be pointless for the drafters to include such provisions if a
5 judgment debtor were not required to conduct a UCC search and notify any third party with a
6 superior interest in property subject to a judgment lien or levy. If a judgment creditor had no
7 duty to conduct a UCC search and provide secured creditors with notice, it would also effectively
8 render the scheme established by Article 9 of the Commercial Code meaningless. Accordingly,
9 the Court should reject Mould's suggestion that he was under no duty to conduct a UCC search
10 and notify Dutchess of his intent to levy property subject to superior security interest.

11 **F. Mould's Opposition Misconstrues the Record Concerning Eagle's Motion.**

12 Mould's opposition is replete with factual inaccuracies and misrepresentations of the
13 events surrounding its writs of execution and Eagle's motion. Mould's claim that counsel for
14 Eagle indicated that Eagle would not pay the fees award is inaccurate. As an initial matter, for
15 the purposes of this motion, it is irrelevant whether Eagle has paid the attorney's fee award.
16 Even if it were relevant, nowhere in the emails attached to the Clifford Declaration does counsel
17 for Eagle make such a statement regarding the payment of fees.² *See* Clifford Decl., Exh. B.
18 Rather, Eagle was in the middle of discussions with Mould when he breached a prior agreement
19 to notify Eagle before taking any collection action. *See id.*

20 Likewise Mould's assertion that Eagle's motion is an alleged attempt to harass Mould
21 and forced him to incur further attorney's fees is simply not supported by the record. *See*
22 Opposition at 4:22-26. It is Mould's flagrant disregard for the rights of a third party creditor that
23 compelled Eagle to intervene. Eagle's ex parte application and subsequent motion to quash and
24 recall could have been avoided had Mould simply adhered to the agreement he entered into and
25 provided proper notice to counsel for Eagle and Dutchess. Further, once Eagle learned of

26
27 _____
28 ² By attaching email correspondence between counsel for the parties, counsel for Mould has once again demonstrated its inability to maintain confidential communications concerning settlement discussions.

1 Mould's intent to obtain an order of assignment, Eagle offered to take this motion off-calendar if
2 Mould would stipulate to staying his writs of execution pending a ruling on his motion for such
3 an order. Supp. Ratinoff Decl., Exhs. A-B, ¶¶ 7-9. Mould refused to accept Eagle's proposal
4 *sub silentio*. *Id.*, ¶ 10. Thus, it is Mould's conduct that has caused the parties to incur
5 unnecessary attorney's fees and burdened the Court with a dispute that could have been avoided
6 but for that conduct.

7 **IV. CONCLUSION.**

8 For the reasons set forth in herein, Eagle respectfully requests that this Court grant this
9 Motion and issue an order quashing and recalling Mould's Writ of Execution. If the Court is not
10 inclined to grant such an order, Eagle respectfully requests that this Court stay the Writ of
11 Execution until Dutchess retains counsel and file its third party claim as a superior secured
12 creditor and until the Court rules on Mould's motion for an order of assignment.

13 Dated: January 4, 2007

BUCHANAN INGERSOLL & ROONEY LLP

14
15 By 
16 JEFFREY M. RATINOFF
17 Attorneys for Plaintiff
18 EAGLE BROADBAND, INC.
19
20
21
22
23
24
25
26
27
28