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FILED

FEB 9 - 2007

MARI TORRE
County Executive Officer
Superior Court of CA County of Santa Clara
BY JUDITH CASTILLO DEPUTY

8 Counsel for Defendant
9 Thomas Mould, sued herein as
10 DOE 5 a/k/a benderanddundat

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

VERIFIED OPPOSITION TO THIRD
PARTY CLAIM BY DUTCHESS
PRIVATE EQUITIES, L.P.
(C.C.P. §720.340(a))

Date: 3-1, 2007
Time: 9:00 a.m.
Dept.: 22
Judge: Hon. Kevin J. Murphy

Complaint Filed: October 5, 2005
Trial Date: None Set
Special Motion to Strike Complaint Granted:
March 7, 2006

1 COMES NOW defendant and judgment creditor Thomas Mould (a/k/a Doe 5)
2 (“Judgment Creditor” or “Mould”), who files his Verified Opposition to Third-Party Claim by
3 Dutchess Private Equities, L.P. (“Dutchess”) pursuant to C.C.P. section 720.340(a) as follows:

4 I, Paul Clifford declare,

5 1. I am a member in good standing with the California State Bar and am counsel for
6 the judgment creditor, defendant Doe 5, a/k/a Thomas Mould, in this action. I have personal
7 knowledge of the facts contained in this declaration, unless otherwise indicated. If called upon
8 to testify I am competent to do so. The documents attached to this declaration are true copies of
9 what they purport to be.

10 2. On November 16, 2005, Mould filed a special motion to strike the Complaint as a
11 meritless SLAPP pursuant to California’s anti-SLAPP law, C.C.P. section 425.16. The purpose
12 of a SLAPP is “to interfere with and burden the defendant’s exercise of his or her rights.”
13 (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 652, disapproved on another
14 point in *Equilon Enterprises v. Consumer Cause* (2002) 29 Cal.4th 53, 68, fn. 5.) “The
15 provisions of section 425.16 were designed to provide *an economical and expeditious remedy to*
16 *SLAPP suits.*” (*Wollersheim, supra*, at p. 647, fn. 3 [emphasis added].)

17 3. On August 9, 2006, this Court awarded Judgment Creditor \$66,451.68 in attorneys
18 fees and costs pursuant to C.C.P. section 425.16(c). Attached hereto as Exhibit A is a true copy
19 of said award. The fee-shifting provision is an important part of the anti-SLAPP statute,
20 intended to “adequately compensate the defendant for the expense of responding to a baseless
21 lawsuit” (*Dove Audio, Inc., v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785; *Liu*
22 *v. Moore* (1999) 69 Cal.App.4th 745, 748, 750), to discourage SLAPPs, “by imposing the
23 litigation costs on the party seeking” to chill the exercise of speech or petition rights (*Ketchum v.*
24 *Moses* (2001) 24 Cal.4th 1122, 1131), and to encourage “private representation in SLAPP cases,
25 including situations when a SLAPP defendant is unable to afford fees.” (*Ibid.*) “The statute is
26 broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing
27 defendant for expenses incurred in extricating herself from a baseless lawsuit.” (*Wilkerson v.*
28

1 *Sullivan* (2002) 99 Cal.App.4th 443, 446.)

2 To further this goal, collection of fees awarded to a prevailing defendant is not even
3 stayed by an appeal of the award itself, unless the non-prevailing party posts an undertaking.
4 (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1433-34.) *Dowling* stated that this was
5 necessary to protect SLAPP victims and deter SLAPP litigation. It explained that in enacting the
6 anti-SLAPP law, “the Legislature intended to provide SLAPP defendants an efficient tool to
7 quickly and inexpensively unmask and defeat SLAPP suits.” (*Id.* at p. 1433.) “At the trial court
8 level, that tool is the special motion to strike a SLAPP complaint . . .” (*Ibid.*) The court further
9 explained that immediate enforceability of the fee award was necessary to discourage continued
10 SLAPP litigation at the appellate level:

11 A determined SLAPP plaintiff intent on pursuing the litigation, however, may (as
12 happened here) seek appellate review. We are persuaded the Legislature intended to deter
13 SLAPP litigation not only at the trial court level, but also in the appellate courts in order
14 to protect the proper exercise of First Amendment rights. Requiring a SLAPP plaintiff
15 who appeals from an adverse judgment under the anti-SLAPP statute to give an
undertaking to stay enforcement of the portion of the judgment awarding reasonable
attorneys fees and costs to the prevailing defendant under section 425.16, subdivision (c),
will promote meritorious appeals, and will deter continued SLAPP litigation at the
appellate level.

16 (*Id.* at pp. 1433-34.) *Dowling’s* insistence on immediate enforceability of anti-SLAPP fee
17 awards clearly furthers the Legislature’s intent in providing a means for SLAPPs to be unmasked
18 and dismissed early in the litigation.

19 4. On November 30, 2006, an Abstract of Judgment reflecting Mould’s attorneys fees
20 award was recorded by the Santa Clara County Clerk-Recorder. Attached hereto as Exhibit B is
21 a true copy of said Abstract of Judgment.

22 5. On or about December 11, 2006, Judgment Creditor caused to be served writs of
23 execution on said award on Hewlett Packard Corporation and Calpine Corporation. With
24 interest, the total amount sought pursuant to said writs of execution was \$68,597.62, which
25 includes interest and costs. A true copy of said writ of execution is attached hereto as Exhibit C.

26 6. I am informed and believe that the Santa Clara County Sheriff’s Office has not
27 received any sums pursuant to said writs of execution from either Hewlett Packard Corporation
28

1 or Calpine Corporation. Consequently, Judgment Creditor has not posted an undertaking with
2 the Sheriff's Office, or requested an order restraining the Sheriff's Office from disbursing any
3 funds.

4 7. I am informed and believe that on or about January 26, 2007, in response to said
5 writs of execution, Dutchess Private Equities Fund, L.P. ("Dutchess") filed with the levying
6 officer, the Santa Clara County Sheriff's Office, two Third-Party Claims in regard to said writs
7 of execution, claiming that it has a superior interest in the property levied upon. Attached hereto
8 as Exhibits D and E are true copies of said third-party claims.

9 8. Dutchess claims that it was granted a security interest in said property on or about
10 February 10, 2006, pursuant to a security agreement, securing debts owed to Dutchess by
11 plaintiff and judgment debtor, Eagle Broadband, Inc. ("Eagle"). (See Exhibits D and E hereto.)

12 9. Dutchess claims further that, as of January 3, 2007, it is owed a total of
13 \$4,116,656.07 by plaintiff and judgment debtor Eagle Broadband, Inc., which amount is secured
14 pursuant to its security agreement with Eagle. (See Exhibits D and E attached hereto, p. 4.)

15 10. According to its balance sheet most recently filed with the Securities and
16 Exchange Commission ("SEC"), contained in its SEC Form 10-Q filed on January 16, 2007,
17 Eagle has total assets in the amount of \$19,480,000, nearly five times the amount of allegedly
18 secured debt held by Dutchess. A true copy of said SEC Form 10-Q is attached hereto as Exhibit
19 F. (Exhibit F, p. 4.)

20 11. Also, according to its balance sheet most recently filed with the SEC (Exhibit F
21 hereto, pp. 11-12, note 4), Eagle owed Dutchess only \$3,927,000 as of November 30, 2006. As
22 it appears that Eagle was due to make at least one additional payment of \$250,000 between
23 November 30, 2006, and January 3, 2007, it appears that the amount due from Eagle to Dutchess
24 as of January 3, 2007, should be no more than \$3,677,000. (See Exhibits D and E, Exhibit C
25 attached thereto, p. 1.) It is unclear why Eagle has reported one amount in its sworn SEC filing,
26 while Dutchess states a different amount in its sworn third-party claims.

27 12. Dutchess' claims should be subordinated on the grounds that the debt allegedly
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1 | owed to Dutchess is over-secured, and Dutchess' interest in Eagle's assets should be
2 | subordinated to that of Judgment Creditor.

3 | 13. Civil Code section 3433 provides:

4 | Where a creditor is entitled to resort to each of several funds for the satisfaction of his
5 | claims, and another person has an interest in, or is entitled as a creditor to resort to some,
6 | but not all of them, the latter may require the former to seek satisfaction from those funds
7 | to which the latter has no such claim, so far as it can be done without impairing the right
8 | of the former to complete satisfaction, and without doing injustice to third persons.

9 | Here, Mould claims an interest in only \$68,597.62 of Eagle's assets of \$19,480,000, leaving
10 | approximately \$19,411,403 in assets to which Mould has no claim, from which Dutchess can
11 | satisfy its interest of \$4,116,656.07.¹ Further, no injustice will be done to any third persons
12 | should Mould be permitted to collect the relatively paltry sum which he seeks. Even if Mould
13 | collects what is owed to him, and Dutchess collects what is owed to it, Eagle would still be left
14 | with assets of approximately \$15,294,747, based on its representations in its SEC Form 10-Q.
15 | (See Exhibit F hereto, p. 4.)

16 | 14. Additionally, Dutchess has a security interest in assets in which Mould has no
17 | interest. On October 18, 2006, Mould filed a Notice of Judgment lien with the California
18 | Secretary of State. A true copy of said Notice of Judgment Lien is attached hereto as Exhibit G.
19 | Such lien gives Mould an interest in only accounts receivable, chattel paper, equipment, farm
20 | products, inventory, and negotiable documents of title. (C.C.P. section 697.530.) Dutchess has
21 | a security interest in this same property of which there is more than enough to satisfy both debts,
22 | but also in Eagle's motor vehicles, trucks, tanks, boats, ships, fixtures, partnership interests,
23 | licenses, customer lists, goodwill, trademarks, service marks, trade styles, trade names, patents,
24 | patent applications, copyrights, all of Eagle's documents, files, records, business papers, and
25 | computer programs, which are not subject to Mould's Judgment Lien. (Exhibits D and E hereto,

26 | ¹ As discussed above, there is a discrepancy in what Eagle has reported to the SEC
27 | as being owed to Dutchess and that which Dutchess claims it is owed by way of its third-
28 | party claims. Nonetheless, even if the higher sum claimed by Dutchess is correct, after
Mould obtains his \$68,597.62, the value of Eagle's remaining assets will still be nearly
five times that which Dutchess claims it is owed.

1 Exhibit A attached thereto, pp. 1-3; see C.C.P. section 697.530.) In addition to the security
2 agreement with Eagle, the promissory note between Dutchess and Eagle states that the debt shall
3 also be secured by a security agreement with Eagle's CEO David Micek as well. (Exhibits D
4 and E attached hereto, Exhibit C thereto, p. 13, Article 21.)

5 15. The principle set forth in Civil Code section 3433 is known as "marshaling assets"
6 and is discussed in *Shedoudy v. Beverly Surgical Supply Company* (1980) 100 Cal.App.3d 730,
7 733 [citations omitted], in which the court states:

8 Marshaling is an equitable doctrine developed historically and traditionally used to
9 prevent a junior lienholder with a security interest in a single property from being
10 squeezed out by a senior lienholder with a security interest not only in that property, but
11 in one or more additional properties . . . The doctrine requires the senior lienholder to first
12 resort to assets free of the junior lien to avoid the inequity which would result from the
13 unnecessary elimination of the junior lienholder's security with the increased likelihood
14 the junior creditor will be unable to satisfy its claim. We decide the equitable powers of
15 the court are properly used to remove the security interest of a senior lienholder even in
16 the absence of a pending foreclosure by that creditor where necessary to permit a
17 judgment creditor as junior claimant to satisfy its judgment when in doing so, no risk of
18 loss is imposed on the senior creditor.

19 Even if Mould is permitted to collect the sum which he is owed from Eagle from the property in
20 which both he and Dutchess have an interest, there is other property to which Mould has no
21 claim which secures the debt to Dutchess.

22 16. In addition, C.C.P. section 697.590(f) provides in pertinent part:

23 A judgment lien that has attached to personal property and that is also subordinate under
24 subdivision (b) to a security interest in the same personal property is subordinate to the
25 security interest only to the extent that the security interest secures advances made before
26 the judgment lien attached or within 45 days thereafter or made without knowledge of the
27 judgment lien . . .

28 Consequently, Mould's interest in Eagle's property is subordinate to Dutchess only as to a
maximum of \$4,116,656.07; there remains more than \$19,000,000 in Eagle's assets to which
Mould's claims are not subordinate to Dutchess. Mould is clearly entitled to collect the amounts
owed to him by Eagle, and Dutchess will still be over-secured by approximately \$15,000,000.

17. Further, the obligation incurred by Eagle to Dutchess was fraudulent as to Mould.
Civil Code section 3439.04 provides in pertinent part:

(a) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor,
whether the creditor's claim arose before or after the transfer was made or the obligation

1 was incurred, if the debtor made the transfer or incurred the obligation as follows:
2 (1) With the actual intent to hinder, delay, or defraud any creditor of the Debtor.

3 Among the factors that should be considered in determining such intent are whether before the
4 security agreement was entered into, Eagle had been sued or threatened with suit, whether the
5 transfer to Dutchess was of substantially all of Eagle's assets, whether the value of the
6 consideration received by Eagle was reasonably equivalent to the obligation incurred, and
7 whether the transfer occurred shortly before or shortly after substantial debt was incurred. (Civil
8 Code section 3439.04(b).)

9 Here, Mould filed his special motion to strike in this case on November 16, 2005, which
10 clearly raised the substantial possibility that Eagle would face not only an award of attorneys
11 fees pursuant to C.C.P. section 425.16(c) [award of attorneys fees to a defendant prevailing on a
12 special motion to strike is mandatory], but also a malicious prosecution action should all or any
13 of the defendants' special motions to strike be granted.² Eagle incurred its obligation to
14 Dutchess in February 2006, after all four special motions to strike were filed and Eagle
15 reasonably should have been aware of its potential liabilities resulting from said motions.
16 (Exhibits D and E hereto, p.3, ¶¶ 5-7). Additionally, Dutchess claims that *all* of Eagle's assets
17 were encumbered by way of the obligation Eagle incurred to Dutchess. (Exhibits D and E
18 hereto, Exhibit A attached thereto, pp. 1-3.) Even more glaring evidence of Eagle's intent to
19 hinder or delay creditors from collecting from it, or defraud its creditors is that it encumbered
20 approximately \$19,000,000 in assets to secure an approximately \$4,000,000 obligation.

21 In addition, Eagle reveals its intent to use the Dutchess agreements to thwart collection
22 efforts by its creditors in its recently filed opposition to Mould's motion for an assignment order,
23 claiming that its agreements with Dutchess even prevent it from posting an appeal bond on its
24 appeal of the attorneys fees award, much less paying the fee award. Eagle states: "Eagle

25 ² Special motions to strike were filed against Eagle's Complaint by four
26 defendants. Mould and Richard Williams (Doe 4) filed their motions on November 16,
27 2005. Two other defendants, Does 2 and 3, filed notice of their special motions to strike
28 on or about November 23, 2005, and filed their supporting papers on or about December
9, 2005.

1 Broadband would like nothing more than to either work out some sort of settlement agreement
2 with Mould or post a bond to stay execution of the judgment while its appeal is pending, but it
3 has a secured creditor, and does not have unfettered discretion in these matters . . . Mould's
4 apparent need to air his vendetta against Eagle in the Courts and on the internet does not alter the
5 simple truth that well established creditor-debtor laws precludes the relief Mould is seeking [an
6 assignment order, etc.] because such relief directly impinges upon Dutchess' rights."

7 (Assignment Opp., 1:15-18, 1:28-2:2.)

8 All of the above are evidence of Eagle's motive in entering into the obligation with
9 Dutchess in order to prevent any creditor which might obtain a judgment against it from
10 collecting. If Dutchess' and Eagle's argument is accepted, no judgment creditor of Eagle will be
11 able to collect on any judgment so long as Dutchess' alleged security interest in all of Eagle's
12 assets is effective.

13 18. Judgment Creditor Thomas Mould therefore moves this Court for an order
14 determining the validity of the third-party claims by Dutchess, that the obligation incurred by
15 Eagle to Dutchess was fraudulent as to Mould, that Judgment Creditor is entitled to levy and
16 execute in and to the subject property and/or any other property in which Dutchess claims a
17 security interest, that any interest of Dutchess shall be deemed junior and subordinate to that of
18 Judgment Creditor, and for a proper disposition of the property that is the subject of the claim in
19 accordance with C.C.P. section 720.310.

20 I declare under penalty of perjury under the laws of the state of California that the
21 foregoing is true and correct. Executed on February 9, 2007, at Berkeley, California.

22 Dated: February 9, 2007

23
24 
25 Paul Clifford
26 Counsel for Defendant Thomas Mould
27 (Doe 5 a/k/a "benderanddundat")
28