

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Gregory A. Broiles (State Bar No. 229384)
The Law Office of Gregory A. Broiles
1625 The Alameda, Suite 101
San Jose, CA 95126
(408) 834-8511
(408) 907-8900 facsimile

Attorney for Defendants Doe 2 and Doe 3

ENDORSED

2006 FEB 16 PM 3:37

KIRI TORRE, CEO
SUPERIOR COURT OF CA.
CO. OF SANTA CLARA
BY Yvonne Halford DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

EAGLE BROADBAND, INC.,
Plaintiff,
vs.
DOES 1 through 25,
Defendants

Case No.: 1-05-CV-050179
REPLY TO PLAINTIFF'S OPPOSITION
TO DEFENDANTS' MOTION TO
DISMISS PURSUANT TO C.C.P.
§425.16
Date: February 23, 2006
Time: 9:00 AM
Dept: 2
Judge: Hon. William J. Elfving

INTRODUCTION

The plaintiff in this case seeks to distract the investing public and the court from the simplest and most direct explanation for a decline in the price of their shares: a lack of faith in the company's long-term prospects for growth – or even viability as an organization, together with the company's consistent pattern of issuing additional shares, thereby deflating the value of existing shares.

1 Plaintiffs have provided declarations which suggest – on the basis of
2 simple speculation – that defendants engaged in a scheme to convey misleading
3 information to Eagle Broadband investors. Plaintiffs further suggest that those
4 shareholders then prematurely sold their Eagle Broadband shares as a result
5 of the misinformation, causing a decrease in the value of Eagle Broadband’s
6 shares.

7 What the Plaintiff’s theory cannot explain, however, is why company
8 insiders – if they believed the share price to be artificially depressed below a
9 fair value – would then choose to sell shares, rather than purchase additional
10 shares at a bargain price.

11 Plaintiff further asks the court to ignore existing precedent concerning
12 the treatment of Internet message boards as public forums for First
13 Amendment and C.C.P. §425.16 purposes without even attempting to
14 distinguish the current factual situation from those considered in the appellate
15 caselaw.

16 Plaintiff further, in a virtual admission that they cannot at this time
17 produce evidence sufficient to survive a Motion to Strike pursuant to C.C.P.
18 §425.16, asks the court for six additional months of intrusive discovery against
19 the defendants, who have already been wrongfully subjected to
20 embarrassment, harassment, and trouble as a result of Plaintiff’s groundless
21 lawsuit.

22 DISCUSSION

23 Plaintiff, an Internet company experiencing a depressed stock price
24 following the boom-and-bust of the dotcom economy, have repeatedly sold
25 additional shares to investors in order to raise funds and meet their financial
26 obligations. Broiles decl. at ¶¶3-18. Plaintiff’s own prospectus documents
27 indicate that:

28 “We have a history of operating losses and may never achieve profitability.

1 From inception through May 31, 2005, we have incurred an accumulated deficit in the
2 amount of \$175,879,000. For the quarter ended May 31, 2005, we incurred losses from
3 operations in the amount of \$4,980,000. We anticipate that we will incur losses from
4 operations for the foreseeable future. Our future revenues may never exceed operating
5 expenses, thereby making the continued viability of our Company dependent upon raising
6 additional capital.

7 As we have not generated positive cash flow from operations for the past three fiscal
8 years, our ability to continue operations is dependent on our ability to either begin to
9 generate positive cash flow from operations or our ability to raise capital from outside
10 sources.

11 We have not generated positive cash flow from operations during the last three fiscal
12 years and have relied on external sources of capital to fund operations. At May 31, 2005,
13 we had approximately \$2,876,000 in cash, cash equivalents and securities available for
14 sale, and a working capital deficit of approximately \$4,767,000. Our net cash used by
15 operations for the nine-months ended May 31, 2005, was approximately \$9,200,000.

16 In August 2005, the Company privately placed the sale of up to 30 million shares of its
17 common stock for net proceeds of up to \$3,766,500. The Company will utilize these
18 proceeds along with its cash and cash equivalents to fund operations. We may need to
19 raise additional capital to fund working capital in the third quarter of fiscal 2006. If
20 shareholder approval for the issuance of the 14,875,000 shares is not obtained, we will
21 only receive net proceeds of \$1,898,943 and we may need to raise additional capital to
22 meet working capital requirements in the second quarter of fiscal 2006.” Broiles Decl. at
23 ¶19.

24 Plaintiffs seek desperately to blame outside forces for the lack of interest
25 investors have shown in their company, and this lawsuit is an extension of that
26 strategy.

27 Plaintiff’s expert Dierdre Flaherty explains, in effect, that she is aware of
28 a scheme known as “Short and Distort” (Flaherty Decl. at ¶11); and that she
does not have enough information to say whether or not the plaintiff in this
case has been the victim of such a scheme. Flaherty Decl. at ¶28. If the
declarant cannot even conclude that a scheme or pattern of wrongful activity
has taken place, then she certainly cannot conclude that the defendants in this
case participated in such a scheme.

Plaintiff’s “Short and Distort” theory appears especially unlikely in light
of the behavior of H. Dean Cubley, Plaintiff’s Chief Technology Officer, who

1 presumably would be immune to distortions and misinformation spread on an
2 Internet message board about his own company. On February 11, 2005 – in
3 the middle of the period identified by Plaintiff’s expert Flaherty as the period
4 where “EAG lost in excess of 46% of its value” (Flaherty Decl. at Exhibit F) – the
5 Plaintiff’s CTO (and board member) Cubley chose to exercise a stock option to
6 purchase one million shares of EAG at .41 per share, and then immediately
7 sold those shares at .421 per share, leading to a net realization of \$11,000 on
8 the disposition of the 1,000,000 shares purchased. Broiles Decl. at ¶

9 It is difficult to imagine a person who would have been less susceptible to
10 a “short and distort” scheme than Mr. Cubley, a person with intimate
11 knowledge of both the operational and technical facts of Plaintiff’s business;
12 and it is further difficult to imagine that Mr. Cubley entered into that
13 transaction with the belief that EAG’s stock price was likely to rise above the
14 then-current price of \$.42 per share any time in the near future.

15 Further, in August of 2005, the company itself sought to sell 30 million
16 additional shares of stock at a target price of \$.135 per share; and offered
17 options to a placement agent as an incentive with a strike price of \$.24 per
18 share. Broiles Decl. at ¶20.

19 Plaintiffs ask the Court to allow them to go on a fishing expedition
20 looking for market manipulators who might or might not exist; while their own
21 actions and the actions of their insiders suggest that Plaintiffs saw the market
22 prices as opportune times to sell EAG stock, rather than purchase it. The
23 rational response to an artificial depression in the stock price would have been
24 for insiders and the company to engage in a plan to purchase and hold the
25 cheap stock, waiting for the inevitable return to a fair price.

26 Plaintiffs have offered no explanation to this Court why the Court of
27 Appeal’s ruling in Ampex v. Cargle (2005) 128 Cal.App.4th 1569, to the effect
28 that Yahoo! Finance Message Boards are public forums, should be ignored.

1 Plaintiffs have offered no facts nor analysis to explain why the Eagle
2 Broadband message board – which, in the words of Plaintiff’s own expert,
3 enjoys a “significantly higher” (Flaherty Decl. at ¶14) volume of postings than
4 boards for what she believes are comparable companies – should not be
5 considered a public forum for C.C.P. §425.16 purposes, especially where the
6 message board considered in Ampex had a considerably lower volume of
7 postings, the company at issue had a considerably smaller number of
8 outstanding shares, and had issued fewer press releases.

9 In opposing an anti-SLAPP motion, the plaintiff cannot rely on allegations
10 in the complaint, but must bring forth evidence that would be admissible at
11 trial. Ampex v. Cargle (2005) 128 Cal.App.4th 1569, 1576; HMS Capital, Inc. v.
12 Lawyers Title Co. (2004) 118 Cal.App.4th 204, 212. In order to satisfy that
13 burden, Plaintiff has provided an affidavit from a CPA explaining that she is
14 aware of a stock manipulation technique but cannot tell if it was employed
15 against the Plaintiff; and an affidavit from an employee of Plaintiff whose
16 information about the conduct and mental state of the Defendants was
17 apparently gained “from reviewing the Complaint filed in this action”. Reynolds
18 Decl. at ¶¶ 10, 11, 16. Those affidavits are wholly insufficient to satisfy
19 Plaintiff’s burden to bring forth admissible evidence establishing a prima facie
20 case against Defendants Doe 2 and Doe 3; indeed, the affidavits supplied by
21 Plaintiff fall significantly short of even supporting the allegations made in the
22 complaint.

23 **CONCLUSION**

24 Defendants Doe 2 and Doe 3 have shown that were sued by Plaintiff
25 because they exercised their right to free speech in connection with a public
26 issue. According to C.C.P. §425.16, Plaintiffs had an obligation to produce
27 admissible evidence which would show they have a probability of prevailing on
28

1 Gregory A. Broiles (State Bar No. 229384)
2 The Law Office of Gregory A. Broiles
3 1625 The Alameda, Suite 101
4 San Jose, CA 95126
5 (408) 834-8511
6 (408) 907-8900 facsimile

7 Attorney for Defendants Doe 2 and Doe 3

ENDORSED

2006 FEB 16 PM 3: 37

KIRI TORRE, CEO
SUPERIOR COURT OF CA.
CO. OF SANTA CLARA
BY *Yvonne Halford* DEPUTY

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF SANTA CLARA

11
12 EAGLE BROADBAND, INC.,

13 Plaintiff,

14 vs.

15 DOES 1 through 25,

16 Defendants

Case No.: 1-05-CV-050179

DECLARATION OF GREGORY A.
BROILES IN SUPPORT OF REPLY TO
PLAINTIFF'S OPPOSITION

Date: February 23, 2006

Time: 9:00 AM

Dept: 2

Judge: Hon. William J. Elfving

17
18
19
20 I, Gregory A. Broiles, declare under penalty of perjury that the following is true
21 and correct:

22 1. I am an attorney licensed to practice in the State of California and am
23 the attorney of record for Defendants Doe 2 "team_3339" and Doe 3
24 "upanddown100" in the above-entitled case.

25 2. I have reviewed SEC filings made by Eagle Broadband Inc., plaintiff in
26 this case, made available by the Securities & Exchange Commission via their
27 website.

1 3. According to the Form S-1 filed by the plaintiff with the SEC on August
2 26, 2005, in September 2002, the plaintiff issued \$3 million worth of
3 convertible debt instruments convertible to 15,000,000 shares of common
4 stock.

5 4. According to the Form S-1 filed by the plaintiff with the SEC on August
6 26, 2005, in September 2002 the plaintiff issued 628,947 shares of stock to
7 individuals as payment for professional services rendered.

8 5. According to the Form S-1 filed by the plaintiff with the SEC on August
9 26, 2005, in September 2002 the plaintiff issued 7,371,434 shares of stock to
10 settle "various litigation claims".

11 6. According to the Form S-1 filed by the plaintiff with the SEC on August
12 26, 2005, in July 2003, the plaintiff issued 6,885,203 shares upon conversion
13 of \$1,846,541 in debt.

14 7. According to the Form S-1 filed by the plaintiff with the SEC on August
15 26, 2005, in August 2003 the plaintiff offered \$7,000,000 in convertible debt
16 (realizing proceeds of \$2,866,000) which were convertible to 31,620,049 shares
17 of stock.

18 8. According to the Form S-1 filed by the plaintiff with the SEC on August
19 26, 2005, in September 2003, the plaintiff issued 2,490,466 shares of stock to
20 satisfy debts owed to third parties;

21 9. According to the Form S-1 filed by the plaintiff with the SEC on August
22 26, 2005, in September 2003, the plaintiff issued 820,425 shares of common
23 stock upon the cancellation of a line of credit.

24 10. According to the Form S-1 filed by the plaintiff with the SEC on August
25 26, 2005, in October 2003, the plaintiff issued promissory notes and preferred
26 stock convertible into 29,500,000 shares of common stock.

1 11. According to the Form S-1 filed by the plaintiff with the SEC on August
2 26, 2005, in October 2003, the plaintiff issued 4,756,249 shares pursuant to a
3 merger agreement.

4 12. According to the Form S-1 filed by the plaintiff with the SEC on August
5 26, 2005, in June 2004, the plaintiff entered into an agreement to sell
6 5,360,488 shares of stock, and issued warrants to purchase an additional
7 1,340,022 shares of stock.

8 13. According to the Form S-1 filed by the plaintiff with the SEC on August
9 26, 2005, in October 2004, the plaintiff issued 6,983,806 shares of common
10 stock upon conversion of \$2,500,000 in debt.

11 14. According to the Form S-1 filed by the plaintiff with the SEC on August
12 26, 2005, in December 2004, the plaintiff issued 10,000,000 shares of stock to
13 another company for "debt resolution".

14 15. According to the Form S-1 filed by the plaintiff with the SEC on August
15 26, 2005, in April 2005, the plaintiff issued 1,500,000 shares of stock in
16 settlement of a lawsuit.

17 16. According to the Form S-1 filed by the plaintiff with the SEC on August
18 26, 2005, in June 2005, the plaintiff issued 7,954,085 shares of common stock
19 to former officers and directors pursuant to agreements with those individuals.

20 17. According to the Form S-1 filed by the plaintiff with the SEC on August
21 26, 2005, in August 2005, the plaintiff issued 1,157,895 shares of common
22 stock to an individual pursuant to a settlement agreement.

23 18. According to the Form S-1 filed by the plaintiff with the SEC on August
24 26, 2005, in August 2005, the plaintiff entered into a purchase agreement to
25 sell 30,000,000 shares of common stock at a price of \$.135 per share.

26 19. According to the Form S-1 filed by the plaintiff with the SEC on August
27 26, 2005, in discussing the risk factors associated with an investment in the
28 company, the plaintiff wrote:

1 "We have a history of operating losses and may never achieve
2 profitability.

3 From inception through May 31, 2005, we have incurred an accumulated
4 deficit in the amount of \$175,879,000. For the quarter ended May 31,
5 2005, we incurred losses from operations in the amount of \$4,980,000.
6 We anticipate that we will incur losses from operations for the
7 foreseeable future. Our future revenues may never exceed operating
8 expenses, thereby making the continued viability of our Company
9 dependent upon raising additional capital.

10 As we have not generated positive cash flow from operations for the past
11 three fiscal years, our ability to continue operations is dependent on our
12 ability to either begin to generate positive cash flow from operations or
13 our ability to raise capital from outside sources.


14 We have not generated positive cash flow from operations during the last
15 three fiscal years and have relied on external sources of capital to fund
16 operations. At May 31, 2005, we had approximately \$2,876,000 in cash,
17 cash equivalents and securities available for sale, and a working capital
18 deficit of approximately \$4,767,000. Our net cash used by operations for
19 the nine-months ended May 31, 2005, was approximately \$9,200,000.

20 In August 2005, the Company privately placed the sale of up to 30
21 million shares of its common stock for net proceeds of up to \$3,766,500.
22 The Company will utilize these proceeds along with its cash and cash
23 equivalents to fund operations. We may need to raise additional capital
24 to fund working capital in the third quarter of fiscal 2006. If shareholder
25 approval for the issuance of the 14,875,000 shares is not obtained, we
26 will only receive net proceeds of \$1,898,943 and we may need to raise
27 additional capital to meet working capital requirements in the second
28 quarter of fiscal 2006."

20. According to the Form 4 filed by H. Dean Cubley with the SEC on
February 28, 2005, on February 11, 2005, H. Dean Cubley purchased
1,000,000 shares of the plaintiff's stock at .41 per share and immediately sold
those shares for .421 per share. A copy of that Form 4 is attached as Exhibit A
to this declaration.

1 Dated: February 16, 2006

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

By: 
Gregory A. Broiles
Attorney for Defendants Doe 2 and Doe

FORM 4

[] Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. See Instruction 1(b).

UNITED STATES SECURITIES AND EXCHANGE COMMISSION Washington, D.C. 20549

OMB APPROVAL
OMB Number: 3235-0287
Expires: January 31, 2008
Estimated average burden hours per response... 0.5

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP OF SECURITIES

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934,
Section 17(a) of the Public
Utility Holding Company Act of 1935 or Section 30(f) of the
Investment Company Act of 1940

1. Name and Address of Reporting Person *		2. Issuer Name and Ticker or Trading Symbol		5. Relationship of Reporting Person(s) to Issuer (Check all applicable)	
CUBLEY H DEAN DR (Last) (First) (Middle)		EAGLE BROADBAND INC [EAG]		<input checked="" type="checkbox"/> Director <input type="checkbox"/> 10% Owner <input type="checkbox"/> Officer (give title below) <input type="checkbox"/> Other (specify below)	
101 COURAGEOUS DRIVE (Street)		3. Date of Earliest Transaction (MM/DD/YYYY)			
LEAGUE CITY, TX 77573 (City) (State) (Zip)		2/11/2005			
		4. If Amendment, Date Original Filed (MM/DD/YYYY)		6. Individual or Joint/Group Filing (Check Applicable Line)	
				<input checked="" type="checkbox"/> Form filed by One Reporting Person <input type="checkbox"/> Form filed by More than One Reporting Person	

Table I - Non-Derivative Securities Acquired, Disposed of, or Beneficially Owned

1. Title of Security (Instr. 3)	2. Trans. Date	2A. Deemed Execution Date, if any	3. Trans. Code (Instr. 8)		4. Securities Acquired (A) or Disposed of (D) (Instr. 3, 4 and 5)		5. Amount of Securities Beneficially Owned Following Reported Transaction(s) (Instr. 3 and 4)	6. Ownership Form: Direct (D) or Indirect (I) (Instr. 4)	7. Nature of Indirect Beneficial Ownership (Instr. 4)
			Code	V	Amount	(A) or (D)			
Eagle Broadband Common Stock	2/11/2005		M	(1)	1000000	A	\$0.41 (1)	2117335	D
Eagle Broadband Commonn Stock	2/11/2005		S	(2)	1000000	D	\$0.421	1117335	D

Table II - Derivative Securities Beneficially Owned (e.g. , puts, calls, warrants, options, convertible securities)

1. Title of Derivate Security (Instr. 3)	2. Conversion or Exercise Price of Derivative Security	3. Trans. Date	3A. Deemed Execution Date, if any	4. Trans. Code (Instr. 8)		5. Number of Derivative Securities Acquired (A) or Disposed of (D) (Instr. 3, 4 and 5)	6. Date Exercisable and Expiration Date		7. Title and Amount of Securities Underlying Derivative Security (Instr. 3 and 4)		8. Price of Derivative Security (Instr. 5)	9. Number of derivative Securities Beneficially Owned Following Reported Transaction (s) (Instr. 4)	10. Ownership Form of Derivative Security: Direct (D) or Indirect (I) (Instr. 4)	11. Nature of Indirect Beneficial Ownership (Instr. 4)
				Code	V		(A)	(D)	Date Exercisable	Expiration Date				
Stock Option (right to buy)	\$0.41	2/11/2005		M		1000000	2/17/2004	9/1/2008	Common Stock	1000000	(3)	0	D	

Explanation of Responses:

- (1) These shares of common stock were acquired upon exercise of option from the company's stock optionn plan.
- (2) Sale of common stock acquired upon exercise of stock option prusuant to the stock optionn plan.
- (3) Coersion price is stated in column 2.

Reporting Owners

Reporting Owner Name / Address	Relationships			
	Director	10% Owner	Officer	Other
CUBLEY H DEAN DR 101 COURAGEOUS DRIVE LEAGUE CITY, TX 77573	X			

Signatures

Dr. H. Dean
Cubley

** Signature of Reporting Person

2/28/2005

Date

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

ENDORSED

2006 FEB 16 PM 3:37

KIRI TORRE, CEO
SUPERIOR COURT OF CA.
CO. OF SAN JOSE

Vonne Halford

I, Gregory A. Broiles, the undersigned, hereby declare.

I am over eighteen years of age and not a party to the above action. My business address is 1625 The Alameda, Suite 101, San Jose, California 95126.

On February 16, 2005, I personally served a true copy of:

1. REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO C.C.P. §425.16
2. DECLARATION OF GREGORY A. BROILES IN SUPPORT OF REPLY TO PLAINTIFF'S OPPOSITION

on the interested parties named below, addressed as follows:

Karineh Khachatourian
Gordon & Rees LLP
Embarcadero Center West
275 Battery St, Suite 2000
San Francisco, CA

Mark A. Goldowitz
California Anti-SLAPP Project
2903 Sacramento St.
Berkeley, CA 94702

by overnight FEDEX delivery.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 16, 2006, at San Jose, California.



Gregory A. Broiles