

UCS

FILED

2006 JUN -6 PM 3:43

KIRI TORRE
CHIEF EXEC. OFFICER/CLERK
SUPERIOR COURT OF CA
COUNTY OF SANTA CLARA

[Signature]
L. HA

1 KARINEH KHACHATOURIAN (SBN 202634)
JEFFREY M. RATINOFF (SBN 197241)
2 OLGA RODSTEIN (SBN 209244)
GORDON & REES LLP
3 Embarcadero Center West
275 Battery Street, Suite 2000
4 San Francisco, CA 94111
Telephone: (415) 986-5900
5 Facsimile: (415) 986-8054

6 Attorneys For Plaintiff
EAGLE BROADBAND, INC.

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SANTA CLARA

11 EAGLE BROADBAND, INC.,)
12 Plaintiff,)
13 vs.)
14 DOES 1 through 25, inclusive,)
15 Defendants.)

CASE NO. 1-05-CV-050179
**PLAINTIFF EAGLE BROADBAND,
INC.'S REPLY IN SUPPORT OF ITS
MOTIONS TO COMPEL DOE 2 TO
ATTEND DEPOSITIONS, PRODUCE
DOCUMENTS, RESPOND TO FIRST
SETS OF FORM INTERROGATORIES
AND FIRST SETS OF DOCUMENT
REQUESTS, AND FOR SANCTIONS**

Date: June 9, 2006
Time: 10:00 a.m.
Dept: 7
Judge: Hon. Socrates Manoukian

Complaint filed: October 5, 2005

Gordon & Rees LLP
Embarcadero Center West
275 Battery Street, Suite 2000
San Francisco, CA 94111

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

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

I. INTRODUCTION.

On May 24, 2006, in accordance with this Court's *ex parte* Order shortening time issued earlier that day, Plaintiff Eagle Broadband, Inc. ("Eagle" or "Plaintiff") filed two motions to compel discovery against Defendant DOE 2: (1) Motion to Compel DOE 2 to Attend Depositions and Produce Documents, and for Sanctions; and (2) Motion to Compel DOE 2 to Comply With Eagle's First Sets of Form Interrogatories and First Sets of Document Requests and For Monetary Sanctions.¹ The Court's *Ex Parte* Order set the deadline for DOE 2's opposition to Plaintiff's motions to compel for May 31, 2006, the deadline for Plaintiff's reply briefs for June 6, 2006, and the date of the hearing for June 9, 2006.

Neither an opposition was filed on May 31, 2006 by DOE 2, nor has there been any word from DOE 2 and his counsel, Mr. Gregory Broiles, regarding their collective failure to file an opposition or their proposed course of action in this case. To this day, DOE 2 and his counsel have remained *incommunicado* with the hope that Plaintiff will just drop its case for lack of discovery. In fact, since the date Plaintiff's motions to compel were filed, Plaintiff has uncovered further evidence of DOE 2's *willful* and *purposeful* evasion of discovery and a *willful* and *purposeful* failure to file an opposition – a public declaration by DOE 2 on the Yahoo! Finance Message that he would never provide the requested discovery. Given DOE 2's continuous refusal to comply with discovery and his failure to file any opposition to motions to compel, ample basis exists for this Court to issue an order compelling discovery and awarding sanctions against this Defendant.

II. ARGUMENT.

A. DOE 2's Failure To File Oppositions To Plaintiff's Motions To Compel Constitutes Further Grounds To Grant The Relief Requested Therein.

DOE 2 has evaded Plaintiff's repeated attempts to obtain discovery to ascertain his/her

¹ On June 5, 2006, a day prior to the due date for this reply, Plaintiff's counsel received a telephone call from Paul Clifford of the California Anti-SLAPP Project ("CASP"), counsel for DOE 4 and DOE 5, informing Plaintiff's counsel that CASP may be substituting in as counsel for Defendant DOE 3, a/k/a/ Daniel Berger. As this development raises several separate issues with respect to Defendant Doe 3, a/k/a/ Daniel Berger, Eagle is contemporaneously filing a separate reply in support of its motions to compel against Berger.

1 identity and obtain the necessary discovery to demonstrate that DOE 2 acted with malice in
2 posting false statements regarding Plaintiff. DOE 2's failure to file an opposition alone is
3 grounds for granting the requested relief. *See* 2 R. Weil & I. Brown, *Civ. Pro. Before Trial* §
4 9:105.10 (2006); *Sexton v. Superior Court*, 58 Cal.App.4th 1403, 1411 (1997) (stating that failure
5 to file opposition creates an inference that the motion is meritorious, and that this inference is
6 intended to prevent introduction of legal theories without prior notice to opposing counsel and
7 the court); *see also Certain Underwriters at Lloyd's Of London v. Superior Court*, 56
8 Cal.App.4th 952, 958-959 (noting that failure to file opposition to a motion for summary
9 judgment is an example of an implied admission).

10 Defendant DOE 2's failure to file an opposition to Plaintiff's motions to compel also
11 reinforces the need for the Court to issue an order compelling the immediate compliance with
12 Plaintiff's discovery. Plaintiff continues to suffer prejudice from not being able to proceed with
13 the underlying action against any of the defendants, including DOE 2, remaining in the action.
14 Defendants' Anti-SLAPP motions, which were filed shortly after Plaintiff filed its complaint in
15 November 2005, have brought this case to a standstill. Yahoo! will not produce information
16 concerning the identities of the remaining DOE defendants, including the two DOEs that did not
17 file motions to strike, until after DOE 2's Anti-SLAPP motion has been decided. Eagle has
18 already had to appear once on an order to show cause as to why all defendants have not been
19 identified and served and must appear again in August 2006 if it is unable to serve the remaining
20 DOEs. In the meantime, the defendants, including DOE 2, continue to actively participate and
21 post on the Eagle Message Board without consequence. Thus, any further delay in the
22 proceedings would be fundamentally unfair to Eagle.

23 **B. DOE 2's Express Refusal To Respond To Eagle's Discovery And File An**
24 **Opposition Is Further Evidence That No Substantial Justifications Exist To**
25 **Preclude The Granting Of Plaintiff's Motion And To Award Sanctions.**

26 Since filing Plaintiff's motions to compel, Plaintiff has learned that DOE 2 is well aware
27 of Plaintiff's deposition notice and discovery requests and had no intention of responding to
28 either or even opposing Eagle's motions to compel. On May 26, 2006, two days after Plaintiff
filed its motions to compel, DOE 2 posted a message on the Yahoo! Finance Message Board for

Gordon & Rees LLP
Embarcadero Center West
275 Battery Street, Suite 2000
San Francisco, CA 94111

1 Eagle Broadband under one of his Yahoo! user names, stating:

2 **“Motion to Compel will be... IGNORED!**

3 **F*** OFF EAGLE YOU ARE GETTING NOTHING!”**

4 See Supplemental Declaration of Jeffrey M. Ratinoff in Support of Plaintiff’s Motions to
5 Compel, ¶ 12, Exh. E (emphasis added). This post clearly evidences that DOE 2 and his counsel,
6 Gregory Broiles have engaged in a purposeful and willful campaign to stonewall Plaintiff’s
7 attempts at obtaining discovery and that they have acted without substantial justification. It also
8 makes clear that they will not comply unless this Court intervenes. Thus, the Court should not
9 only grant Plaintiff’s request for the expedited production of discovery, but should also award
10 Plaintiff its reasonable attorney’s fees incurred compelling Broiles and DOE 2 to comply with
11 the discovery obligations.

12 **III. CONCLUSION.**

13 For the reasons set forth above and in Plaintiff’s moving papers, Plaintiff respectfully
14 requests that this Court order DOE 2 through his counsel of record, Gregory Broiles, to: (a) serve
15 responses to Plaintiff’s First Sets of Form Interrogatories and Document Requests, without
16 objections; (b) produce all responsive documents, regardless of whether they are privileged, via
17 personal service within three (3) days of the Court’s order; and (c) appear for deposition within
18 ten (10) days of this Court’s order. In addition, Plaintiff respectfully requests that the Court
19 jointly and severely impose sanctions in the amount of \$11,750.00 (\$5,500.00 for the motion to
20 compel Responses to Eagle’s document requests and interrogatories and \$6250.00 for the motion
21 to compel Berger’s deposition) against Defendants DOE 2 and Daniel Berger and their counsel,
22 Gregory Broiles, for Plaintiff’s reasonable attorney’s fees incurred in conjunction with its
23 motions to compel.

24 Dated: June 6, 2006

GORDON & REES LLP

25
26 By 

OLGA RODSTEIN
Attorneys for Plaintiff
EAGLE BROADBAND, INC.