

No. H030169

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

EAGLE BROADBAND, INC.,
Plaintiff and Respondent,

v.

RICHARD WILLIAMS, a/k/a Doe 4,
Defendant and Appellant.

Appeal from Order of the Santa Clara Superior Court
Case No. 105CV050179
The Honorable William J. Elfving

APPELLANT'S OPENING BRIEF

Mark Goldowitz, No. 96418
Paul Clifford, No. 119015
California Anti-SLAPP Project
2903 Sacramento Street
Berkeley, CA 94702
Phone: (510) 486-9123 x301
Fax: (510) 486-9708

Special Counsel for Appellant
RICHARD WILLIAMS, a/k/a Doe 4

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, Rule 14.5

Eagle Broadband, Inc. v. Richard Williams, a/k/a Doe 4,
H030169

Appellant Richard Williams does not know of any entity or person that must be listed under Rule 14.5(d)(1) or (2).

Mark Goldowitz
California Anti-SLAPP Project
Special Counsel for Appellant Richard Williams, a/k/a Doe 4
Dated: September 21, 2006

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS.	i
TABLE OF CONTENTS.	ii
TABLE OF AUTHORITIES	v
INTRODUCTION.	1
I. STATEMENT OF THE CASE.	2
A. Factual Background.	2
1. Eagle Broadband, Inc.	2
2. Eagle Invites Public Attention.. . . .	2
3. Eagle’s Stock Price Declines Significantly	3
4. Eagle and the Russell 3000 Index.	3
5. The Eagle Yahoo! Finance Message Board.	4
6. Richard Williams.	4
7. Richard Williams’ Post.	5
B. Procedural History.	7
1. Eagle Sues Seven Message Board Posters, Including Williams.	7
2. Williams Files an Anti-SLAPP Motion.	8
3. Eagle Files a Motion to Conduct Discovery.	9
4. The Trial Court Denies Williams’ Anti-SLAPP Motion.	9
C. Statement of Appealability.	10

D.	Standard of Review..	11
II.	ARGUMENT: THE TRIAL COURT IMPROPERLY DENIED APPELLANT WILLIAMS’ SPECIAL MOTION TO STRIKE.	12
A.	Williams Met His Burden of Showing That Section 425.16 Applies to the Complaint.	12
1.	The Anti-SLAPP Statute Was Enacted to Protect the Constitutional Rights of Speech and Petition and Must Be Construed Broadly.	12
a.	Section 425.16 Must Be Construed Broadly.	12
b.	Section 425.16 Sets Forth a Two-Step Analysis.	13
c.	The Scope of Acts Covered by Section 425.16.	14
2.	Messages Posted on an Internet Financial Message Board Website About a Publicly-Traded Corporation, Such as The One Posted by Williams, Are Covered under Subdivision (e)(3) of the Anti-SLAPP Statute.	15
a.	Posts on an Internet Website are Statements Made in a Public Forum.	15
b.	Williams’ Post about Eagle, a Publicly-Traded Corporation, Was Made in Connection with an Issue of Public Interest.	16
3.	The Complaint Is Not Exempt from the Anti-SLAPP Statute Pursuant to Section 425.17(c).	18
B.	Eagle Has Not Shown a Probability of Prevailing on Its Claims Against Williams.	19
1.	The Post by Williams Is Parody Protected by the First Amendment.	20

a.	Parody Is Protected by the First Amendment	20
i.	Baker v. Los Angeles Herald Examiner	21
ii.	San Francisco Bay Guardian v. Superior Court.	22
iii.	Highfields Capital Management L.P. v. Doe	23
b.	Williams’ Post Is a Classic Parody Protected by the First Amendment.	25
2.	Eagle Has Not Shown That Williams’ Post Was an Unlawful, Unfair, or Fraudulent Business Act or Practice Prohibited by Business and Professions Code Sections 17200 et seq.	28
a.	Williams’ Post Is Not a Business Act or Practice or Advertising.	28
b.	Securities Transactions Are Not Covered by Section 17200.	29
c.	Eagle Has Not Shown That It Suffered Any Damage as a Result of Williams’ Post.	30
3.	Eagle Has Not Shown That Williams’ Post Was Actionable Defamation Because It Has Not Shown It Suffered Any Damages as a Result of Said Post.	31
	CONCLUSION	33

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Hustler v. Falwell</i> (1998) 485 U.S. 46.	21
<i>Global Telemedia International v. Doe 1 aka BUSTEDAGAIN40</i> (C.D.Cal 2001) 132 F.Supp.2d 1261.	26
<i>Highfields Capital Management L.P. v. Doe</i> (N.D. Cal. 2005) 385 F.Supp.2d 969.	23,24

STATE CASES

<i>Ampex Corporation v. Cargle</i> (2005) 128 Cal.App.4th 1569.	15,16,17,18
<i>Annette F. v. Sharon S.</i> (2004) 119 Cal.App.4th 1146.	16
<i>Averill v. Superior Court</i> (1996) 42 Cal.App.4th 1170.	31
<i>Baker v. Los Angeles Herald Examiner</i> (1986) 42 Cal.3d 254.	21,26,27
<i>Barnes-Hind, Inc. v. Superior Court</i> (1986) 181 Cal.App.3d 377.	32
<i>Beach v. Harco National Insurance Company</i> (2003) 110 Cal.App.4th 82.	11
<i>Blatty v. New York Times</i> (1986) 42 Cal.3d 1033.	27
<i>Bowen v. Ziasun Technologies</i> (2004) 116 Cal.App.4th 777.	29
<i>Bradbury v. Superior Court</i> (1996) 49 Cal.App.4th 1170.	13
<i>Briggs v. Eden Council for Hope and Opportunity</i> (1999) 19 Cal.4th 1106.	13
<i>Church of Scientology v. Wollersheim</i>	

(1996) 42 Cal.App.4th 628.	30
<i>ComputerXpress v. Jackson</i> (2001) 93 Cal.App.4th 993.	15,16,17,18
<i>Couch v. San Juan Unified School District</i> (1995) 33 Cal.App.4th 1491.	22
<i>Damon v. Ocean Hills Journalism Club</i> (2000) 85 Cal.App.4th 468.	15,16
<i>Equilon Enterprises v. Consumer Cause</i> (2003) 29 Cal.4th 53.	33
<i>Feitelberg v. Credit Suisse First Boston</i> (2005) 134 Cal.App.4th 997.	29
<i>Kasky v. Nike</i> (2002) 27 Cal.4th 939.	28
<i>Leonardini v. Shell Oil</i> (1989) 216 Cal.App.3d 547.	32
<i>Ludwig v. Superior Court</i> (1995) 37 Cal.App.4th 8.	20
<i>Monterey Plaza Hotel v. Hotel Employees and Restaurant Employees Local 483</i> (1999) 69 Cal.App.4th 1057.	11,12
<i>Navellier v. Sletten</i> (2002) 29 Cal.4th 82.	13,18
<i>Navellier v. Sletten</i> (2004) 106 Cal.App.4th 763.	20
<i>Nichols v. Great American Insurance Companies</i> (1985) 169 Cal.App.3d 766.	32
<i>Roberts v. Los Angeles County Bar Association</i> (2003) 105 Cal.App.4th 604.	11
<i>San Francisco Bay Guardian v. Superior Court</i> (1993) 17 Cal.App.4th 655.	22,26,27
<i>Seelig v. Infinity Broadcasting Corp.</i> (2002) 97 Cal.App.4th 798.	11

Wilbanks v. Wolk (2004) 121 Cal.App.4th 883. 13,16

Wilson v. Parker, Covert & Chidester
(2003) 28 Cal.4th 811. 14,20

STATUTES

Business & Professions Code

§ 17200. 28,29

§ 17204. 30

§ 17500. 28

Civil Code § 45a. 32

Code of Civil Procedure section 425.16. 10,11,12,13,14,15,16,18,19,33

RULES OF COURT

California Rules of Court, Rule 14.5. 1,33

MISCELLANEOUS

Webster's New Universal Unabridged Dictionary
(*Second Edition*, 1983, p. 1304). 20

INTRODUCTION.

Eagle Broadband Inc. (Eagle) sued defendant Richard Williams a/k/a Doe 4 a/k/a richwill21 (Williams) for defamation and unfair business practices, based on a parody post Williams made on an Internet financial message board regarding a matter of public interest – the management and operations of Eagle, a publicly-traded corporation. This lawsuit is an effort by a financially-troubled company to silence its critics, and a public relations ploy (filed two weeks before the annual shareholders' meeting) to create an illusion that its management is looking out for shareholders' interests.

As discussed below, Eagle's claims against Williams are subject to the anti-SLAPP law and Eagle did not and cannot show a probability of prevailing on these claims. Therefore, Williams' special motion to strike the Complaint should have been granted. The trial court's order should be reversed and this SLAPP should be dismissed as to Richard Williams.

I. STATEMENT OF THE CASE.

A. Factual Background.

1. Eagle Broadband, Inc.

Eagle bills itself as “a leading provider of advanced broadband, Internet Protocol (IP) and communications technology and services that create new revenue opportunities for broadband providers and enhance communications for government, military and enterprise customers.” (Joint Appendix (JA) 2 ¶ 2.) Eagle is a Texas corporation whose stock is publicly traded on the American Stock Exchange. According to its annual report, for the fiscal year ending August 30, 2004, it had assets of more than \$70 million. (JA 2 ¶ 1, 49 ¶ 2, 80.) Eagle had 205,509,000 shares outstanding as of August 31, 2004. (JA 49 ¶ 2, 80.) As of November 1, 2005, Eagle had 269,170,000 shares outstanding. (JA 49 ¶ 3, 113.) For the fiscal year ending August 31, 2004, Eagle’s annual report lists its total revenue as \$12,490,000. (JA 49 ¶ 2, 65.)

2. Eagle Invites Public Attention.

Eagle, by its own actions, has invited public attention. It maintains a public website on the Internet at www.eaglebroadband.com. (JA 49 ¶ 7, 126.) Eagle regularly distributes press releases promoting the company and its products and posts copies of these press releases on its website. (JA 49 ¶ 8, 128-29.) Eagle’s earnings releases and other information about the

company are available to the public by way of its SEC filings, to which Eagle provides links on its website. (JA 49 ¶ 9, 132.)

3. Eagle's Stock Price Declines Significantly.

According to Yahoo! Finance, Eagle's shares traded at an average price of \$5.28 in January 2000 (on an average daily volume of 229,560), \$3.10 in January 2001 (on an average daily volume of 149,514), \$.55 in January 2002 (on an average daily volume of 227,552), \$.23 in January 2003 (on an average daily volume of 351,885), \$1.69 in January 2004 (on an average daily volume of 6,487,095), and \$.51 in January 2005 (on an average daily volume of 4,330,410). (JA 49 ¶ 6, 122-23.)

Eagle's Vice President of Marketing declared that many shareholders have asked him questions about Eagle's share price. (JA 183 ¶ 5.)

In October 2005, when this lawsuit was filed, Eagle's average price per share was \$.16 (on an average daily volume of 1,772,880). (JA 49 ¶ 6, 122.) At that time, Eagle's stock was trading at the lowest price levels it had seen in over two and one-half years. (JA 122-23.)

4. Eagle and the Russell 3000 Index.

On June 28, 2004, Eagle distributed a press release entitled "Eagle Broadband Added to Russell 3000 Index." Eagle's press release announced that Eagle had been added to the Russell 3000 Index, "which measures the performance of the 3000 largest U.S. companies based on total market

capitalization.” The press release quoted Eagle’s Chairman and CEO as saying that this was “a clear recognition of Eagle Broadband’s continued progress in executing our business plan over the last year.” (JA 49 ¶ 5, 119.)¹

Almost a year later, on June 24, 2005, Eagle was deleted from the Russell 3000 Index. (JA 317 ¶ 3, 325-26, 330-32.)

5. The Eagle Yahoo! Finance Message Board.

As is the case with most publicly-traded companies, there is a Yahoo! Finance message board dedicated to Eagle where members of the general public discuss Eagle’s operations, management, financial prospects, and many other topics. (JA 50 ¶ 10, 134-35, 284-85 ¶ 7.) According to Eagle, there were over 500,000 messages a year posted on the Yahoo! Finance message board dedicated to Eagle during the period between November 1, 2003, and October 2005. (JA 5 ¶ 15(c).) This amounts to an average of approximately 1370 messages per day.

6. Richard Williams.

Richard Williams was a long-term investor in Eagle who did not stand to profit from any decline in Eagle’s share price. To the contrary – his interest was in seeing the price increase. (JA 284 ¶ 5.) He became

¹ Oddly enough, Eagle claimed below that “it has never been listed on the Russell 3000 Index Fund.” (JA 172:26-27, citing 185 ¶ 9.) This puzzling assertion is contradicted not only by Eagle’s own June 28, 2004, press release, but also by Russell’s website. (JA 119, 317 ¶ 3, 325-26.)

interested in Eagle in October 2003, and ultimately bought its stock because he believed it had potential to grow and succeed in a still-emerging market. (*Ibid.*) He read selected SEC filings, press releases and other information provided by Eagle on its website, as well as news reports about the company. (JA 284 ¶ 6.) He also began reading the Yahoo! message board for Eagle in October 2003, and periodically posted messages there. (JA 284 ¶ 7.) Williams never sold short Eagle's stock, nor did he collaborate with others to do so, as Eagle alleges in its Complaint. Indeed, he *lost* \$12,724.25 because of the decline in Eagle's stock price. (JA 284 ¶ 5.)

Williams did not work for any competitor of Eagle and did not post his message to sell goods and services. (JA 283-84 ¶¶ 3-4, 7.) At the time of his post, Williams was a construction inspector for the installation of fiber optic networks. His job was to insure that networks were installed in accordance with a company's specifications, as well as to document the installation work. (JA 283-84 ¶ 3.) When this lawsuit was filed, Williams was in Iraq acting as a site manager for camp construction for international police trainers and was also consulting on the refurbishment of the main Iraqi police headquarters in Fallujah. (JA 284 ¶ 4.)

7. Richard Williams' Post.

On June 10, 2005, Richard Williams read a message on the Eagle message board that indicated that Eagle was being "deleted" from

something. (JA 285 ¶ 9, 323.) The message included a link to the Russell-Mellon website, specifically to an article indicating which companies Russell intended to delete from its 3000 Index. Eagle was one of the companies to be deleted. (JA 285 ¶ 9, 325-26.) Williams then visited Eagle's website and located the press release which Eagle issued on June 28, 2004, when it was first listed in the Russell 3000 Index. He posted that press release on the Eagle message board, under the title "Remember this golden oldie?" (JA 285 ¶ 10, 334.)

Williams then used Eagle's June 28, 2004, press release as a template to write his parody press release, titled "Press release," announcing that Eagle had been deleted from the Russell 3000, which he posted about 10 minutes after posting Eagle's June 2004 press release:

LEAGUE CITY, Texas -- June 10, 2005 -- Eagle Broadband, Inc. (AMEX: EAG), a leading provider of broadband and communications technology and services, announced today that the company has been deleted from the Russell 3000 Index which measures the performance of the 3000 largest U.S. companies based on total market capitalization.

"We are very not very [sic] pleased to be deleted from the Russell 3000, which we consider a clear recognition of Eagle Broadband's continued failures in executing our business plan over the last year," stated Dave Micek, Chairman and CEO of Eagle Broadband. "Deletion from the index is a reflection of our continued stagnation, worsening financials and decreased market capitalization. The listing is also an indication of further customer rejection of Eagle's technology and services, the indifference of our employees and our continued focus on eroding shareholder value."

(JA 13, 285-86 ¶¶ 10-12.) Williams posted his parody press release as a reply to his companion post – titled “Remember this golden oldie?” – containing Eagle’s June 28, 2004, announcement that it had been added to the Russell 3000 Index. (JA 286 ¶ 12.)

Williams’ parody was intended to convey his negative opinion about Eagle’s management, operations, and financial prospects in a darkly humorous way. (See JA 13, 285-86 ¶¶ 11-12.)

B. Procedural History.

1. Eagle Sues Seven Message Board Posters, Including Williams.

Eagle filed its Complaint, alleging causes of action for unfair business practices and defamation, on October 5, 2005, two weeks before its annual shareholders’ meeting. (JA 1-11, 440.) It named as defendants seven posters who used specific screen names, including richwill21, Williams’ screen name. (JA 2-3 ¶¶ 4-10.) It alleged that Williams and the other defendants were part of a stock manipulation scheme to “short and distort,” by illegal short selling of the company’s stock and then posting negative statements about the company to drive down the stock price. (JA 5-6 ¶¶ 13-16, 9 ¶ 33, 214-15 ¶¶ 10-12.)

The Complaint alleges that Williams’ post was a “fabricated press release” which had the “look and feel” of an official company press release, caused Eagle damages, and is actionable. (JA 5 ¶ 16; 9-10 ¶¶ 33, 35-36.)

Although its share price was already in a more than two-year downward spiral, Eagle blames Williams' single post (out of hundreds of thousands of messages during this period) for negatively affecting its share price, causing it a "loss to its business reputation and good will" and other unspecified damages. (JA 5 ¶ 16; 10-11 ¶¶ 36, 40, 44.)

On October 25, 2005, Eagle applied ex parte and obtained permission to serve a subpoena on Yahoo! to discover the true identities of richwill21 and six other defendants. (JA 142-43.) Eagle then served said subpoena on Yahoo! (JA 137-41.)

2. Williams Files an Anti-SLAPP Motion.

On November 16, 2005, Williams filed a special motion to strike the Complaint. (JA 36-145.) The motion demonstrated that Williams' post was protected by the California anti-SLAPP law as speech about an issue of public interest and predicted that Eagle would not be able to show a probability of prevailing on its claims. (JA 38-47.) On January 20, 2006, Eagle filed a 17-page opposition, which asserted that the anti-SLAPP law did not apply and that Eagle could show a likelihood of prevailing on its claims. (JA 162-81.) On February 15, 2006, Williams filed his reply, which showed again that his post was protected by the anti-SLAPP law. (JA 271:10-273:5.) Williams also demonstrated that Eagle had not shown a probability of prevailing on its claims because the post was parody

protected by the First Amendment and for other reasons. (JA 273:6-280:23.)

3. Eagle Files a Motion to Conduct Discovery.

On January 20, 2006, Eagle also filed a motion to permit discovery against four defendants, including Williams, seeking a six-month continuance of the hearing on the anti-SLAPP motions. (JA 160-61, especially ¶ 5.) On February 9, 2006, Williams filed his opposition to that motion, arguing that Eagle had not shown good cause to proceed with any discovery against him. (JA 247- 57.) On February 15, 2006, Eagle filed its reply. (JA 258-65.)

4. The Trial Court Denies Williams' Anti-SLAPP Motion.

On February 23, 2006, the trial court held a hearing on these motions. (Reporter's Transcript, 2/23/06.) On March 7, 2006, it denied Williams' special motion to strike the Complaint as a meritless SLAPP and denied Eagle's motion to conduct discovery as to Williams. (JA 484-96.)

Regarding Eagle's motion for discovery, the trial court stated that the "only significant issue is whether, in the context presented by [Williams], the Court can conclude that the average reader, as a matter of law, would recognize the post as a parody," and ruled that Williams' "financial and stock trading records are not relevant to the issue." (JA 490:22-25.)

With regard to Williams' special motion to strike, the trial court found that Williams had met his burden to show that Eagle's Complaint against him arose from activity protected by the anti-SLAPP law. (JA 492:18 – 493:9.) The trial court then stated that although Williams may have intended his post to be a parody, it could not be said that as a matter of law, the average reader would have recognized it as a parody. (JA 495:7-8.) The trial court also found that Eagle had shown, through the declarations of Deirdre Flaherty and Frederick Reynolds, "that Eagle's stock value and business suffered from [Williams'] fake press release and other false and misleading messages that were posted on the Eagle MB from January 1, 2005, through October 31, 2005." (JA 495:9-11, 494:24-28.)

On May 8, 2006, Williams timely filed his notice of appeal of the trial court's denial of his special motion to strike. (JA 497-512.)

C. Statement of Appealability.

An order denying a special motion to strike brought pursuant to Code of Civil Procedure² section 425.16 is an appealable order pursuant to sections 904.1, subdivision (a)(13), and 425.16, subdivision (I) (formerly subd. (j)).

² Subsequent statutory references herein are to this Code unless otherwise indicated.

D. Standard of Review.

The denial of an anti-SLAPP motion is reviewed *de novo*. (*Roberts v. Los Angeles County Bar Association* (2003) 105 Cal.App.4th 604, 614.)

“Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are legal questions which we review independently on appeal.” (*Beach v. Harco National Insurance Company* (2003) 110 Cal.App.4th 82, 90, quoting *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807; see also *Monterey Plaza Hotel v. Hotel Employees and Restaurant Employees Local 483* (1999) 69 Cal.App.4th 1057, 1064 [“an appellate court independently reviews the entire record to determine whether the plaintiff has made a sufficient prima facie case . . .”].)

II. ARGUMENT: THE TRIAL COURT IMPROPERLY DENIED APPELLANT WILLIAMS' SPECIAL MOTION TO STRIKE.

The trial court's denial of Williams' special motion to strike was improper because the anti-SLAPP statute applies to Eagle's claims and Eagle failed to show that its claims against Williams have any merit, as discussed below.

A. Williams Met His Burden of Showing That Section 425.16 Applies to the Complaint.

1. The Anti-SLAPP Statute Was Enacted to Protect the Constitutional Rights of Speech and Petition and Must Be Construed Broadly.

a. Section 425.16 Must Be Construed Broadly.

SLAPPs have been defined as “civil lawsuits . . . aimed at preventing citizens from exercising their political rights or punishing those who have done so.” (*Monterey Plaza Hotel, supra*, 69 Cal.App.4th at p. 1063 [citation omitted].)

In 1992, in response to the “disturbing increase” in meritless lawsuits brought “to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances,” the Legislature overwhelmingly enacted Code of Civil Procedure section 425.16, California's anti-SLAPP law. (Stats. 1992, ch. 726, § 2.) In 1997, the

Legislature unanimously amended the statute to expressly state that it “shall be construed broadly.” (Stats. 1997, ch. 271, §1; amending § 425.16(a).)³

In 1999, the California Supreme Court underscored this requirement of broad construction, directing that courts, “whenever possible, should interpret the First Amendment and section 425.16 in a manner ‘favorable to the exercise of freedom of speech, not to its curtailment.’” (*Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1119, quoting *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1170, 1176.) Since *Briggs*, our Supreme Court has issued 14 additional opinions arising from the anti-SLAPP law.

b. Section 425.16 Sets Forth a Two-Step Analysis.

Section 425.16 sets forth a two-step process for evaluating a special motion to strike. First, the defendant must make a prima facie showing that the plaintiff’s cause of action arises from an act of the defendant in furtherance of the right of petition and/or the right of free speech in connection with a public issue. (§ 425.16, subd. (b)(1); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883,

³ Subdivision (a) of section 425.16 provides: “The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and this participation should not be chilled through abuse of the judicial process. *To this end, this section shall be construed broadly.*” (Emphasis added.)

894.) Once a defendant has made this showing, the burden shifts to the plaintiff to establish a probability of prevailing on its claims, by establishing that “the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment.” (*Wilson v. Parker, Covert & Chidester* (2003) 28 Cal.4th 811, 821 [citations and internal punctuation omitted].)

c. The Scope of Acts Covered by Section 425.16.

Subdivision (e) of the anti-SLAPP statute provides four illustrations of the types of acts covered by the statute:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

As discussed below, Eagle’s Complaint against Williams is subject to the anti-SLAPP law, pursuant to subdivision (e)(3) of the statute.

2. Messages Posted on an Internet Financial Message Board Website About a Publicly-Traded Corporation, Such as the One Posted by Williams, Are Covered under Subdivision (e)(3) of the Anti-SLAPP Statute.

Eagle's action against Williams is based upon a single message he posted on the Yahoo! Finance message board dedicated to Eagle. (JA 5 ¶ 16, 13.) The message is covered by section 425.16, subdivision (e)(3), as a "statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."

a. Posts on an Internet Website are Statements Made in a Public Forum.

The term "public forum" is traditionally defined as a place that is open to the public where information is freely exchanged. (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 475.) "Under its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication." (*Damon*, at p. 476.) Statements made on an Internet message board are statements made in a public forum. (*Ampex Corporation v. Cargle* (2005) 128 Cal.App.4th 1569, 1576; *ComputerXpress v. Jackson* (2001) 93 Cal.App.4th 993, 1006-08.)

Ampex expressly held the Yahoo! message board to be a public forum:

Web sites that are accessible free of charge to any member of the public where members of the public may read the views and information posted, and post their own opinions, meet the definition of a public forum for purposes of section 425.16. . . . Thus the Yahoo! message board maintained for Ampex was a public forum.

(*Ampex, supra*, citing *ComputerXpress, supra*; see also *Wilbanks v.*

Wolk (2004) 121 Cal.App.4th 883, 895, 897 [private website on which public could not post is a public forum]; *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1161, 1168 [letter to editor is statement made in a public forum]; *Damon v. Ocean Hills Journalism Club, supra*, 85 Cal.App.4th at p. 476-77 [private newsletter is a public forum].)

b. Williams' Post about Eagle, a Publicly-Traded Corporation, Was Made in Connection with an Issue of Public Interest.

The statement at issue here is commentary on the management, operations and financial prospects of Eagle in the form of a parody press release posted on a Yahoo! Finance message board, about a development of some interest to the readers of that message board – Eagle's deletion from the Russell 3000 Index just a year after it had been added. (See JA 5 ¶ 16, 13.) Messages on an Internet message board about a publicly-traded corporation are statements made "in connection with an issue of public interest." (*ComputerXpress, supra*, at pp. 1007-08; *Ampex Corporation, supra*, at pp. 1576-1577.)

In *ComputerXpress v. Jackson*, *supra*, 93 Cal.App.4th at pp. 1006-08, the court held that Internet message board messages about a publicly-traded corporation were covered by subdivision (e)(3) of the anti-SLAPP law. The statements which were the basis for suit against the defendants:

included claims that ComputerXpress's products were inferior, the company was a stock scam and would be out of business within 30 days, the officers and directors were illegally conspiring to manipulate the value of its stock, and one of the officers or directors had filed bankruptcy.

(*ComputerXpress*, *supra*, at p. 1005.) The court noted that the plaintiff was a publicly-traded company, which "apparently made use of press releases in an effort to promote the company." (*ComputerXpress*, *supra*, at pp. 1007-08.)

Similarly, in *Ampex Corporation*, *supra*, at pp. 1576-1577, the court held that posting messages about a publicly-traded corporation on a Yahoo! message board is covered under subdivision (e)(3) as speech in connection with a public issue. The *Ampex* messages included statements such as "I just wonder how the crooks fooled everyone for so long. . . . All in all, it was the most miserable, sleazy, cheap operation I have ever worked for." (*Id.* at p. 1574.)

In this case, Eagle is a publicly-traded company with tens of millions of its shares bought and sold annually. Eagle makes use of press releases and a public website in an effort to promote the company. Williams' post

concerned an issue of public interest – the management, operation, and financial prospects of a publicly-traded corporation – just as did the messages in *ComputerXpress and Ampex*. (JA 45:20-46:24.)

Even if Williams’ message was false and not protected by the First Amendment, as Eagle contends, that is a matter for consideration under the second prong of SLAPP analysis. The validity of a defendant’s speech bears only on the probability of plaintiff prevailing, not on whether the statute applies. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94-95.) Nonetheless, Williams’ message is constitutionally protected, as discussed below.

It is clear that statements on financial message boards about a publicly traded corporation, such as Williams’ post here, are covered by subdivision (e)(3) of the anti-SLAPP law. (*Ampex, supra* [Yahoo!]; *ComputerXpress, supra*.) Therefore, the anti-SLAPP statute, section 425.16, applies to Eagle’s causes of action against Williams.

3. The Complaint Is Not Exempt from the Anti-SLAPP Statute Pursuant to Section 425.17(c).

Eagle contended below that its Complaint was exempt from the anti-SLAPP law pursuant to section 425.17, subdivision (c) (section 425.17(c)). (JA 168:26-169:22.) This argument is without merit. Section 425.17(c) provides that section 425.16 does not apply to certain causes of action which arise from a defendant’s statements or conduct made for the purpose

of promoting sales of the defendant's goods or services or made in the course of delivering the defendant's goods or services. (§ 425.17(c)(1).) Williams' post was not made to promote transactions in, or in the course of delivering, goods or services. (JA 283-85 ¶¶ 3-4, 7.) Williams is not a competitor of Eagle and has not shorted its stock, nor was he part of a scheme to do so. Rather, he was a shareholder with an interest in the share price going up. (JA 283-85 ¶¶ 3-5, 7.) The Complaint makes no allegations which would support a finding that it is exempt from the anti-SLAPP statute and Eagle has made no such showing. Thus, the section 425.17(c) exemption does not apply to Eagle's claims against Williams.

B. Eagle Has Not Shown a Probability of Prevailing on Its Claims Against Williams.

Once a defendant has made a *prima facie* showing that the lawsuit arises from petition or speech activity covered by section 425.16, as appellant Williams has done, the burden shifts to the plaintiff to establish a probability of prevailing on its claims. Plaintiff must do so by competent and admissible evidence:

In order to establish a probability of prevailing on the claim, a plaintiff responding to an anti-SLAPP motion . . . must demonstrate that the complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment . . . [Plaintiff's claim must be] legally sufficient and . . . substantiated by competent evidence . . .

(Wilson v. Parker, Covert & Chidester, supra, 28 Cal.4th at p. 821
[citations and internal quotation marks and punctuation omitted]; see also
Ludwig v. Superior Court (1995) 37 Cal.App.4th 8, 15-16, 21 fn.16, 25
[plaintiff must meet burden with “competent, admissible evidence”];
Navellier v. Sletten (2004) 106 Cal.App.4th 763, 775 [plaintiff has the
burden in papers opposing the special motion to strike to show a probability
of prevailing on his claims].)

Here, Eagle’s Complaint alleges causes of action against Williams
for unfair business practices and defamation, based on a single allegedly
actionable post. (See JA 5 ¶ 16, 13.) Eagle has not shown that either of its
causes of action has merit.

**1. The Post by Williams Is Parody Protected by the
First Amendment.**

**a. Parody Is Protected By the First
Amendment.**

Parody is a form of speech squarely protected by the First
Amendment. Parody cannot be actionable because, by definition, it does
not convey a provably false assertion of fact. Parody is defined as a:

literary or musical composition imitating the characteristic style of
some other work or of a writer or composer, but treating a serious
subject in a nonsensical manner in an attempt at humor or ridicule.

*(Webster’s New Universal Unabridged Dictionary [Second Edition, 1983],
p. 1304.)*

The California Supreme Court, in protecting a parody, emphasized that the requirement that a defamation plaintiff demonstrate an actual falsehood “is grounded in the First Amendment itself.” (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259.) As the United States Supreme Court explained, holding that a Hustler Magazine parody ad was protected expression under the First Amendment:

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. . . . The First Amendment recognizes no such thing as a “false” idea. . . . Freedoms of expression require “breathing space.”

(*Hustler v. Falwell* (1998) 485 U.S. 46, 50, 52.)

As the following discussion of leading California parody cases indicates, our courts have recognized this fundamental satirical attribute of parody and have held accordingly that such speech is protected by the First Amendment.

i. *Baker v. Los Angeles Herald Examiner.*

In *Baker v. Los Angeles Herald Examiner*, *supra*, 42 Cal.3d at p. 258, the producer of a television documentary on sex education sued a reviewer, who stated in a television program review:

My impression is that [the producer] . . . told his writer/producer . . . “We've got a hot potato here – let's pour on titillating innuendo and as much bare flesh as we can get away with. Viewers will eat it up!”

The California Supreme Court held that this parody was not actionable because a reasonable listener or reader would understand that the purported quotation was a statement of opinion, rather than fact. (*Id.* at pp. 261-62, 269.)

ii. *San Francisco Bay Guardian v. Superior Court.*

In *San Francisco Bay Guardian v. Superior Court* (1993) 17 Cal.App.4th 655, 657, a landlord sued the Bay Guardian newspaper for publishing a fake letter, purportedly written by the plaintiff landlord, which said:

I don't understand why Vince Bielski is so upset about electroshock therapy. I find that my tenants who have undergone this treatment are much more cooperative.

Even though plaintiff found five people to declare under oath that they did not recognize the letter as parody, the court nonetheless concluded that “the average reader, as a matter of law, would recognize that the letter was a . . . parody and not actually written by [plaintiff].” (*Id.* at p. 659.) Therefore, the court held, “the letter does not defame [plaintiff] by false attribution or presentation of false facts.” (*Id.* at p. 661.)⁴

⁴ Although Eagle is clearly a public figure, as the trial court implicitly found (see JA 489:26-28), First Amendment protection of parody is not limited to suits by public figures. (See, e.g., *Couch v. San Juan Unified School District* (1995) 33 Cal.App.4th 1491, 1494-96, 1503-04 [high school campus security officer could not recover for publication of a parody].)

iii. *Highfields Capital Management L.P. v. Doe.*

In a case remarkably similar to this one, *Highfields Capital Management L.P. v. Doe* (N.D.Cal. 2005) 385 F.Supp.2d 969, 972, a Doe defendant was sued for posting three messages under the screen name “highfieldscapital” on a Yahoo! message board for Silicon Graphics (SGI), a company in which the plaintiff was the largest shareholder.

Much as did Eagle’s here, SGI’s share price had varied widely in the years prior to the defendant’s post, from a high of \$12.56 to a low of 32 cents. Its share price was \$1.82 the day before “highfieldscapital” posted a message stating: “It appears that this will be a very fine day.” (*Id.* at p. 973.) On the day that message was posted, SGI’s stock sank to \$1.77, and “highfieldscapital” posted the following message that evening:

We trust our retail investor friends have taken advantage of this quarter’s SGI pre-earnings rally, which occurred this morning. It’s just Highfields’ way of sharing important information with our smaller, yet still highly valued, partners in the exciting story of Silicon Graphics.

(*Ibid.*) Almost a week later, “highfieldscapital” posted another barbed message:

We’re going to buy a new corporate jet . . . a Gulfstream IV. It will have custom zebrano wood trim and Corinthian leather seats with plasma TVs. Best of luck to our retail friends today and tomorrow!

(*Ibid.*)

The district court refused to allow plaintiff to proceed on its claims against “highfieldscapital” and quashed a subpoena seeking the Doe defendant’s true identity. The court explained:

While plaintiff seems to suggest otherwise, the interests and policies invoked by the defendant are of the considerable potential significance. Indeed, they are rooted in the First Amendment . . . What defendant seeks to protect through his motion to quash is the right to express most efficiently and anonymously, without fear of expensive adverse consequences, his views about matters in which many other members of the public are interested. . . .

Viewed in context (the only relevant way to view communications), defendant’s postings consisted of sardonic commentary on a public corporation; through irony and parody, these bulletin board postings express dissatisfaction with the performance of the stock and the way company executives choose to spend company resources. They also can be interpreted as expressing disapproval or criticism of Highfields Capital – mocking its arrogance and condescension. . . . These are views in which other members of the public may well be interested – and that defendant has a right to express anonymously.

(Id. at pp. 974-75.)

The court found that the messages were not defamatory because “the context strongly suggests that the statements were not likely to be taken seriously by anyone, not likely even to come to the attention of the types of clients [Highfields] courted, and not likely to be attributed in fact to Highfields by such clients or anyone else.” *(Id. at p. 979.)*

The court also noted that while the plaintiff corporation had reputational and financial rights at stake, “[i]t is of some analytical moment, however, that the rights plaintiff seeks to defend are not as vulnerable or

precarious as the rights defendant seeks to protect – and not as close to the central societal values that animate our Constitution.” (*Id.* at p. 975.)

b. Williams’ Post Is a Classic Parody Protected by the First Amendment.

Here, Williams’ post is also unquestionably a parody, and a pretty amusing one at that. It was a take-off on the press release that Eagle issued on June 28, 2004, announcing that Eagle had been added to the Russell 3000 Index. (Compare JA 13 with 119.) About a year later, Eagle was removed from that Index (JA 331-32), which led to the parody press release. (JA 285-86 ¶¶ 9-11.) Indeed, Williams re-posted Eagle’s June 2004 press release 10 minutes before posting the parody as a reply. (See JA 285-86 ¶¶ 11-12, 334, 336.)

The parody press release purports to have been issued by Eagle, quoting Eagle’s Chairman and CEO as saying some truly outlandish things. He is quoted characterizing Eagle’s deletion from the Russell 3000 Index as a “clear recognition” of Eagle’s “continued failures in executing our business plan over the last year,” a “reflection of our continued stagnation, worsening financials and decreased market capitalization,” and “an indication of further customer rejection of Eagle’s technology and services, the indifference of our employees and our continued focus on eroding shareholder value.” (JA 5 ¶¶ 16, 13.)

The average reader would not believe that Eagle had actually issued this press release. Clearly, a CEO would *never* boast in a company press release of management’s “continued focus on eroding shareholder value” or any of the other negative statements quoted in the previous paragraph.

In addition, viewed in the context in which it was posted – an Internet finance message board, which contains “messages posted anonymously in the general cacophony of an Internet chat- room,” and “was part of an on-going, free-wheeling and highly animated exchange” (*Global Telemedia International v. Doe 1 aka BUSTEDAGAIN40* (C.D.Cal 2001) 132 F.Supp.2d 1261, 1267)⁵ – a reasonable reader would not mistake Williams’ parody post for a real Eagle press release.

Williams’ “press release” was a recognizable and non-actionable parody, just as much as the fake letter in *San Francisco Bay Guardian* and the fake quotation in *Baker*. The average reader would not believe that a

⁵ The description of the character of Internet financial message boards in *Highlands Capital, supra*, 385 F.Supp.2d at p. 969, is also apt: “The content, character, and quality of these messages covers a huge range. Many of the messages are crude, indecent, or transparently laughable – and many appear to have nothing whatsoever to do with SGI. Many of the postings include misspellings, grammatical errors, and/or incomplete thoughts and sentences. Many of the posters use screen names that would suggest, if taken seriously, some connection with SGI. Many postings imply (by content and/or screen name) that the author has some access to inside information or some unique ability to foretell the future performance of the company. Many of the postings purport to predict the price path of SGI stock. Messages on this board reflect considerable venting, much tongue-in-cheek, little pretense at sophistication or thoughtfulness, and an ample and obvious sense of irreverence.”

landlord would state in a letter to the editor that his tenants who have undergone electroshock therapy “are much more cooperative” (*San Francisco Bay Guardian, supra*), or that the plaintiff television producer in *Baker, supra*, had actually said the words that the reviewer sarcastically suggested. Similarly, the average reader would not believe that Eagle’s CEO made the statements in, and that Eagle actually issued, Williams’ parody press release.

Eagle argued below that this parody is actionable because – despite its extreme implausibility – it has the “look and feel” of an actual corporate press release. (JA 174:5-17; see also 172:24-173:1) Of course it does. That is the point – to mimic the look and feel of Eagle’s press release a year earlier announcing its addition to the Russell 3000 Index, in order to poke fun at the company and raise serious questions about why it is doing so poorly.

Because Williams’ post is parody protected by the First Amendment, both of Eagle’s claims are subject to and defeated by this defense. (*Blatty v. New York Times* (1986) 42 Cal.3d 1033, 1044-45 [“First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement. . .”].)

2. Eagle Has Not Shown That Williams’ Post Was an Unlawful, Unfair, or Fraudulent Business Act or Practice Prohibited by Business and Professions Code Sections 17200 et seq.

Eagle’s first cause of action is for violation of the Unfair Competition Law (UCL), Business and Professions Code sections 17200 et seq. (JA 10 ¶¶ 37-40.) This unfair business practices claim against Williams is without merit for at least three reasons, in addition to the First Amendment infirmity discussed above.

a. Williams’ Post Is Not a Business Act or Practice or Advertising.

The Unfair Competition Law defines acts of unfair competition as follows:

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

(Bus. & Prof. Code § 17200.) Section 17500 applies only to advertising. (see Bus. & Prof. Code § 17500; see also *Kasky v. Nike* (2002) 27 Cal.4th 939, 951 [§ 17500 proscribes false or misleading advertising].) Eagle has not shown that Williams’ post was a “business act or practice” or advertising. Indeed, this post was not connected to Williams’ business. (JA 283-85 ¶¶ 3-5, 7.) Therefore, Eagle failed to show that Williams violated this statute.

b. Securities Transactions Are Not Covered by Section 17200.

Eagle's section 17200 claim is pre-empted by federal law. In *Bowen v. Ziasun Technologies* (2004) 116 Cal.App.4th 777, 789-90, after a detailed analysis of state and federal cases, the court concluded that "section 17200 does not apply to securities transactions." (*Id.* at p. 790, quoted with approval in *Feitelberg v. Credit Suisse First Boston* (2005) 134 Cal.App.4th 997, 1009.)

The securities transaction exclusion from section 17200 claims articulated in *Bowen* is applicable here because it dealt with fraud in the purchase of securities. Eagle's Complaint alleges that Williams' post was part of "organized . . . stock market manipulation schemes" designed "to deflate the price of Eagle Broadband stock and reap illegal gains from short sales." (JA 1:25-28, 4-5 ¶¶ 13-15; see also 178:3-6.) The trial court attempted to distinguish *Bowen*, stating that "Eagle's UCL claim is not grounded upon any particular securities transactions." (JA 493:18-24.) However, the gravamen of Eagle's Complaint alleges a campaign of illegal short-selling of Eagle stock (see JA 9-10 ¶¶ 33-34), which necessarily involves securities transactions. (See JA 210-11 ¶¶ 7-8 [Eagle's "expert" states that "'Selling Short' is the sale of a stock that the buyer does not own," a "transaction"].) Therefore, the Complaint does not allege a valid UCL claim.

c. Eagle Has Not Shown That It Suffered Any Damage as a Result of Williams' Post.

A UCL claim can only be brought, as relevant here, by a “person who has suffered injury in fact and has lost money or property as a result of such unfair competition.” (Bus. & Prof. Code § 17204, as amended by Proposition 64, effective 11/3/04.) Although Eagle generally alleges that the price of its stock fell because of the posts of *seven* defendants, including Williams (JA 9 ¶ 33; 10 ¶ 36), it has produced no evidence to indicate that Williams’ post produced such a result or any other damages.

First, the record demonstrates that Williams’ post did not adversely affect Eagle’s share price. Williams’ parody was posted on June 10, 2005, at 8:41 p.m., after the stock market had closed. (See JA 13.) That day, a Friday, Eagle’s stock closed at 22 cents per share. On Monday, June 13, 2005, Eagle’s stock opened at 22 cents, reached a high of 23 cents, and closed at 21 cents. The next day, June 14, it closed at 25 cents, up 4 cents. It climbed to a relative high, closing at 30 cents on June 21, 2005. (JA 466-67.)

Before Williams’ post, from January 3, 2005, through June 10, 2005, Eagle’s stock price had already dropped from 67 cents to 22 cents, with no help from Williams. (JA 463, 467.) As Eagle’s purported expert stated, during the period of January 1, 2005, through October 31, 2005, Eagle “has experienced a decline in stock price in excess of 76% of its value.” (JA 227

¶ 26). During that period, based on Eagle’s figures, there were probably more than 400,000 posts on the Eagle message board. (314 days x 1370 messages/day [see above at p. 4] = 430,180.) Eagle has not shown that Williams’ one parody post has caused any part of that decline.

Second, Eagle’s purported expert merely speculates that a decline in Eagle’s share price “could” lead to losses for Eagle. (JA 227 ¶ 26.) Thus, there is no evidence that Williams’ parody post *caused* Eagle’s stock price to decrease, much less any actual damages to Eagle. Eagle’s failure to show any damages is an indication that this is a meritless SLAPP. (*Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1176.)

Further, Eagle’s expert’s pondering regarding damages focuses on short sales of Eagle’s stock. (JA 219-224, ¶¶ 18-22; 229:9-11.)⁶ As discussed above, Williams never shorted Eagle’s stock, nor did he participate in any scheme to short Eagle’s shares or to manipulate Eagle’s share price. (JA 284 ¶ 5.)

3. Eagle Has Not Shown That Williams’ Post Was Actionable Defamation Because It Has Not Shown It Suffered Any Damages as a Result of Said Post.

Eagle’s second cause of action is for defamation. (JA 10-11 ¶¶ 41-45.) As discussed above, this claim is without merit as to Williams because

⁶ Eagle’s expert does conclude, without any explanation of the damage, or identification of the damage, or connection to Williams’ post or any others, that Eagle “suffered some damage.” (JA 228:8-9.)

Williams' post was parody protected by the First Amendment. In addition, Eagle's defamation claim is without merit because Eagle has not shown that it suffered any damages, let alone special damages, as a result of this post. Civil Code section 45a states in relevant part that "Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof." However, the Complaint does not allege, and Eagle has not shown, that Williams' post constituted libel on its face (it does not accuse Eagle of criminal conduct or the like), and Eagle has not shown that it has suffered special damages as a result of said post, as discussed above at p. 31.

In addition, Eagle asserts that its defamation claim is actually for trade libel (JA 172:8), a claim requiring a showing of special damages, which Eagle has not show. (*Leonardini v. Shell Oil* (1989) 216 Cal.App.3d 547, 572.) "Trade libel is generally distinguished from common law defamation and is said to connote 'an intentional disparagement of the quality of property, which results in pecuniary damage to plaintiff.'" (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 381.) Further, a cause of action for trade libel requires a publication which induces others not to deal with the plaintiff. (*Nichols v. Great American Insurance Companies* (1985) 169 Cal.App.3d 766, 773.) Despite Eagle's characterization of its claims, Eagle failed to plead these essential elements

of a cause of action for trade libel (see JA 10:24-11:10), and it has not shown that it can prevail on such a claim even if it had been pled.

CONCLUSION.

Appellant Richard Williams has clearly shown that Eagle's causes of action against him are covered by the anti-SLAPP statute. Eagle has not shown that those causes of action have any merit. Therefore, the trial court erred in denying Williams' special motion to strike the Complaint and its order should be reversed. Williams should also be awarded his attorneys' fees and costs for work in the trial court and on appeal. (§ 425.16, subd. (c); *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659-60, disapproved on another point in *Equilon Enterprises v. Consumer Cause* (2003) 29 Cal.4th 53, 68 fn. 5.)

Dated: September 21, 2006

Respectfully submitted,

Mark Goldowitz
California Anti-SLAPP Project
Special Counsel for Appellant
Richard Williams, a/k/a Doe 4

WORD COUNT CERTIFICATION

I, Mark Goldowitz, hereby certify, pursuant to California Rules of Court, Rule 14(c)(1), that the word count of my office's WordPerfect computer program for this brief indicates that it contains 7,284 words.

Executed this 21st day of September, 2006.

Mark Goldowitz

PROOF OF SERVICE

The undersigned hereby states under the penalty of perjury under the laws of the State of California:

I am employed in Alameda County; I am over the age of eighteen and not a party to the within cause; and my business address is 2903 Sacramento Street, Berkeley, California, 94702-5209.

On this day, I addressed envelopes to:

Karineh Khachatourian	District Attorney
Jeffrey M. Ratinoff	Santa Clara County
Gordon & Rees LLP	70 West Hedding Street, West Wing
Embarcadero Center West	San Jose, CA 95110
275 Battery Street, Suite 2000	
San Francisco, CA 94111	Attorney General - Consumer Affairs
(Counsel for Plaintiff and	Ronald A. Reiter
Respondent Eagle Broadband, Inc.)	Supervising Deputy Attorney General
	Office of the Attorney General
Supreme Court of California	Consumer Law Section
350 McAllister Street, Rm. 1295	455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102	San Francisco, CA 94102
(5 copies)	
Hon. William J. Elfving	
Santa Clara County Superior Court	
191 North First Street	
San Jose, CA 95113	

and I placed in said envelopes a copy of the following document:

APPELLANT'S OPENING BRIEF

and I deposited said envelopes in the U.S. Mail, postage fully prepaid, all on this day.

Dated: September 21, 2006

Jennie Romer