

No. H030169

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

EAGLE BROADBAND, INC.,
Plaintiff and Appellant,

v.

ROY THOMAS MOULD, a/k/a BENDERANDDUNDAT,
Defendant and Respondent.

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

RESPONDENT'S BRIEF

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

Counsel for Respondent
ROY THOMAS MOULD,
a/k/a BENDERANDDUNDAT

**State of California
Court of Appeal
Sixth Appellate District**

**CERTIFICATE OF INTERESTED
ENTITIES OR PERSONS**

Court of Appeal Case Caption: Eagle Broadband, Inc. v. Mould

Court of Appeal Case Number: H0 30169

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person Information if necessary.

Please check here if applicable:

There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 14.5 (d) .

Signature of Attorney/Party Submitting Form

Printed Name: Mark Goldowitz

Address: 2903 Sacramento Street; Berkeley, CA 94702

Telephone: (510) 486-9123

State Bar No: 96418

Party Represented: Defendant and Respondent Roy Thomas Mould

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. vi

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. The Eagle Yahoo! Finance Message Board. 4

 5. Thomas Mould. 4

 6. Mould Becomes and Eagle Shareholder in 2000. 5

 7. The Complaint’s Allegation About
 Mould’s Post. 5

 8. Mould’s Post. 6

 B. Procedural History. 7

 1. Eagle Sues Seven Message Board Posters,
 Including Mould, for Alleged Participation in
 a Stock Manipulation Scheme. 7

 2. Mould Files an Anti-SLAPP Motion. 8

 3. Eagle Files a Motion to Conduct Discovery. 9

4.	The Trial Court Grants Mould’s Anti-SLAPP Motion and Denies Eagle’s Motion For Discovery.	10
C.	Statement of Appealability.	11
D.	Standard of Review.	11
II.	ARGUMENT: THE TRIAL COURT PROPERLY GRANTED RESPONDENT MOULD’S SPECIAL MOTION TO STRIKE. . .	12
A.	Section 425.16 Applies to the Complaint Against Mould. .	12
B.	Eagle Has Not Shown a Probability of Prevailing on Its Claims Against Mould.	12
1.	Eagle Has Not Shown That Mould’s Post Was Actionable Defamation.	13
a.	Eagle Has Not Pled and Proved That Mould Made a Provably False Statement.	14
i.	Eagle Has Not Pled and Proved That Mould Made a False Statement.	14
ii.	Eagle Has Not Proved That the “Out of Cash” and “Aggregate” Statements, Which Were Not Alleged in the Complaint, Were False When They Were Made.	15
b.	Eagle Has Not Pled or Proved Actual Malice.	18
i.	As a Public Figure, Eagle Must Plead and Prove That Mould’s Statements Were Made With Actual Malice.	18

ii.	Eagle Did Not Plead and Prove That Mould Made His Statements With Actual Malice.	20
iii.	Mould’s Declaration Shows That He Did Not Make His Statements With Actual Malice.	21
iv.	The Basis for Mould’s Statement Regarding Aggregate.	22
v.	The Basis for Mould’s “Out of Cash” Statement.	22
c.	Eagle Has Not Shown That Mould’s Post Was Libel Per Se.	25
d.	Eagle Has Not Shown Any Damage as a Result of Mould’s Post.	26
i.	Eagle’s Share Price Increased After Mould Posted His Message.	27
ii.	Eagle Diluted the Value of Its Stock Through the Issuance of Tens of Millions of Additional Shares.	27
iii.	Eagle’s “Expert” Can Not Identify Any Damages Attributable to Mould’s Post; Mould Never Shorted Eagle’s Shares.	28
e.	Eagle Has Not Shown That Mould’s Post Constituted Trade Libel.	29
2.	Eagle Has Not Shown That Mould’s Post Was an Unlawful, Unfair, or Fraudulent Business Act or Practice Prohibited by Business and Professions Code Sections 17200 et seq.	31

a.	Mould’s Post Is Not a Business Act or Practice or Advertising.	31
b.	Eagle Has Not Shown That Mould Made Any False Statements.	32
c.	Mould Was Not Part of Any “Short and Distort” Scheme.	32
d.	Eagle Has Not Shown That It Suffered Any Damage as a Result of Mould’s Post.	33
e.	Securities Transactions Are Not Covered by Section 17200	33
3.	The Trial Court’s Denial of Eagle’s Motion for Discovery Was Not an Abuse of Discretion.	35
CONCLUSION	36

INTRODUCTION.

Appellant Eagle Broadband, Inc. (Eagle) sued respondent Roy Thomas Mould a/k/a benderanddundat (Mould), based on a single post Mould made on an Internet financial message board regarding a matter of public interest – the management, operations, and financial prospects of Eagle, a publicly-traded corporation. Eagle also sued six other posters. This lawsuit is an effort by a financially troubled company to silence its critics, and a public relations ploy (filed two weeks before Eagle’s annual shareholders’ meeting) to create an illusion that its management is looking out for shareholders’ interests.

Eagle’s primary contention, that Mould’s special motion to strike was granted “on a technicality,” is false. Eagle’s evidence was not “misconstrued” by the trial court, as Eagle contends. Rather, Eagle simply failed to submit any evidence establishing that Mould posted any false information about the company or that it had been damaged by Mould’s post.

As set forth below, Eagle’s claims against Mould are subject to the anti-SLAPP law and Eagle did not show a probability of prevailing on them. Therefore, Mould’s special motion to strike the Complaint was properly granted and, accordingly, the trial court’s order granting Mould’s motion should be affirmed.

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, 205,509,000 shares outstanding, and total revenue of \$12,490,000.

(JA 49 ¶ 2, 65, 80.) As of November 1, 2005, Eagle had 269,170,000 shares outstanding. (JA 49 ¶ 3, 113.)

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.

Eagle's stock price declined significantly from January 2000 through October 2005. Eagle 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.)

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 level it had seen in over two and one-half years. (JA 122-23.) Eagle's Vice President of Marketing declared that in 2005 several shareholders complained to him about Eagle's falling share price and that they were concerned about their investment in Eagle. (JA 183 ¶¶ 5-6.)

4. 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, 290 ¶ 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.

5. Thomas Mould.

Thomas Mould is a self-employed consultant who provides personal and business consulting services in the following areas: finance and accounting, tax planning and preparation, systems planning, implementation and improvement, strategic business planning, start-up, turn-around and growth initiatives, incorporation, financial statement analysis, and capitalization and planning. Mould holds both CPA (Certified Public Accountant - inactive status - he does not perform certified audits or reviews) and CMA (Certified Management Accountant) certifications. He has completed Masters of Business Administration course work at the University of Minnesota Carlson School and is working on completion of a

Masters of Divinity at Bethel Seminary & University. Mould never worked for Eagle Broadband or any of its affiliates or competitors. (JA 289 ¶ 3.)

6. Mould Becomes an Eagle Shareholder in 2000.

Mould began following Eagle's performance in late 1999. He has reviewed all of its filings with the SEC since that time, press releases and other information provided by Eagle on its website, listened to conference calls between the company and investors, and has read news reports regarding Eagle. He started reading the Eagle Yahoo! Finance message board in 2000. (JA 290 ¶¶ 6-7.)

Mould became an Eagle shareholder in January 2000, periodically buying and selling, but always as a long-term investor. He never sold short shares of Eagle or any other stock and he never profited or benefitted from a decline in Eagle's stock price. (JA 289-90 ¶¶ 4-5.) Indeed, as Eagle's stock declined, Mould lost \$63,922.51 from his investment in the stock. (JA 290 ¶ 5.)

7. The Complaint's Allegations About Mould's Post.

Eagle's Complaint alleges that benderanddundat (Thomas Mould) "posted a fabricated announcement that 'Change at Eagle is Coming' and that Eagle Broadband was suffering from continued financial losses causing the share price to drop and encouraging others to 'share their positions long [sic]...then go short to make some of your money back...'" (JA 8 ¶ 27, 27.)

The Complaint does not identify the specific statements in the post which it alleges are false. (JA 8 ¶¶ 27-28.)

8. Mould's Post.

Mould's post, message # 508992, posted on the Eagle message board on January 24, 2005, at 1:33 pm EST, was titled "TO THOSE WHO HAVE FOLLOWED MY POSTS.." It stated:

Significant change is coming at Eagle. They are out of cash, sales, and time. They must pay Aggregate back the \$10mm which they do not have...Aggregate may choose to bail them out by rolling the \$10mm but they will demand significant protection...Eagles [sic] continued losses are hurting them...Share price will continue to drop significantly...we are now in the .40's...30's will not be far behind.

Eagle will have to

1. Issue special preferred series
and/or
2. Create significant dilution and downward price momentum to place additional common shares.
and/or
3. File for a Chapter 11 reorganization.
and/or
4. Sell Assets or the company or a large stake in the company at rock bottom pricing to hook up with a large player with cash.

It's ugly ahead...

Sell your long positions...then go short and make some of your money back...

This is truly a case-study in professional incompetence and dereliction of fiduciary duty to shareholders...

(JA 27.)

Mould's intent in making the post was to provide thoughtful opinion and relevant information for the message board readers. His message set forth his opinion of Eagle's financial condition and prospects for the future at that time and was based on his review of Eagle's SEC filings, information which it publicly announced, and news reports. (JA 291 ¶ 9, 293-96 ¶¶ 15-16.)

B. Procedural History.

1. Eagle Sues Seven Message Board Posters, Including Mould, for Alleged Participation in a Stock Manipulation Scheme.

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 benderanddundat, Mould's screen name. (JA 2-3 ¶¶ 4-10.)

The Complaint alleged that Mould 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 1:24-28, 4-5 ¶¶ 13-15, 8 ¶¶ 28, 9 ¶¶ 33, 34.) Curiously, Eagle apparently did not hire an expert to analyze the potential of a "short and distort" scheme, or whether Eagle had been damaged, until after this lawsuit was filed. (JA 167:11-12.) In

addition, even though Mould had previously posted his e-mail address on the Eagle Yahoo! message board, Eagle made no attempt to contact him about his post prior to filing this lawsuit. (JA 297 ¶ 20.)

The Complaint alleged that Mould “deliberately posted false and misleading information concerning Plaintiff’s purported inability to sell a key product essential to its business. . . .” (JA 8 ¶ 28.) However, there is no such statement in Mould’s post. (JA 27.)

Although its share price was already in a long period of decline, Eagle blames Mould’s single post and posts by the other six defendants (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 8 ¶¶ 27-28; 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 benderanddumat and six other defendants. (JA 142-43.) Eagle then served said subpoena on Yahoo! (JA 137-41.)

2. Mould Files an Anti-SLAPP Motion.

On November 16, 2005, Mould filed a special motion to strike the Complaint. (JA 36-145.) The motion demonstrated that Mould’s post was protected by the California anti-SLAPP law, section 425.16 of the Code of

Civil Procedure¹, 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 argued 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, Mould filed his reply, which showed again that his post was protected by the anti-SLAPP law. (JA 271:10-273:5.) Mould's reply also demonstrated that Eagle had not shown a probability of prevailing on its claims because, inter alia, his statements fairly and accurately opined on Eagle's financial condition, were not business practices or acts, and caused Eagle no actionable damage. (JA 278:2-280:24.)

3. Eagle Files a Motion to Conduct Discovery.

On January 20, 2006, along with its opposition to the anti-SLAPP motion, Eagle also filed a motion to permit discovery against four defendants, including Mould, seeking a six-month continuance of the hearing on the anti-SLAPP motions. Eagle argued that it should be permitted to: (1) discover the true names and employment histories of the Doe defendants in order to determine whether they are associated with any of Eagle's competitors or were involved in the sale of securities; (2)

¹ Statutory references herein are to this Code unless otherwise indicated.

propound discovery on Yahoo! to uncover evidence that its message boards are not public fora; (3) discover the financial and trading records of the Doe defendants; and (4) obtain “a complete set” of postings about Eagle “during the relevant time period” to determine the context of the subject posts. (JA 160-61.) On February 9, 2006, Mould 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 Grants Mould’s Anti-SLAPP Motion and Denies Eagle’s Motion for Discovery.

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

Regarding Eagle’s motion for discovery, the trial court noted that Mould’s financial and stock trading records would not help Eagle establish that Mould’s post contained false statements or caused it damage. (JA 491:1-19.)

With regard to Mould’s special motion to strike, the trial court determined that the anti-SLAPP statute applies to Eagle’s claims (JA 492:18-493:9) and that Eagle failed to show that Mould made any false statements of fact. (JA 495:20-26.)

On May 4, 2006, Eagle filed its notice of appeal of the trial court's order granting Mould's special motion to strike. (JA 518-533.)

C. Statement of Appealability.

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

D. Standard of Review.

“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.)

The trial court's ruling on Eagle's motion to permit discovery may only be reversed if the trial court abused its discretion. (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 617.)

II. ARGUMENT: THE TRIAL COURT PROPERLY GRANTED RESPONDENT MOULD’S SPECIAL MOTION TO STRIKE.

As discussed below, the trial court properly granted respondent Mould’s special motion to strike the Complaint because the anti-SLAPP statute applies to Eagle’s claims and Eagle failed to show that its claims against Mould have any merit.

A. Section 425.16 Applies to the Complaint Against Mould.

Eagle concedes that the anti-SLAPP statute applies to its claims.

(AOB 6.)

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

Once a defendant has made a *prima facie* showing that the lawsuit arises from petition or speech activity covered by section 425.16, as Eagle concedes was done here by Mould, the burden shifts to the plaintiff to establish a probability of prevailing on its claims. Plaintiff must do so by showing that its complaint is legally sufficient and that its claims are supported 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* (2002) 28 Cal.4th 811, 821 [citations and internal quotation marks and punctuation omitted]; see also *Roberts v.*

Los Angeles County Bar Association (2003) 105 Cal.App.4th 604, 614

[plaintiff must meet burden with “competent, admissible evidence”];

Navellier v. Sletten (2004) 106 Cal.App.4th 763, 775 [*Navellier II*]

[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 Mould for defamation and unfair business practices, based on a single allegedly actionable post. (See JA 5 ¶ 16, 8 ¶¶ 27-28; 10-11; 27.) Eagle did not show that either of its causes of action has any merit.

1. Eagle Did Not Show That Mould’s Post Was Actionable Defamation.

Eagle’s second cause of action is for defamation. (JA 10-11 ¶¶ 41-45.) This claim is without merit as to Mould because Eagle has not pled and proved that Mould made a false statement, has not shown that it was made with actual malice, and because Eagle has not shown that it suffered any damages, let alone special damages, as a result of Mould’s post.

Further, Eagle has not shown that Mould’s post was libel per se or trade libel.

a. Eagle Has Not Pled and Proved That Mould Made a Provably False Statement.

i. Eagle Has Not Pled and Proved That Mould Made a False Statement.

A complaint for libel must specifically identify, if not plead verbatim, the words constituting the allegedly libelous statement. (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1612, fn. 5.) To be libelous, a statement must be provably false. (Civ. Code, § 45; *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259.)² Further, because Mould’s post involved an issue of public interest (the management, operations, and financial prospects of a publically traded corporation), the burden is on Eagle to show that Mould’s post contained a false statement. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 372-73.)

Eagle’s Complaint alleges that Mould’s January 24, 2005, post contains two false factual assertions: (1) “that Eagle Broadband was suffering from continued financial losses causing the share price to drop” (JA 8, ¶ 27); and (2) it contained “information concerning Plaintiff’s purported inability to sell a key product line essential to its business.” (*Id.*, ¶ 28.) Eagle has made no effort to show that these statements are false.

² Since Mould’s Internet post is a “publication by writing,” if it were defamatory, it would be libel rather than slander. (See Civ. Code, § 45 [libel includes a defamatory “publication by writing”].)

Indeed, as discussed above at page 8, the second one was not even in the post. Eagle has therefore effectively abandoned these claims.

ii. Eagle Has Not Proved That the “Out of Cash” and “Aggregate” Statements, Which Were Not Alleged in the Complaint, Were False When They Were Made.

Eagle argues that two other statements, which are not alleged in the Complaint, are false: that plaintiff is “out of cash” and owes “Aggregate” \$10 million.³ (JA 173:11-14; AOB 9-11.) However, in opposing Mould’s anti-SLAPP motion, Eagle is limited to its Complaint *as pled* and is not allowed to add allegations after the filing of a special motion to strike. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 [*Navellier I*] [plaintiff must state and substantiate “a legally sufficient claim”]; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 655 [in a special motion to strike, “the pleadings frame the issues to be decided”], disapproved on another point in *Equilon Enterprises v. Consumer Cause* (2002) 29 Cal.4th 53, 68, fn. 5; *Simmons v. Allstate Insurance* (2001) 92 Cal.App.4th 1068, 1073-74 [a party has no right to amend a pleading prior to adjudication of a pending

³ Despite obviously conveying Mould’s opinion about Eagle’s financial condition, Eagle contends that the post is not Mould’s opinion because he did not insert a modifier such as “IMO” (“in my opinion”). (AOB 10, fn. 5.) Eagle ignores the disclaimer which appears with each message that “These messages are only the opinion of the poster . . .” (JA 290-91 ¶ 8.)

anti-SLAPP motion]; *Roberts v. Los Angeles County Bar Association*, *supra*, 105 Cal.App.4th at p. 613 [applying this principle to imply a stay, preventing plaintiff from filing an amended complaint, before defendant filed its appeal of the denial of anti-SLAPP motion]; *Navellier II, supra*, 106 Cal.App.4th at p. 772 [“a plaintiff cannot use an 11th-hour amendment to plead around a motion to strike under the anti-SLAPP statute”].)

The trial court erred in considering allegations which were not set forth in Eagle’s Complaint. Nonetheless, the trial court correctly found that Eagle has not proved that these statements were false when they were made, on January 24, 2005. (JA 495:20-26.)

Eagle’s *only* evidence in this regard is a declaration by its then Vice President of Marketing, Fred Reynolds, dated January 19, **2006**, which states, in the present tense, that “Eagle Broadband *is not* ‘out of cash’ and Eagle Broadband *does not* owe ‘Aggregate’ any amount.” (JA 187 ¶ 15 [emphasis added].) However, this statement regarding Eagle’s finances in January **2006** does not prove that Mould’s statements made *a year earlier* were false when they were made.⁴

⁴ Eagle’s failure to prove falsity is similar to the plaintiff’s failure to prove falsity in *Vogel v. Felice* (2005) 17 Cal.App.4th 1006, 1021-22, where plaintiff’s denial that he owed his wife and kids “thousands.” As this District noted in that case, “By denying a debt in a specified amount, it leaves open the possibility of a debt in some other, perhaps substantially equivalent, amount.” Similarly, by denying that Eagle was “out of cash” and owed aggregate \$10 million at the time he signed his declaration,

Eagle accuses the trial court of misconstruing the Reynolds declaration, arguing that it actually says something more than what it clearly states. (AOB 1-2, 10-11.) However, it is clearly Eagle, rather than the trial court, which has misconstrued Reynolds' declaration.

Although the court may be required to draw reasonable inferences from Reynolds' declaration (see AOB 11), it is not reasonable to infer that if Eagle did not owe Aggregate anything in January 2006, it did not owe Aggregate anything in January 2005. Even when viewed in a light most favorable to Eagle, Reynold's declaration does not contradict Mould's statement. Not only did Reynolds' declaration not expressly negate Mould's statement, the gist of it does not suggest that Mould's statement was false. (See *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 709, cited by Eagle at AOB 11.)

Further, in determining that Reynolds' declaration did not address Eagle's financial condition at the time Mould made his post, the trial court did not "weigh the credibility or comparative strength of competing evidence," as Eagle argues. (AOB 7.) Rather, it merely considered what Reynolds actually said in his declaration.

Reynolds left open the possibility that those conditions were existent a year earlier, when Mould made his post.

Thus, Eagle has not pled or proved that Mould made a false statement.

b. Eagle Has Not Pled or Proved Actual Malice.

i. As a Public Figure, Eagle Must Plead and Prove That Mould's Statements Were Made With Actual Malice.

Even if the Reynolds declaration could be stretched to mean that Mould's "out of cash" and "Aggregate" statements were false when they were made, Eagle still has no claim against Mould because it failed to prove that Mould made his post with actual malice. Eagle is a public figure, as the trial court implicitly found (see JA 489:26-28), and Eagle has not challenged that on appeal. A "limited purpose" public figure is one who "voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351.) Here, Eagle is a direct participant in the public debate about its finances, management, operations, and share price, as it maintains a public website promoting the company and its stock, it regularly issues press releases about the company and its stock, and it holds public conference calls in which its finances, management, performance and stock are discussed. (See pp. 2-3, above.)

Eagle is a public figure because it drew attention to itself:

A plaintiff can become a public figure by discussing the matter with the press or by being quoted by the press, thus thrusting himself into

the vortex of a public issue. A defendant need not show, however, that the plaintiff himself made the statements which resulted in the public controversy. A plaintiff's attempts to thrust himself into the public eye are sufficient.

(*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190 [citations omitted].)

Plaintiffs involved in issues of no greater public significance have been held to be public figures. (See, e.g., *Bindrim v. Mitchell* (1979) 92 Cal.App.3d 61, 71, fn. 1 [licensed clinical psychologist who conducted "nude marathon" group therapy sessions was a public figure], disapproved on other grounds, *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 847, fn. 9.) Limited purpose public figures "lose some protection regarding their reputation to the extent that the allegedly defamatory communication relates to their role in a public controversy." (*Rudnick v. McMillan, supra.*)

Under the First Amendment, in order to recover in a defamation action, public figures such as Eagle must plead and prove by clear and convincing evidence that the defendant's statements were made with "actual malice," i.e., with knowledge that they were false or with reckless disregard of whether or not they were false. (*Reader's Digest Association v. Superior Court* (1984) 37 Cal.3d 244, 256; see also *Vogel v. Felice, supra.*) The plaintiff must show "that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of [the] statement." (*Bose Corp. v. Consumers Union* (1984) 466

U.S. 485, 511, fn. 30.) “[O]nly those statements made with a high degree of awareness of their probable falsity” are actionable. (*Garrison v. Louisiana* (1964) 379 U.S. 64, 74.) Eagle did not show that this was true as to Mould. “The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind.” (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 950.)

ii. Eagle Did Not Plead and Prove That Mould Made His Statements With Actual Malice.

Eagle’s Complaint alleges that Mould “deliberately posted false and misleading information concerning Plaintiff’s purported inability to sell a key product line essential to the business . . .” (JA 8, A28.) However, as discussed above, Mould’s post contains no such statement. (See above, p. 8; see also JA 27.)

Further, here, Mould reasonably believed that the actual statements in his post were true. Not surprisingly, Eagle did not submit *any* – let alone clear and convincing – evidence that Mould “subjectively entertained serious doubts as to the truth,” or that he had a “high degree of awareness of . . . probable falsity” of his publication at the time he made it. (*Bose Corp. v. Consumers Union, supra; Garrison v. Louisiana, supra.*)

Eagle argues that Mould’s losses on its stock “suggest” that he made his statements with actual malice. (AOB 9, fn. 4.) However, assuming,

arguendo, that Mould’s losses caused him to have negative feelings about Eagle, the United States Supreme Court has explicitly held that when a plaintiff must prove “actual” (constitutional) malice, “impos[ing] liability on the basis of the defendant’s hatred, spite, ill will, or desire to injure [is] ‘clearly impermissible.’ ‘[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* [*v. Sullivan*] standard.’” (*National Association of Letter Carriers v. Austin* (1974) 418 U.S. 264, 281 [citations omitted].)

iii. Mould’s Declaration Shows That He Did Not Make His Statements With Actual Malice.

In his declaration, Mould establishes that he did not make his statements with actual malice, because his opinions were reasonable and based on fact, as discussed below. (JA 289-292 ¶¶ 3-12, 293 ¶¶ 15-16, 297 ¶ 20.) Mould describes Eagle’s financial decline as the basis for his post. Eagle had been severely diluting its stock with the issuance of tens of millions of additional shares. (JA 292 ¶¶ 11-12.)

Additionally, it was entirely proper for Mould to submit the disputed evidence and argument in his reply papers in response to plaintiff’s argument and evidence, because it was Eagle’s burden to show a probability of prevailing and that was the issue addressed by Mould’s “new” evidence and argument. (*Navellier II, supra*, 106 Cal.App.4th at p. 775 [defendant

properly pointed in his reply to plaintiff's failure to meet his burden under section 425.16].)⁶

iv. The Basis for Mould's Statement Regarding Aggregate.

The basis for Mould's statement regarding "Aggregate" was that Eagle had announced through a press release that it had obtained financing from Aggregate, yet never announced that it had repaid the financing or otherwise disposed of it as a liability. (JA 293-94 ¶ 15, 404-05, 408-09.)

v. The Basis for Mould's "Out of Cash" Statement.

Mould's statement that Eagle was "out of cash" in his January 24, 2005, post was part of the general statement that "They are out of cash, sales, and time." (JA 27.) Mould had seen a significant erosion of Eagle's financial condition, including going from having a significant cash balance of \$32 million and liabilities of \$3,580,000 in 2000 to cash, cash equivalents, and securities available for sale of only \$474,000 and liabilities of over \$17 million in 2004. Eagle also reported a negative gross profit for the first quarter of its 2005 fiscal year of -\$157,000. This meant that Eagle's sales were not even covering its direct product costs and there was

⁶ Eagle argues that the trial court erred in considering "new" arguments and evidence Mould submitted in his reply papers, relying on a case that does not involve the anti-SLAPP law with its two-step process and shifting burdens. (AOB 15, fn. 9; 18.)

no margin to help cover operating expenses, much less liabilities that had already accrued and any debt service requirements. (JA 294 ¶ 16a, 346, 354.) From the end of Eagle’s fiscal year 2000, to Mould’s posting of his message, Eagle’s “current assets” had decreased by more than 90%, from \$49,306,000 to \$4,311,000. From the end of fiscal year 2001 to the end of fiscal year 2004, Eagle’s accumulated deficit increased more than thirty-fold, from \$4,358,063 to \$157,106,000. (JA 80, 294 ¶ 16b, 346, 354, 448.)

Additionally, on December 29, 2004, just over three weeks before his post, Eagle amended its previous SEC Form 10K for the fiscal year ended August 31, 2004, revealing that on December 10, 2004, Eagle had become liable for at least \$1,680,000 to insiders because it had guaranteed them a certain profit when they exercised stock options and the share price was too low to generate the guaranteed profits. (JA 294 ¶ 16c, 374.)

On January 21, 2005, after the close of trading, three days before Mould’s post, Eagle filed documents with the SEC indicating that it intended to issue an additional 30,000,000 shares. (JA 294 ¶ 16d, 377-400.) In its January 21, 2005, SEC Form S-3, Eagle acknowledged that it had not generated positive cash flow for the past three fiscal years:

As we have not generated positive cash flow from operations for the past three fiscal years, our ability to continue operations is dependent on our ability to either begin to generate positive cash flow from operations or our ability to raise capital from outside sources. [¶]
We have not generated positive cash flow from operations during the

last three fiscal years and we currently rely on external sources of capital to fund operations. At November 30, 2004, we had approximately \$474,000 in cash, cash equivalents and securities available for sale, and a working capital deficit of approximately \$13,490,000. Our net cash used by operations for the three months ended November 30, 2004, was approximately \$870,000.

(JA 294-95 ¶ 16d, 383.) That is, Eagle published in its own filing that its “cash burn rate” (net cash used by operations) for the quarter just ended was greater than its remaining cash, cash equivalents and securities available for sale. Furthermore, Eagle no longer had a positive working capital base to ensure the availability of the cash needed for the business.

By Eagle’s own published and sworn analysis of its situation and its prescriptive solution (issuing more shares for cash), Eagle *needed cash* at the time of Mould’s post on January 24, 2005. (JA 295:8-13, 383) It was clear to Mould that the company was surviving by selling more and more stock, rather than on revenues and previous earnings from its business. In fact, from the date of the last public quarterly filing that helped form the basis of Mould’s message to the date his special motion to strike was filed, Eagle issued an additional approximately 90 million shares. (JA 295:24-296:2, 354, 442.)

Mould’s statement in his January 24, 2005, post that Eagle was “out of cash” was accurate from an accountant’s point of view (which Mould is). According to Mould’s research, Eagle had about one and one-half months’ worth of operating expenses on hand, and no significant revenues, or

prospects for revenues, and it was repeatedly announcing bad news, such as owing money to insiders for guaranteed profits on options. (See JA 294 ¶ 16c, 374.) That’s why Mould said that Eagle was “out of cash, sales, and time.”

In any case, the “out of cash” statement was at worst constitutionally protected non-actionable hyperbole. (JA 296:12-16; *Rosenauer v. Scherer* (2001) 88 Cal.App.4th 260, 280 [“hyperbolic language . . . is constitutionally protected”].) After all, Eagle’s cash on hand at the end of November 2004 was 474,000 and its quarterly “burn rate” (net cash used by operations) was almost double that – \$878,000. (JA 383.)

c. Eagle Has Not Shown That Mould’s Post Was Libel Per Se.

Eagle also argues that Mould’s post constitutes libel per se. (AOB 13-14.) Libel per se requires that the defamation be apparent on the face of the statement, “without the necessity of explanatory matter such as an inducement, innuendo, or other extrinsic fact.” (Civ. Code, § 45a.) Civil Code section 45a further provides 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.” (*Ibid.*)

Eagle’s Complaint alleges that Mould’s post contains two false statements: (1) “that Eagle Broadband was suffering from continued financial losses causing the share price to drop” (JA 8 ¶ 27); and (2) it

contained “information concerning Plaintiff’s purported inability to sell a key product line essential to its business.” (*Id.*, ¶ 28.) It is unclear what Eagle contends constitutes libel per se in either of these statements. However, it is clear that neither of said statements, even if they were false, which Eagle has not shown, constitute libel per se. Neither statement accuses Eagle of a crime, or the like. Additionally, both statements require further explanation of their alleged libelous nature. Therefore, these statements do not qualify for libel per se and accordingly Eagle must show that it suffered damages, which it has not done, as discussed next. (Civ. Code, § 45a.)

d. Eagle Has Not Shown Any Damage as a Result of Mould’s Post.

Eagle’s defamation claim against Mould is also without merit because Eagle has not shown any damages caused by Mould’s post. This failure is fatal to Eagle’s defamation claim against Mould, because the Complaint does not allege, and the allegations against Mould do not constitute, libel per se, as discussed in the preceding subsection. 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.)

i. Eagle's Share Price Increased After Mould Posted His Message.

Eagle alleges that on the day of Mould's post, Monday, January 24, 2005, Eagle's stock closed five cents lower than it opened. (JA 8 ¶ 28.) Eagle relies on the classic logical fallacy of *post hoc, ergo propter hoc* (after the fact, therefore because of the fact). However, the fact that one event chronologically follows another does not establish a causal relationship between the two. There is no evidence that Mould's post, which was one of hundreds posted daily on this message board, caused any of this drop.

In fact, on the day Mould made his post, Eagle's stock price fell seven cents *before* he made his post; the share price actually *increased* that day after Mould's post! (JA 292-93 ¶ 14, 307-10.)⁸

ii. Eagle Diluted the Value of Its Stock Through the Issuance of Tens of Millions of Additional Shares.

Further, Eagle's share price was already in a strong downward trend, as discussed above. (JA 122-24, 461.) The brutal truth is that Eagle has

⁸ Although correctly stating that Mould's post was made on January 24, 2005, the arrow on the line chart attached as an exhibit to the declaration of Eagle's purported expert deceptively indicates that Mould's post was made on January 22, 2005, not January 24, 2005, which makes it appear that Eagle's share price decreased dramatically after Mould's post. (JA 244.) In fact, if Eagle's "expert" had properly placed the arrow identifying the date of Mould's post, her chart would show an uptick in the share price after Mould's post. (*Ibid.*)

consistently lost millions of dollars a year since its fiscal year 2000 and was in precarious financial shape. At the close of fiscal year 2000, Eagle reported that it had a cash balance in excess of \$32,000,000 and liabilities of \$3,580,000, current assets of \$49,306,000. (JA 346). At the end of its fiscal year 2001, Eagle had an accumulated deficit of \$4,358,000. (JA 448.) In its SEC filing just before Mould made his post, Eagle reported a cash balance of only \$474,000 and liabilities in excess of \$17,000,000. (JA 354.) By the end of its fiscal year 2004, Eagle's accumulated deficit had increased to a whopping \$157,106,000, which increased to \$162,602,000 over the next three months! (JA 80, 354.)

Perhaps most significantly, after the close of business on the trading day before Mould made his post, Eagle announced that it was going to further dilute its shares by 13% by issuing tens of millions of additional shares. (JA 291-92 ¶¶ 10-13, 377-79.) Its stock price quite logically declined as a result – the seven cent drop in price on the next trading day, which occurred *before* Mould made his post, represents a 12.5% decrease. (JA 307-310.)

iii. Eagle's "Expert" Cannot Identify Any Damages Attributable to Mould's Post; Mould Never Shorted Eagle's Shares.

In addition, Eagle's purported expert merely speculates that a decline in Eagle's share price "could" lead to losses for Eagle. (JA 227 ¶ 26.)

Eagle's expert merely concludes, without any explanation or identification of the damage, or any connection to Mould's post or any others, that she "believe[s]" Eagle "suffered some damage." (JA 228:8-9.) Thus, there is no evidence that Mould's post *caused* Eagle's stock price to decrease, much less any actual damages to Eagle.

Further, Eagle's theory is premised on the presumption that Mould and the other defendants participated in an illegal and fraudulent stock manipulation scheme by selling short Eagle's shares. (JA 1:24-28; 4-5 ¶¶ 13-15; 8 ¶ 28; 9 ¶¶ 33-34; see also 219-224 ¶¶ 18-22, 229:9-11.) However, as discussed above, Mould 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.)

e. Eagle Has Not Shown That Mould's Post Constituted Trade Libel.

Eagle contends that its cause of action for defamation is actually a cause of action for trade libel. (AOB 7, JA 172:8.) "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.) 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.)

In addition, trade libel requires a showing of special damages. (*Leonardini v. Shell Oil* (1989) 216 Cal.App.3d 547, 572.)⁹

Despite Eagle's characterization of its cause of action, Eagle's Complaint does not plead the essential elements of a cause of action for trade libel – that Mould intentionally disparaged the quality of Eagle's property, which disparagement caused others not to deal with Eagle and resulted in damage to Eagle. (See JA 10:24-11:10) Nor has Eagle shown that it can prevail on such a claim even if it were pled.

As discussed above, Eagle has not shown that Mould's post was false or libelous or that Eagle suffered any damage from the post. It is also clear that Mould did not *intentionally* make any false statements, even if Eagle could show that any were false. (See JA 291 ¶ 9, 293-296 ¶¶ 15-16.)

Further, Eagle has made no showing whatsoever that Mould's post induced anyone not to do business with Eagle, either as a customer or shareholder. In this regard, Eagle again claims that the Reynolds declaration says something which it clearly does not, that it "*suggests* that

⁹ Eagle asserts that to show or prove special damages on a trade libel claim, a general *allegation* that people were dissuaded by the publication from making a contract or patronizing the plaintiff company is sufficient. (AOB 8.) However, Eagle ignores that the case it cites for this proposition, *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 74, in the passage quoted by Eagle, was quoting another case, *Wright v. Cowles* (1906) 4 Cal.App. 343, 347, that merely addressed the pleading (not the proof) requirement. Neither case is authority for Eagle's apparent assertion that a plaintiff can *prove* a trade libel claim merely by making an allegation.

this post resulted in stockholders being dissuaded from purchasing additional stock.” (AOB 13, fn. 7 [emphasis added].) First, merely *suggesting* that something happened does not show that it *did* happen.

Second, Reynolds’ declaration suggests no such thing, but merely states:

I have also fielded calls from shareholders regarding certain postings on Yahoo! Finance Message Board. Shareholders have made inquiries about whether certain postings were in fact true and they expressed concern over whether such postings would have a negative impact on the investing community or Eagle Broadband in general.

(JA 183 ¶ 6.) Reynolds does not identify which posts the “shareholders” inquired about, nor does he state anywhere that anyone told him that they would not buy Eagle stock, or would not do business with Eagle, as a result of anyone’s posts, much less Mould’s. Thus, Eagle has not shown that Mould’s post constituted trade libel.

2. Eagle Has Not Shown That Mould’s 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 unfair business practices, violation of the Unfair Competition Law (UCL), Business and Professions Code sections 17200 et seq. (JA 10 ¶¶ 37-40.) This claim against Mould is without merit for at least five reasons.

a. Mould’s Post Is Not a Business Act or Practice or Advertising.

The UCL 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 Mould’s post was a “business act or practice” or advertising. To the contrary, Mould’s post was not connected to his business. (JA 289 ¶ 3, 290:19-21.) Therefore, Eagle has failed to show that Mould violated the UCL.

b. Eagle Has Not Shown That Mould Made Any False Statements.

The gravamen of Eagle’s UCL claim is that Mould posted “false and misleading information.” (JA 10 ¶ 38.) However, as discussed above, Eagle has not shown that Mould’s post contained any false statements. Therefore, Eagle has also not shown that Mould committed any unfair or illegal business practice or act or false advertising.

c. Mould Was Not Part of Any “Short and Distort” Scheme.

Eagle alleges that Mould participated in a “short and distort” scheme whereby he sold its stock short and made his post in an attempt to manipulate the share price to his profit. (JA 9 ¶ 33, 165:9-13, 167:5-168:3, 179:2-7.) However, Eagle did not submit any evidence of such action by

Mould. In fact, Mould never sold short Eagle's stock, or any other stock, nor did he participate in any scheme to short Eagle's shares or to manipulate Eagle's share price. Indeed, Mould lost more than \$60,000 because of the decline in Eagle's stock. (JA 289-90 ¶¶ 4-5.)

d. Eagle Has Not Shown That It Suffered Any Damage as a Result of Mould's 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 the *seven* named defendants, including Mould (JA 9 ¶ 33; 10 ¶¶ 36, 38), it has produced no evidence to indicate that Mould's' post produced such a result.

e. Securities Transactions Are Not Covered by Section 17200.

Finally, Eagle's section 17200 claim is pre-empted by federal law. Eagle argues that federal law does not pre-empt section 17200 claims, citing *Roskind v. Morgan Stanley Dean Witter* (2000) 80 Cal.App.4th 345, and *Strigliabotti v. Franklin Resources* (N.D.Cal 2005) 2005 WL 645529. (AOB 15, fn. 9.) However, as noted in *Bowen v. Ziasun Technologies* (2004) 116 Cal.App.4th 777, 789-90, *Roskind* merely held that federal securities laws do not *pre-empt* section 17200 claims. After a detailed

analysis of state and federal cases, *Bowen* 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.) *Strigliabotti v. Franklin Resources* (N.D.Cal 2005) 2005 WL 645529, is not applicable because it does not involve the purchase or sale of securities (as does this case and *Bowen*); indeed, it may not even be a published opinion.

The inapplicability of 17200 to securities transactions, articulated in *Bowen*, governs here because Eagle’s claims involve allegedly improper securities transactions. Eagle’s Complaint alleges that Mould’s 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 1:24-28, 4-5 ¶¶ 13-15, 8 ¶ 28, 9 ¶¶ 33-34; 10 ¶¶ 36, 38; 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 1:24-28, 4-5 ¶¶ 13-15, 8 ¶ 28, 9 ¶¶ 33-34, 10 ¶¶ 36, 38), which necessarily involves securities transactions. Indeed, Eagle’s own “expert” declares that “‘Selling Short’ is the sale of a stock that the buyer does not own,” that it is

a “transaction.” (See JA 210-11 ¶¶ 7-8.) Therefore, the Complaint does not allege a valid UCL claim.

3. The Trial Court’s Denial of Eagle’s Motion for Discovery Was Not an Abuse of Discretion.

Eagle contends that the trial court should have granted it the right to conduct discovery, although it acknowledges that the standard of review in this issue is abuse of discretion. (AOB 18-19.) However, Eagle does not explain how any amount of discovery could overcome two of the fatal defects in its case against Mould – that he did not make any false statements (see JA 495:20-25) and that Eagle cannot show that Mould’s post caused it any damages. (AOB 18-19.) Additionally, Mould provided much of the information which Eagle sought to discover – his employment and trading histories. (JA 161:1-5, 161:11-12, 289-290 ¶¶ 3-5.) Eagle no longer argues that the extensive discovery which it sought to refute the public forum nature of Internet message boards would be useful. (Compare AOB 18-19, with JA 161:6-10.) Similarly, Eagle no longer argues that Yahoo! should be compelled to produce all of the messages posted “during the relevant time period” in order to provide the context of Mould post. (Compare AOB 18-19, with JA 161:13-15.)

The trial court’s finding that discovery would not assist Eagle in making its case against Mould (JA 485:4-488:7, 491:1-492:3) is clearly

correct and is not an abuse of discretion. There is no discovery which can establish any merit to Eagle's claims against Mould.

CONCLUSION.

Eagle concedes that its claims against Mould are covered by the anti-SLAPP statute, but Eagle has not shown that they have any merit.

Therefore, the trial court properly granted Mould's special motion to strike the Complaint and its order should be affirmed. Mould should also be awarded his attorneys' fees and costs on appeal. (§ 425.16, subd. (c); *Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th at pp. 659-60.)

Dated: October 23, 2006

Respectfully submitted,

Mark Goldowitz
California Anti-SLAPP Project
Counsel for Respondent
Roy Thomas Mould
a/k/a BENDERANDDUNDAT

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 7868 words.

Executed this 23rd day of October, 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 Appellant	Ronald A. Reiter
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:

RESPONDENT'S BRIEF

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

Dated: October 23, 2006

Jennie Romer