

**ORIGINAL**

**CASE NO. H030169**

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

**EAGLE BROADBAND, INC.,**

*Plaintiff and Appellant,*

vs.

**ROY THOMAS MOULD, a/k/a BENDERANDDUNDAT,**

*Defendant and Respondent.*

Appeal from the Superior Court for Santa Clara County  
Case No. 1-05-CV-050179  
Hon. William J. Elfving, Presiding

**FILED**  
NOV 15 2006  
Court of Appeal - Sixth App. Dist.  
By \_\_\_\_\_  
DEPUTY

**APPLICATION FOR RELIEF FROM FAILURE TO TIMELY FILE  
APPELLANT'S REPLY BRIEF AND REQUEST FOR LEAVE TO FILE  
REPLY BRIEF; DECLARATION OF JEFFREY M. RATINOFF; ORDER**

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FILED  
CAL 29/06  
ATT'S OPENING BRIEF 9/27/06  
ATT'S BRIEF 10/24/06  
MOTION EXTENSIONS - None

**Application For Relief From Failure To Timely File Appellant's Reply Brief**  
**And Request For Leave To File Reply Brief**

Pursuant to Rules of Court 45 and 45.5, Plaintiff Eagle Broadband, Inc. ("Eagle") hereby applies for an order granting it relief from its failure to timely file its Reply Brief and an extension and/or leave to file its Reply Brief on or before November 22, 2006.

The Rules of Court express California's public policy that the normal time-frames enumerated therein should "generally be met to ensure expeditious conduct of appellate business and public confidence in the efficient administration of appellate justice." Cal. R. Ct. 45.5(a)(1). However, the Rules also recognize that, "[f]or a variety of legitimate reasons, counsel may not always be able to prepare briefs or other documents within the time specified in the rules of court." Cal. R. Ct. 45.5(a)(3). Thus, for "good cause," the Court may relieve a party from a default occasioned by any failure to comply with the Rules of Court's filing deadlines for briefs. *See* Cal. R. Ct. 45(e). "In practice, provided the applicant demonstrates 'good cause,' relief from default is liberally granted." 1 Eisenberg, et al., *California Practice Guide: Civil Appeals and Writs* ¶ 5:115 (Rutter 2006).

The Rules of Court expressly recognize that good cause exists to grant a party relief from waiver or default where counsel responsible for preparing the document encounters a personal emergency that counsel did not reasonably expect to conflict with the due date and cannot reasonably rearrange. *See* Cal. R. Ct. 45.5(b)(10); 1 Eisenberg, et al., *supra*, ¶ 5. Other factors that the Court should consider that is applicable in this instance include the degree of prejudice (if any) to any party from the grant or denial of an extension and the number and complexity of the issues raised by the appeal. Cal. Civ. Proc. Code 45.5(b)(1), (4). In the present case, as discussed below, such good cause exists to grant the requested relief.

On October 24, 2006, Defendant and Respondent Thomas Mould ("Mould")

filed and served his Respondent's Brief. As a result, Eagle's Reply Brief was due on November 14, 2006. Declaration of Jeffrey M. Ratinoff ("Ratinoff Decl."), ¶ 3. Since receiving the respondent brief, Jeffrey Ratinoff, the attorney assigned the primary responsibility of preparing Eagle's papers and who had in-depth knowledge and understanding of the issue before the Court, had been diligently drafting Eagle's Reply Brief. Ratinoff Decl., ¶¶ 2-3.

On Wednesday, November 8, 2006, Mr. Ratinoff learned of an unexpected personal emergency that required his immediate attention. Ratinoff Decl., ¶ 4. That same day, counsel for Eagle contacted counsel for Mould to request that he enter into a stipulate to a reasonable extension of time for Eagle to file its Reply Brief. *Id.* Counsel for Mould had initially indicated a willingness to enter into such a stipulation, but indicated that he would need to confirm whether he had authority to grant Eagle's requests. *Id.* Despite the urgency of the situation, counsel for Mould waited until Friday, November 10 to inform counsel for Eagle that he would not grant the requested extension. *Id.* at ¶¶ 5-6. Although counsel for Eagle attempted to work around this unforeseen emergency over the weekend and timely file its Reply Brief, he was unable to file the brief or otherwise file a request for an extension of time with the Court on or before November 14, 2006 because of the need to travel out of town. *Id.* at ¶¶ 7-8.

If Eagle is not permitted to submit a Reply Brief, it will suffer extreme prejudice to its appeal of the trial court's order granting Mould's special motion to strike. Ratinoff Decl., ¶ 9. Despite Eagle raising a *narrow* issue on appeal that the trial court erred by finding that Eagle failed to demonstrate that the alleged defamatory statements made by Mould were false, the Respondent's Brief filed by Mould raises numerous new arguments raised that are outside the scope of the issues raised in Eagle's Opening Brief and/or were not previously raised in Mould's moving papers filed with the trial court. *See id.* For example, Mould dedicates a significant amount of his Respondent's Brief arguing that Eagle failed to plead and prove that Mould acted with malice. This argument is entirely

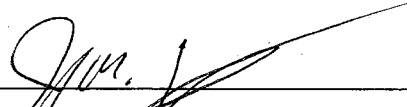
improper since Mould did not raise the issue before the trial court and asserted such arguments for the first time in his Respondent's brief. Thus, it is necessary that Eagle be allowed to file a Reply Brief to address these new matters that Mould has raised for the first time in this Appeal. Ratinoff Decl., ¶ 9.

While Eagle will suffer prejudice if it is not permitted to file its Reply Brief, Mould will not. Counsel for Mould's unwillingness to grant Eagle's request was without any legitimate basis, particularly since Eagle has always extended such professional courtesy when requested by counsel for Mould. Ratinoff Decl., ¶ 6. The reason given was that Mould simply did not want to grant Eagle an extension. Ratinoff Decl., ¶ 5. Further, granting Eagle an additional week to file its Reply Brief will not unreasonably delay or hinder the resolution of this Appeal, especially considering that Mould took the extra fifteen days to file his Respondent's brief after receiving a notification of default from the Court for failing to timely file his brief. Accordingly, Eagle respectfully requests that the Court grant Eagle relief from its failure to timely file its Reply Brief and an extension and/or leave to file its Reply Brief on or before November 22, 2006.

Dated: November 15, 2006

Respectfully submitted by,  
GORDON & REES LLP

By



Jeffrey M. Ratinoff  
Attorneys for Plaintiff  
EAGLE BROADBAND, INC

**By the Court**  
**So ordered**  
**RUSHING**  

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**Presiding Justice**

## DECLARATION OF JEFFREY M. RATINOFF

I, Jeffrey M. Ratinoff declare as follows:

1. I am an attorney at law duly licensed to practice before all courts of the State of California. I am an attorney with the firm of Gordon & Rees LLP, attorneys for Plaintiff and Appellant Eagle Broadband, Inc. ("Eagle"). If called upon to testify as to the matters set forth herein, I could and would competently testify thereto as the matters set forth in this declaration that are personally known to me to be true.

2. I am the attorney assigned the primary responsibility of preparing Eagle's papers before the trial court on the matters subject to his appeal. I am also the attorney that is primarily responsible for preparing the Reply Brief in support of Eagle's appeal of the order granting the special motion to strike filed by Defendant and Respondent Thomas Mould ("Mould") pursuant to Code of Civil Procedure Section 425.16. As a result, I have intimate knowledge of the legal and factual issues presented to the Court on this Appeal.

3. On October 24, 2006, Mould filed and served his Respondent's Brief. As a result, Appellant's Reply Brief was due on November 14, 2006. Since that time, I have diligently been preparing Eagle's Reply Brief in response to the Respondent's Brief filed by Mould.

4. In the late afternoon on Wednesday, November 8, 2006, an unexpected personal emergency occurred. I immediately contacted Paul Clifford, the associate in the law firm representing Mould that I regularly deal with, explained that unforeseen circumstances had come up and requested that he stipulate to an extension of time for Eagle to file its Reply Brief. Mr. Clifford indicated that he did not see it as being a problem, but needed to check with his supervising partner, Mark Goldowitz. Mr. Clifford indicated that he would get back to me the next morning.

5. I did not hear from Mr. Clifford as promised. Thus, on November

10, 2006, I called Mr. Clifford to again ask whether he would stipulate to an extension of time. Mr. Clifford indicated that he still had not conferred with his supervising partner and would attempt to do so. Later that day, Mr. Clifford left me a voicemail message wherein he indicated that he had spoken to Mr. Goldowitz who indicated that his client instructed him to not provide any extensions to Eagle.

6. I was shocked to learn of Mr. Clifford's unwillingness to grant me the professional courtesy of an extension given that I have previously provided similar extensions to Mr. Clifford and indicated a willingness to continue to do so.

7. Thereafter, I endeavored to complete Eagle's Reply brief and have it filed on Tuesday, November 14, 2006. However, due these unforeseen circumstances, which ultimately required me to travel out of town the morning of November 12, 2006 and return very late at night on Monday, November 13, 2006, I was not able to complete the brief in an acceptable manner or otherwise file an application for an extension of time on or before November 14, 2006.

8. Due to these unforeseen circumstances and the need to address numerous new arguments raised by Mould in his Respondent's Brief that are outside the scope of the issues raised in Eagle's Opening Brief and/or were not previously raised in Mould's moving papers filed with the trial court, I respectfully request that the Court grant Eagle relief and grant it leave to file a Reply Brief on or before November 22, 2006.

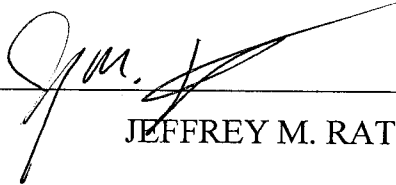
9. If Eagle is not permitted to submit a Reply Brief, it will suffer extreme prejudice due to the need to address the numerous new arguments raised by Mould in his Respondent's Brief that are outside the scope of the issues raised in Eagle's Opening Brief and/or were not previously raised in Mould's moving papers filed with the trial court.

10. Counsel for Mould's unwillingness to grant Eagle's request was without justification. I know of no prejudice that will result to Mould as a result of the granting Eagle's request.

11. This application is made in good faith for the reasons set forth above and not for the purpose of delay.

12. I have notified Eagle that this request for relief and leave to file a reply brief has been filed and am sending a copy of this application and declaration to Eagle.

I declare under penalty of perjury under the laws of California that the foregoing statements are true and correct. Executed this 15th day of November 2006, at San Francisco, California.

  
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JEFFREY M. RATINOFF

## PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Embarcadero Center West, 275 Battery Street, Suite 2000, San Francisco, California. On the date set forth below, I served the attached document(s) entitled:

**1. APPLICATION FOR RELIEF FROM FAILURE TO TIMELY FILE  
APPELLANT'S REPLY BRIEF AND REQUEST FOR LEAVE TO FILE  
REPLY BRIEF; DECLARATION OF JEFFREY M. RATINOFF; ORDER**

- by transmitting via facsimile the document listed above to the fax numbers set forth below on this date before 5:00 p.m.
- by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California at San Francisco, addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.
- by personally delivering the document listed above to the persons at the addresses set forth below.

Mark A. Goldowitz, Esq.  
California Anti-SLAPP Project  
2903 Sacramento St.  
Berkeley, CA 94702  
(510) 486-9708 FAX

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 15, 2006 at San Francisco, California.

  
Doreen Bristol

**ORDER**

Good cause appearing, IT IS HEREBY ORDERED that Appellant Eagle Broadband Inc.'s request for relief from its failure to timely file its Reply Brief and for leave to file its Reply Brief is GRANTED. Eagle Broadband Inc. shall be permitted to file and serve its Reply Brief on or before November 22, 2006.

DATED: \_\_\_\_\_

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PRESIDING JUSTICE