

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

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
BEFORE THE HONORABLE WILLIAM J. ELFVING, JUDGE
DEPARTMENT NO. 2

---000---

EAGLE BROADCASTING, ET AL.,)	
)	
PLAINTIFF,)	NO. 1-05-CV050179
)	
VS.)	
)	
RICHWILL 21, ET AL.,)	HEARING ON MOTION
)	
DEFENDANT.)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HELD ON FEBRUARY 23, 2006

A P P E A R A N C E S:

FOR PLAINTIFF:	KAREN KHACHATOURIAN, ESQ.
	JEFFREY M. RATINOFF, ESQ.
FOR DEFENDANT:	MARK A. GOLDOWITZ, ESQ.
	GREGORY A. BROILES, ESQ.
OFFICIAL COURT REPORTER:	PEYTON SCHULER, CSR
	CERTIFICATE NO. 4034

1
2 SAN JOSE, CALIFORNIA

FEBRUARY 23, 2006

3
4 PROCEEDINGS:

5
6 THE COURT: 1, EAGLE BROADCASTING, INC.
7 VERSUS RICHWILL21.

8 MS. KHACHATOURIAN: GOOD MORNING, YOUR
9 HONOR. KAREN KHACHATOURIAN AND JEFFREY RATINOFF FOR
10 PLAINTIFF.

11 MR. GOLDOWITZ: GOOD MORNING, YOUR HONOR.
12 MARK GOLDOWITZ, CALIFORNIA PROJECT FOR DEFENDANTS,
13 DOES 4 AND 5.

14 MR. BROILES: GOOD MORNING, YOUR HONOR.
15 GREGORY BROILES FOR DEFENDANTS DOES 2 AND 3.

16 THE COURT: MORNING TO EVERYONE.

17 WE'VE GOT ON CALENDAR, LOOKS LIKE THREE
18 MOTIONS. WE HAVE A MOTION TO STRIKE THE COMPLAINT,
19 ONE FILED BY MR. GOLDOWITZ, THE OTHER FILED BY
20 MR. BROILES, AND WE'VE GOT A MOTION FOR DISCOVERY
21 REGARDING THESE MATTERS.

22 LET'S TAKE UP THAT DISCOVERY ISSUE FIRST
23 BECAUSE I KNOW IT'S THE POSITION OF THE PLAINTIFF
24 THAT THEY WANT TO TAKE SOME DEPOS AND DO SOME OTHER
25 THINGS TO PREPARE FOR THE MOTIONS TO STRIKE.

26 MY TENTATIVE RULING ON THE DISCOVERY MOTION
27 IS TO DENY IT. I DON'T THINK THAT MOVING PARTIES
28 HAVE MET THEIR BURDEN. I'M PREPARED TO GO AHEAD AND

1 RULE ON THE MOTIONS TO STRIKE. AND SO BY GIVING YOU
2 THE TENTATIVE ON THE DISCOVERY MOTION, HOPEFULLY WE
3 CAN FOCUS OUR COMMENTS AND NOT REPEAT WHAT'S IN THE
4 PAPERS. BUT LET'S TAKE UP THE DISCOVERY ISSUE FIRST.

5 COUNSEL FOR THE MOVING PARTY, ANYTHING
6 FURTHER YOU WISH TO ADD ON THAT MOTION?

7 MS. KHACHATOURIAN: YES, YOUR HONOR. IN
8 LIGHT OF DEFENDANT'S REPLY BRIEFS WHERE THEY
9 CONCLUDED WHAT WE BELIEVE IS NEW MATTER AND
10 SPECIFICALLY CHERRY-PICKED SOME OF THE INFORMATION
11 THAT WE SPECIFICALLY REQUESTED INCLUDED THE YAHOO!
12 SUBPOENA AND INFORMATION OUR EXPERT REQUESTED IN
13 ORDER TO FULLY DISCUSS AND EVALUATE THE SHORT AND
14 DISTORT SCHEME.

15 THAT IF THE COURT IS GOING TO CONSIDER THIS
16 NEW MATTER, THEN THAT SHOULD ALLOW PLAINTIFF TO TEST
17 THE SUFFICIENCY OF THE NEW MATTER IN THE STATEMENTS
18 MADE BY MR. WILLIAMS AND MR. /PHAOULD, WHICH GOES TO
19 THE HEART OF THE DISPUTE.

20 THE COURT: ALL RIGHT. ANYTHING ELSE FROM
21 COUNSEL WHO ARE OPPOSING THE MOTION TO PERMIT
22 DISCOVERY BEFORE THAT MATTER'S SUBMITTED?

23 MR. GOLDOWITZ: TWO QUICK POINTS. ONE, THE
24 GENERAL DESIRE, TO, QUOTE, TEST SUFFICIENCY, IS NOT
25 SPECIFIED DISCOVERY FOR GOOD CAUSE. IT'S A FISHING
26 EXPEDITION.

27 SECONDLY, ON THE APPLICABILITY ASPECT, IT'S
28 THE DEFENDANT'S BURDEN TO MAKE A PRIMA FACIE SHOWING.

1 SO EVEN IF THEY HAVE TESTED THE SUFFICIENCY AND FOUND
2 COUNTERVAILING EVIDENCE, AS THEY POINT OUT, THE COURT
3 CAN'T WEIGH THE EVIDENCE; THAT DEFENDANT'S PRIMA
4 FACIE BURDEN IS MET. THERE IS NO JUSTIFICATION AT
5 ALL ON EITHER REQUEST.

6 THE COURT: COUNSEL?

7 MR. BROILES: YOUR HONOR, JUST LIKE TO
8 CLARIFY. IF THE PLAINTIFF'S OPPOSITION IS TO DOES 4
9 AND 5, IS IT ALSO DOES 2 AND 3, SINCE I DON'T BELIEVE
10 WE HAVE CONCLUDED ANY MATTERS --

11 THE COURT: DO YOU HAVE A COMMENT ON HIS
12 DILEMMA?

13 MS. KHACHATOURIAN: YES, YOUR HONOR. WITH
14 RESPECT TO DOES 2 AND 3, WE ASKED FOR DISCOVERY TO
15 REVEAL THEIR IDENTITIES TO DETERMINE WHETHER THE
16 EXCEPTION UNDER 425.17 APPLIES TO THE ANTI-SLAPP
17 MOTION, THAT BEING WHETHER THEY'RE COMPETITORS. WE
18 DON'T HAVE THAT INFORMATION SO WE DON'T KNOW WHETHER
19 THAT EXCEPTION WOULD APPLY OR NOT.

20 SO WITH RESPECT TO THE MOTION TO PERMIT
21 DISCOVERY, IT STILL GOES TO DOES 2 AND 3 ON THAT
22 POINT, BUT OVERREACHING, WE ALSO SUBMIT THAT IN ORDER
23 TO FULLY EXPLORE THE SHORT AND DISTORT SCHEME, WE
24 WOULD HAVE TO GET DISCOVERY FROM ALL OF THE DOES
25 REGARDING THEIR TRADING RECORDS, THEIR EMPLOYMENT
26 RECORDS, THEIR FINANCES, WHO THEY HAVE SPOKEN TO,
27 WHETHER THEY'RE COLLUDING WITH OTHER POSTERS.

28 THIS IS A VERY COMPLICATED SCHEME. THERE

1 IS NOT JUST ONE WAY TO PROVE IT. THE FACT THAT DOES
2 4 AND 5 MAY SAY I HAVE NEVER SHORTED, OR I'M THE
3 SHAREHOLDER AND I DID POST THIS FALSE INFORMATION,
4 BUT I WAS KIDDING, THE FACT THAT THEY SAY THAT NOW
5 TESTS THE SUFFICIENCY OF THE EVIDENCE WITH -- WHICH
6 THE COURT IS NOT SUPPOSED TO DO.

7 IT DOES NOT GO TO -- IT GOES TO THE
8 CREDIBILITY, RATHER, NOT TO THE SUFFICIENCY OF THE
9 EVIDENCE. THE PLAINTIFF HAS THE RIGHT TO TEST THOSE
10 STATEMENTS AND TO FIND OUT FOR ITSELF WHAT IS GOING
11 ON HERE. BECAUSE OF THAT, WE FILED THE MOTION TO
12 PERMIT DISCOVERY, BECAUSE UNTIL WE GET MORE
13 INFORMATION, WE'RE NOT GOING TO BE ABLE TO PROVE A
14 HUNDRED PERCENT THAT THESE DOES ARE INVOLVED IN THE
15 SHORT AND DISTORT SCHEME. BUT BASED ON WHAT WE HAVE
16 HERE, IT SURE LOOKS LIKE IT.

17 THE COURT: REGARDING HER COMMENTS,
18 ANYTHING ELSE, COUNSEL?

19 MR. BROILES: NO, YOUR HONOR. I THINK I
20 HAVE WHAT I NEED.

21 THE COURT: I WILL TAKE THAT UNDER
22 SUBMISSION, BUT YOU HAVE HEARD MY TENTATIVE.

23 LET'S MOVE NEXT TO MR. GOLDOWITZ'S MOTION
24 TO STRIKE. ANYTHING FURTHER YOU WISH TO ADD,
25 MR. GOLDOWITZ?

26 MR. GOLDOWITZ: IT'S ALL IN THE PAPERS.

27 THE COURT: COUNSEL FOR PLAINTIFF, ANYTHING
28 FURTHER YOU WISH TO ADD?

1 MS. KHACHATOURIAN: YOUR HONOR, I WOULD.

2 BASICALLY, WE FIRST WOULD LIKE TO NOTE OUR
3 EVIDENTIARY OBJECTIONS TO DOES' 4 AND 5 DECLARATIONS.
4 WE FILED TWO EVIDENTIARY OBJECTIONS TO BOTH PAPERS.
5 WE'D LIKE A RULING ON THAT. IN ADDITION TO THAT,
6 WE'D ALSO LIKE AN OPPORTUNITY TO RESPOND TO THE NEW
7 INFORMATION IF THE COURT IS INCLINED TO CONSIDER IT.

8 THAT BEING SAID, BECAUSE THE COURT'S BEEN
9 BURIED WITH A LOT OF PAPERS, I'D LIKE TO TAKE A FEW
10 MINUTES TO HIGHLIGHT THE KEY POINTS OF THE DISPUTE.

11 THE PLAINTIFF'S CASE IS LIKE NO OTHER. IT
12 IS NOT SUBJECT TO THE ANTI-SLAPP STATUTE, AND IT'S
13 NOT THE TYPE OF CASE THE ANTI-SLAPP STATUTE IS
14 DESIGNED TO PREVENT.

15 THE POSTINGS AT ISSUE AND THE SHORT AND
16 DISTORT SCHEME IS LIKE NO CASE DEFENDANTS HAVE CITED.
17 IT'S NOT LIKE AMPEX, NOT LIKE COMPUTER EXPRESS, IT'S
18 NOT LIKE GLOBAL TELEMEDIA. THE ONLY SIMILARITY
19 BETWEEN THOSE CASES AND THE CASE AT BAR IS THAT
20 THEY'RE POSTINGS ON THE INTERNET. THAT'S WHERE THE
21 SIMILARITY ENDS.

22 IF I MAY, WHAT'S GOING ON HERE -- AND IT'S
23 BEEN IDENTIFIED AND CONFIRMED BY OUR INDEPENDENT
24 EXPERT -- IS THAT THERE'S A SHORT AND DISTORT TRADING
25 SCHEME WHERE PEOPLE ARE POSTING NEGATIVE AND FALSE
26 INFORMATION DESIGNED TO DRIVE DOWN BROADBAND STOCK.
27 FRANKLY, THIS IS BORDERLINE FRAUD. THIS IS NOT AN
28 EXERCISE OF THE FIRST AMENDMENT. THIS IS NOT LIKE

1 THE POSTINGS IN THOSE OTHER CASES WHERE PEOPLE ARE
2 CRITICIZING MANAGEMENT AND CALLING THE CEO A JOKER.

3 WE'RE TALKING ABOUT FABRICATED SEC FILINGS.
4 WE'RE TALKING ABOUT FABRICATED E-MAILS FROM
5 CUSTOMERS. WE'RE TALKING ABOUT FABRICATED PRESS
6 RELEASES. AND THE FOURTH CATEGORY IS WHAT I LIKE TO
7 CALL THE INSIDER INFORMATION POSTING IN WHICH THESE
8 POSTERS TEND TO CLUTTER THE ON-LINE MESSAGE BOARDS TO
9 INSTILL FEAR IN THE INVESTING PUBLIC SO THAT THE
10 SHARE PRICE GOES DOWN AND THEY CAN MAKE A PROFIT ON
11 AN ILLEGAL SHORT SALE. THE POSTERS THEMSELVES DON'T
12 HAVE TO ACTUALLY SHORT. THEY CAN BE HELPING OTHERS.

13 NONETHELESS, IF THE COURT BELIEVES THAT THE
14 ANTI-SLAPP STATUTE APPLIES, WE BELIEVE THAT THE
15 PLAINTIFF HAS GONE BEYOND WHAT IS NECESSARY UNDER THE
16 APPLICABLE STANDARD WHICH IS REASONABLE PROBABILITY
17 OF SUCCESS ON THE MERITS. WE DON'T HAVE TO PROVE OUR
18 CASE ONE HUNDRED PERCENT. WE JUST HAVE TO SHOW THAT
19 WE'RE LIKELY TO BE ABLE TO PROVE OUR CASE BECAUSE AT
20 THIS POINT, THERE IS NO DISCOVERY.

21 WE HAVE SUBMITTED AN INDEPENDENT EXPERT
22 DECLARATION. WE HAVE SUBMITTED A DECLARATION FROM
23 THE COMPANY THAT GOES THROUGH WHY EACH AND EVERY
24 STATEMENT IS FALSE, WHY EACH AND EVERY STATEMENT IS
25 ACTUALLY CREDIBLE. IT DOESN'T HAVE ANY LANGUAGE
26 LIKE, IN MY OPINION, OR USE SHORT PHRASES OR THERE'S
27 QUOTES, CUT AND PASTE LEGENDS. THERE IS EVEN SOME
28 LEGITIMATE FACTS IN THESE POSTINGS THAT WOULD LEAD

1 SOMEONE TO BELIEVE THAT THEY'RE CREDIBLE.

2 BECAUSE OF THAT, WE HAVE SHOWN THAT THESE
3 POSTINGS -- THAT WE WILL BE ABLE TO PROVE THAT THESE
4 POSTINGS ARE FALSE AND THAT IS THIS NOT A FRIVOLOUS
5 LAWSUIT. IF SUBMITTING AN INDEPENDENT EXPERT
6 DECLARATION WHICH IDENTIFIES THE INVESTORS OF A SHORT
7 AND DISTORT SCHEME WHICH IS OUTLINED IN MISS
8 FLAHERTY'S DECLARATION AND ALSO IN THE DECLARATION OF
9 FREDERICK REYNOLDS, THE INVESTOR RELATIONS MANAGER OF
10 THE COMPANY, THEN HOW IS PLAINTIFF EVER GOING TO BE
11 ABLE TO SURVIVE THE ANTI-SLAPP BAR?

12 IF THIS COURT RULES IN FAVOR OF THE
13 DEFENDANTS, THE MESSAGE THIS COURT WILL BE SENDING IS
14 THAT THE ANTI-SLAPP STATUTE IS AN ABSOLUTE BAR TO ANY
15 TYPE OF LITIGATION WHICH IS NOT WHAT THE ANTI-SLAPP
16 STATUTE WAS INTENDED TO PREVENT.

17 ESSENTIALLY, WITH RESPECT TO THE UNFAIR
18 BUSINESS PRACTICES CAUSE OF ACTION, THERE'S BEEN A
19 LOT OF DISCUSSION THAT THE ALLEGATIONS SET FORTH
20 THEREIN ARE PREEMPTED BY THE SECURITIES LAWS. EAGLE
21 BROADBAND CANNOT BRING A SECURITIES ACTION --

22 THE COURT: COUNSEL, LET ME INTERRUPT YOU.
23 WE'RE ALREADY AT 10:00. HOW MUCH MORE TIME DO YOU
24 ESTIMATE YOU NEED FOR YOUR REMARKS?

25 MS. KHACHATOURIAN: FIVE MINUTES.

26 THE COURT: THEN WE STILL HAVE ANOTHER
27 MOTION TO GO PLUS MR. GOLDOWITZ'S RESPONSE. I KNOW
28 YOU HAVEN'T HEARD EVERYTHING SHE HAS TO SAY. ARE YOU

1 ANTICIPATING MUCH TIME, MR. GOLDOWITZ, TO RESPOND TO
2 HER COMMENTS?

3 MR. GOLDOWITZ: SO FAR, I HAVEN'T HEARD
4 ANYTHING THAT WASN'T IN THE OPPOSITION PAPERS. I DO
5 WANT TO RESPOND TO THE OBJECTIONS BECAUSE I HAVEN'T
6 HAD A CHANCE.

7 THE COURT: I WOULD AGREE. I THINK COUNSEL
8 IS GIVING ME THE THEME OF HER CASE AND THINGS THAT
9 HAVE BEEN ARGUED ALREADY IN THE PAPERS. I WANT TO
10 GIVE COUNSEL SOME LATITUDE, BUT I HAVEN'T HEARD
11 ANYTHING NEW YET.

12 MR. BROILES, HOW MUCH TIME DO YOU NEED FOR
13 YOUR MOTION?

14 MR. BROILES: I'M READY TO SUBMIT ON THE
15 PAPERS, YOUR HONOR.

16 THE COURT: DO YOU HAVE ANY IDEA HOW MUCH
17 TIME YOU NEED TO RESPOND TO MR. BROILES' MOTION?

18 MS. KHACHATOURIAN: YOUR HONOR, THIS GOES
19 TO BOTH. I WILL BE DONE IN FIVE MINUTES.

20 THE COURT: LET'S PROCEED. I WILL KEEP THE
21 OTHER PEOPLE WAITING. GO AHEAD.

22 MS. KHACHATOURIAN: NO PRESSURE. I WILL
23 MAKE IT BRIEF. THANK YOU, YOUR HONOR, FOR YOUR
24 INDULGENCE.

25 IN ESSENCE, I WILL JUST CUT TO THE CHASE
26 AND SAY THAT THE EVIDENCE SUBMITTED BY THE DEFENDANTS
27 CREATES TRIABLE ISSUES OF DISPUTED FACT HERE WHICH
28 THE COURT SHOULD WEIGH. IT DOES GO TO THE

1 SUFFICIENCY, IT GOES TO THE WEIGHT AND THE COURT
2 ALREADY KNOWS ALL THIS. WE THINK WE HAVE SUBMITTED
3 ENOUGH TO MOVE THIS CASE FORWARD.

4 WITH THAT, I'D SUBMIT, YOUR HONOR.

5 THE COURT: THANK YOU VERY MUCH.

6 MR. GOLDOWITZ.

7 MR. GOLDOWITZ: ON THE UNDERLYING MOTION,
8 I'M HAPPY TO SUBMIT ON THE PAPERS. I WOULD LIKE TO
9 ADDRESS THE EVIDENTIARY OBJECTIONS WHICH WE JUST GOT
10 YESTERDAY AFTERNOON.

11 FIRST, I HAVE AN OBJECTION AS TO THE
12 TIMING. THE EVIDENTIARY OBJECTIONS PURPORT TO MAKE
13 OBJECTIONS BOTH TO OUR ORIGINAL MOVING PAPERS WHICH
14 WERE FILED NOVEMBER 16TH, MAIL-SERVED TO THE OTHER
15 SIDE. THEIR OPPOSITION WAS A MONTH LATER AND IT
16 DIDN'T CONTAIN ANY OBJECTIONS TO THE PREVIOUSLY FILED
17 PAPERS. THEN AFTER TWO PHONE CALLS YESTERDAY, WE
18 FINALLY GOT -- WITH SOME RELIEF -- A FAX AND COVER
19 SHEET, FINALLY GOT EVIDENTIARY OBJECTIONS BARELY TWO
20 HOURS BEFORE THE CLOSE OF BUSINESS THE DAY BEFORE THE
21 HEARING.

22 AS TO THE MERITS, THEY ARGUE WE PRESENTED
23 NEW MATTERS AND CITE THE REICHART (PHONETIC) CASE.
24 THAT CASE DEALS WITH APPELLANT'S REPLY BRIEFS IN THE
25 APPELLATE COURTS. IT DOESN'T DEAL WITH SECTION
26 425.16, AND IT ACKNOWLEDGED EXPRESSLY THAT IT'S
27 APPROPRIATE FOR A REPLY BRIEF, EVEN IN THE APPELLATE
28 COURTS, TO CONTAIN REBUTTALS TO THE RESPONDENT'S

1 BRIEFING.

2 HERE, THOUGH, THE APPLICABLE AUTHORITY IS
3 IN THE NAVALIER (PHONETIC) CASE, NAVALIER 2. THE
4 COURT OF APPEAL, AFTER REMAND, CITED IN OUR MOVING
5 PAPERS AT PAGE 8, NAVALIER 2 AT PAGE 775 IS A VERY
6 SIMILAR SITUATION.

7 ON THE SPECIAL MOTION TO STRIKE, THE COURT
8 POINTS OUT THAT IT'S THE PLAINTIFFS WHO HAVE THE
9 BURDEN ON THE PROBABILITY OF PREVAILING. THE
10 PLAINTIFFS IN THAT CASE OBJECTED THAT THE DEFENDANTS
11 RAISED ARGUMENTS ABOUT PROBABILITY FOR THE FIRST TIME
12 IN THEIR REPLY PAPERS. THE COURT SAID IT'S THE
13 PLAINTIFF'S BURDEN, AND IN THEIR OPPOSITION PAPERS,
14 THEY HAVE MET THEIR BURDEN AND IT'S TOTALLY
15 APPROPRIATE FOR THE DEFENDANTS IN THE REPLY TO
16 RESPOND OR REBUT WHAT PLAINTIFFS ATTEMPTED TO DO IN
17 TERMS OF MEETING THEIR BURDEN. THAT'S THE SAME THING
18 WE HAVE DONE HERE.

19 THEY CITE THE HERON VERSUS BONILLA CASE
20 SEVERAL TIMES. THEY THEMSELVES ACKNOWLEDGE THAT
21 PETITION FOR REVIEW IS GRANTED AND THAT MAKES THE
22 ENTIRE CASE UNCITABLE. THEY CITE THE FLEISHMAN CASE
23 AT PAGE 3889 WHICH DOESN'T EXIST IN THAT CASE.
24 THAT'S ON PAGE 5 OF THEIR PAPERS.

25 GENERALLY, THEIR OBJECTIONS ARE CONCLUSORY
26 SHOTGUN OPPOSITIONS AND ARE OFTEN CLEARLY MERITLESS.
27 PERHAPS THE MOST BLATANT EXAMPLE IS THEY'RE INSISTING
28 THEY HAVE TO DO THIS DISCOVERY TO GET THE TRADING

1 INFORMATION, THE INFORMATION ABOUT STOCK PURCHASE AND
2 SALES. OUR CLIENTS PUT FORWARD THAT THEY PURCHASED
3 AND SOLD STOCK FROM EAGLE BROADBAND; NEVER SOLD IT
4 SHORT AND NEVER PARTICIPATED IN ANY SHORT AND DISTORT
5 SCHEME. THEY'RE NOW OBJECTING IT'S IRRELEVANT, THE
6 VERY INFORMATION THEY CLAIM THEY NEEDED DISCOVERY
7 ABOUT.

8 IT'S ALSO A LITTLE INCONSISTENT THAT THEIR
9 EXPERT RELIES ON YAHOO!, WALL STREET JOURNAL AND
10 OTHER PURPORTEDLY HEARSAY SOURCES FOR INFORMATION
11 ABOUT SHORT SALES, VOLUME, ET CETERA, AND YET THEY
12 OBJECT TO OUR INFORMATION FROM YAHOO!, THE SAME
13 SOURCE OF -- THE SAME SOURCE THEIR EXPERT USED ABOUT
14 STOCK PRICES.

15 AS WITH THEIR DISCOVERY MOTION, THEY HAVE A
16 GENERAL INSISTENCE ON DOING MORE DISCOVERY WITHOUT
17 SPECIFYING WHAT DISCOVERY -- WHAT THEY EXPECT TO
18 FIND. THAT'S NOTHING MORE THAN A FISHING EXPEDITION.
19 IT'S NOT PERMISSIBLE UNDER THE STATUTE.

20 THEY'RE CLAIMING THAT OUR EVIDENCE GOES TO
21 THE WEIGHT OF THE EVIDENCE AND THE COURT CAN'T WEIGH
22 THE EVIDENCE. WELL, FIRST OF ALL, AS TO
23 APPLICABILITY ISSUES, AS I POINTED OUT EARLIER, IT'S
24 OUR BURDEN AND IT'S A PRIMA FACIE BURDEN IF WE CREATE
25 A TRIABLE ISSUE ON THOSE. IT RESOLVES IT IN OUR
26 FAVOR. IT'S FOR US TO PRESENT EVIDENCE. IT'S NOT AN
27 ISSUE OF WEIGHT. THE COURT IS REQUIRED ON THE
28 APPLICABILITY ISSUES TO BELIEVE AND CREDIT OUR

1 EVIDENCE.

2 FURTHER, GENERALLY OUR EVIDENCE GOES TO NOT
3 WEIGHING ISSUES BUT VALIDITY OF THEIR CLAIMS AS A
4 MATTER OF LAW INCLUDING WHERE THERE IS CONFLICTING
5 EVIDENCE THAT NO REASONABLE JURY COULD FIND FOR THE
6 PLAINTIFF ON PROBABILITY ISSUES INCLUDING, FOR
7 INSTANCE, THEIR CLAIM EAGLE BROADBAND WAS NEVER
8 LISTED IN THE RUSSELL THREE THOUSAND. YET THEIR OWN
9 PRESS RELEASE WHICH WE SUBMITTED POINTS OUT SAYING
10 THAT THEY WERE AS WELL -- AS THE RUSSELL WEBSITE
11 INDICATES, THEY WERE BOTH LISTED AND THEN DE-LISTED.

12 THEY ARGUE SIMILARLY TO THE NEW MATTER.
13 THEY ARGUE THAT WE DIDN'T RAISE ANY EVIDENCE OR
14 ARGUMENT IN OUR MOVING PAPERS REGARDING THE EXEMPTION
15 THAT THEY INTRODUCED FOR THE FIRST TIME. THEIR
16 ARGUMENT -- THAT IS EXEMPTED UNDER 425. THEY DIDN'T
17 ALLEGE THAT IN THE COMPLAINT, DIDN'T ALLEGE
18 DEFENDANTS WERE COMPETITORS, THE POSTINGS WERE DONE
19 FOR PURPOSES OF PROMOTING THE SALES OR GOODS OF THE
20 DEFENDANTS, ET CETERA.

21 THEY ALLEGE FOR THE FIRST TIME IN THEIR
22 OPPOSITION AND WE RESPONDED. AGAIN, IT'S OUR BURDEN
23 TO MAKE A PRIMA FACIE SHOWING OF APPLICABILITY, SO
24 OUR EVIDENCE IS -- EVEN IF THERE'S ARGUMENT,
25 CONFLICTING EVIDENCE, I DON'T SEE ANY EVIDENCE THEY
26 HAVE PUT IN THAT OUR CLIENTS ARE COMPETITORS OR THAT
27 THEY WERE ENGAGED IN A SHORT AND DISTORT SCHEME.

28 SO THAT OBJECTION TO OUR -- AND -- SO OUR

1 REPLY PAPERS RESPONDING TO THEIR 425.17(C) EXEMPTION
2 ARGUMENT IS PERFECTLY APPROPRIATE AND NOT
3 INADMISSIBLE.

4 LASTLY, WITHOUT -- GIVEN THE TIME
5 SITUATION -- WITHOUT GOING DOWN EACH -- POINT BY
6 POINT -- EACH OBJECTION AS TO THEIR OBJECTIONS TO THE
7 DOCUMENTS THAT WE SUBMITTED, GENERALLY, THE VAST BULK
8 OF THE DOCUMENTS WE SUBMITTED ARE FROM SEC
9 SUBMISSIONS BY THE PLAINTIFF, PARTY ADMISSIONS.
10 NOTHING INADMISSIBLE ABOUT THAT, AS WELL AS YAHOO!
11 BOARD POSTINGS WHICH ARE NOT BEING SUBMITTED FOR THE
12 TRUTH OF THE MATTER THEREIN, BUT GENERALLY TO
13 ESTABLISH THE CONTEXT THAT THE PRESS RELEASES REPLY
14 TO AN EARLIER POSTING OF THE ACTUAL PRESS RELEASE
15 THAT EAGLE HAD ISSUED WHEN THEY WERE LISTED
16 ORIGINALLY IN THE RUSSELL THREE THOUSAND INDEX.

17 THAT'S ALL I HAVE. THANK YOU.

18 THE COURT: NOW, THAT'S SUBMITTED.
19 MR. BROILES, YOU'RE SUBMITTING YOUR MOTION ON THE
20 PAPERS. COUNSEL FOR PLAINTIFFS, ANYTHING ELSE ON
21 MR. BROILES' MOTION?

22 MS. KHACHATOURIAN: MR. BROILES' MOTION,
23 NO, BUT I'D LIKE TO RESPOND TO MR. GOLDOWITZ'S
24 COMMENT.

25 THE COURT: IF YOU CAN DO IT IN THE NEXT
26 COUPLE MINUTES.

27 MS. KHACHATOURIAN: I WILL TRY MY BEST,
28 YOUR HONOR.

1 BASICALLY, FIRST OF ALL, WITH RESPECT TO
2 THE TIMING OF THE EVIDENTIARY OBJECTIONS, YOU CAN
3 MAKE EVIDENTIARY OBJECTIONS UP UNTIL THE DAY OF THE
4 HEARING AND YOU CAN MAKE THEM ORALLY. WE, IN FACT,
5 TRIED GET THEM TO THE OTHER SIDE AS QUICKLY AS
6 POSSIBLE, AND WE DIDN'T GET THE REPLIES UNTIL THE DAY
7 BEFORE A LONG HOLIDAY WEEKEND.

8 SO, FRANKLY, I DID THE BEST I COULD. THEY
9 GOT IT BEFORE THE HEARING. THEY CLEARLY HAD TIME TO
10 DIGEST AND OPPOSE IT. THERE SHOULD BE NO TIMELINESS
11 ARGUMENT HERE.

12 AS FAR AS THE ADMISSIBILITY OF THE
13 DOCUMENT. IF THEY'RE PUBLIC DOCUMENTS, YOU DO A
14 REQUEST FOR JUDICIAL NOTICE. THAT IS PROCEDURAL;
15 WHAT YOU ARE SUPPOSED TO DO IF YOU WANT THE COURT TO
16 TAKE JUDICIAL NOTICE OF PUBLIC DOCUMENTS.

17 THIS IS A HEARING WHERE EAGLE BROADBAND'S
18 CASE MAY BE DISPOSED OF SO EVERYONE'S GOT TO COMPLY
19 WITH THE PROCEDURAL RULES AND DO WHAT THEY'RE
20 SUPPOSED TO DO. THEY DID NOT DO A REQUEST FOR
21 JUDICIAL NOTICE, UNLIKE EAGLE BROADBAND AND,
22 THEREFORE, THE DOCUMENTS ARE INADMISSIBLE.

23 WITH RESPECT TO THE 425.17 EXCEPTION,
24 ARGUING THAT WE DID NOT PUT IN OUR COMPLAINT THAT THE
25 DOES WERE COMPETITORS AND ARGUING THAT WE DIDN'T PUT
26 CERTAIN INFORMATION IN OUR COMPLAINT, THAT MAKES THE
27 POINT AS TO WHY WE NEED THE DISCOVERY. HOW ON EARTH
28 CAN YOU EXPECT A PLAINTIFF WHO DOES NOT KNOW WHO

1 THESE DOE ANONYMOUS POSTERS ARE TO PUT IN THERE THAT
2 THEY'RE COMPETITORS? IT IS THE DOES' BURDEN TO SAY
3 WHETHER THE ANTI-SLAPP STATUTE APPLIES. THEY COULD
4 HAVE VERY EASILY SAID IN THEIR OPENING PAPERS THEY
5 WERE NOT COMPETITORS AND THAT THE EXCEPTION DID NOT
6 APPLY. IT'S AN OBVIOUS EXCEPTION. IT WAS MADE TO
7 CURB THE ABUSE BY DEFENDANTS TRYING TO BLOCK
8 LEGITIMATE PLAINTIFFS FROM SEEKING REDRESS AND TO
9 SOMEHOW USE THAT AGAINST THE PLAINTIFF NOW IS JUST
10 UNFAIR.

11 IT ALSO MAKES THE POINT, THOUGH, THAT WITH
12 ALL OF THE NEW EVIDENCE THAT THEY SUBMITTED IN THEIR
13 REPLY BRIEF ABOUT WHETHER THEY SHORTED STOCK, THEIR
14 OWNERSHIP, THEY BASICALLY HAVE CHERRY-PICKED THE
15 INFORMATION THAT WE HAVE REQUESTED AND SAID, TAKE OUR
16 WORD FOR IT, OR HERE'S AN ALTERNATIVE THEORY AS TO
17 WHY EAGLE BROADBAND STOCK IS DEPRESSED.

18 IT DOESN'T MATTER WHETHER YOU HAVE AN
19 ALTERNATIVE THEORY. THE FOCUS IS WHETHER WE PROVIDED
20 ADMISSIBLE EVIDENCE OF FACTS THAT A REASONABLE LAWYER
21 WOULD THINK WOULD HAVE A PROBABILITY OF SUCCESS ON
22 THE MERITS. WE HAVE DONE THAT THROUGH THE
23 DECLARATIONS OF MS. FLAHERTY AND FREDERICK REYNOLDS.
24 WE HAVE SUBMITTED MORE EVIDENCE THAN PROBABLY ANY
25 PLAINTIFF IN THE HISTORY OF ANTI-SLAPP.

26 IN EVERY CASE THAT I HAVE READ, THERE'S
27 NEVER BEEN AN EXPERT DECLARATION THAT VERIFIES THAT
28 THERE IS A SHORT AND DISTORT SCHEME, THAT VERIFIES

1 THAT THE POSTINGS ARE MOST LIKELY CONNECTED TO THE
2 SHORT AND DISTORT SCHEME AND THEN SAYS, IN ORDER TO A
3 HUNDRED PERCENT CONCLUDE THIS, I'M GOING TO NEED
4 DISCOVERY. SO THE IDEA THAT WE HAVE NOT SPECIFIED
5 AND SUPPORTED THE TYPE OF DISCOVERY WE NEED IS JUST
6 IGNORING THE PAPERS IN THEIR ENTIRETY.

7 AS FAR AS WHY THE EVIDENCE IS NOT RELEVANT,
8 WHAT WE'RE SAYING IS THAT IF THEY'RE OPPOSING OUR
9 MOTION TO PERMIT DISCOVERY REGARDING THE SAME SUBJECT
10 MATTER, THEN USING IT AGAINST US IN OUR REPLY BRIEF
11 TO SAY WE DON'T HAVE A PROBABILITY OF SUCCESS ON THE
12 MERITS, THEIR POSITION IS INCONSISTENT, NOT OURS.

13 IF YOU'RE GOING TO GIVE THE DISCOVERY WE'RE
14 REQUESTING, THEN WE GET A RIGHT TO TEST THAT. WE
15 DON'T HAVE TO TAKE YOUR WORD FOR IT. SO WITH ALL DUE
16 RESPECT, THE EVIDENTIARY OBJECTIONS SHOULD BE
17 SUSTAINED BECAUSE THEY'RE TIMELY. AND IF THE COURT'S
18 GOING TO CONSIDER THE EVIDENCE, THEN WE SHOULD HAVE
19 THE OPPORTUNITY TO HAVE DISCOVERY. OTHERWISE, EVERY
20 CASE IS GOING TO GET DISMISSED WHENEVER THERE'S AN
21 ANTI-SLAPP OBJECTION.

22 THE COURT: VERY WELL. I UNDERSTAND ALL
23 YOUR POSITIONS.

24 MR. GOLDOWITZ: YOUR HONOR, ONE, I'M NOT
25 GOING TO RESPOND TO THE REARGUING OF THE MOTION FOR
26 DISCOVERY ON THE MERITS. BUT THE ONE POINT ON THE
27 ARGUMENT THAT WE SUBMITTED THE DOCUMENTS AND DIDN'T
28 REQUEST JUDICIAL NOTICE, THERE IS NO REQUIREMENT THAT

1 THERE BE JUDICIAL NOTICE. THEY CITE NONE. I'M NOT
2 AWARE OF ANY IN THE HUNDRED AND SIXTY MORE CASES ON
3 ANTI-SLAPP STATUTE -- I'M NOT AWARE OF ANY CASE WHERE
4 THE COURTS THREW OUT EVIDENCE SIMPLY BECAUSE IT WAS
5 ATTACHED, AUTHENTICATED BY DECLARATION AND NOT
6 REQUESTING JUDICIAL NOTICE.

7 THE COURT: ALL RIGHT.

8 MR. BROILES: ON THE EVIDENTIARY
9 OBJECTIONS, I WILL BE BRIEF.

10 THE COURT: ONE MINUTE.

11 MR. BROILES: I ADMIT WITH RESPECT TO THE
12 DECLARATION THAT LANGUAGE ABOUT THE AFFIDAVIT WAS IN
13 ERROR. I PREPARED A SUBSTITUTE DECLARATION THAT
14 CORRECTS THAT ERROR THAT I AM PREPARED TO PRESENT TO
15 THE COURT AT THIS TIME IF THE COURT IS SO DISPOSED.

16 I ALSO HAVE THE S-1 FILING PLAINTIFFS
17 OBJECT TO, AND I'M PREPARED TO REQUEST JUDICIAL
18 NOTICE IF THE COURT WOULD LIKE TO REVIEW THAT HUNDRED
19 TWENTY PAGE DOCUMENT.

20 THE COURT: I REALLY DON'T WANT ANY FURTHER
21 PAPERS AT THIS TIME. I'M GOING TO DECIDE IT BASED ON
22 WHAT I HAVE.

23 MS. KHACHATOURIAN: YOUR HONOR, I SWEAR,
24 ONE QUICK POINT. OUR OBJECTION TO THE BROILES'
25 DECLARATION IS BECAUSE THE BRIEF IS NOT SIGNED AND
26 THE DECLARATION ISN'T SIGNED UNDER PENALTY OF
27 PERJURY, THAT IS CLEARLY A VIOLATION OF THE CODE OF
28 CIVIL PROCEDURE AND SHOULD NOT BE CONSIDERED.

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

THE COURT: VERY WELL. ALL MOTIONS ARE
SUBMITTED. THANK YOU, COUNSEL.

MS. KHACHATOURIAN: THANK YOU.

---000---

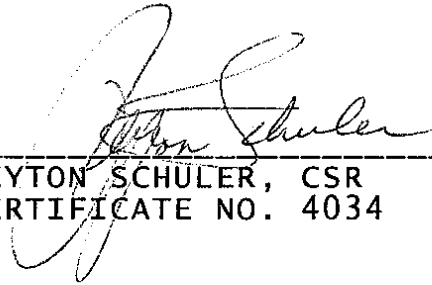
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATE OF CALIFORNIA)
) SS.
COUNTY OF SANTA CLARA)

I, PEYTON SCHULER, DO HEREBY CERTIFY THAT
THE FOREGOING IS A FULL, TRUE AND CORRECT TRANSCRIPT
OF THE PROCEEDINGS HAD IN THE WITHIN-ENTITLED ACTION
HELD ON FEBRUARY 23, 2006.

THAT, I REPORTED THE SAME IN STENOTYPE
BEING THE QUALIFIED AND ACTING OFFICIAL COURT
REPORTER OF THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA,
APPOINTED TO SAID COURT, AND THEREAFTER HAD THE SAME
TRANSCRIBED INTO TYPEWRITING AS HEREIN APPEARS.

DATED THIS 28TH DAY OF FEBRUARY, 2006.


PEYTON SCHULER, CSR
CERTIFICATE NO. 4034