IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE THE CENTER FOR MEDICAL PROGRESS, et al.,	)	
THE CENTER FOR MEDICAL PROGRESS, et al., Petitioners,	)	Case No. 15-72844
v.	)	
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent.	)	Civil Action No. 3:15-cv-3522-WHO Northern District of California
NATIONAL ABORTION FEDERATION, Real Party in Interest.	)	

PETITIONERS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY OF DISCOVERY PENDING APPEAL UNDER CIRCUIT RULE 27-3

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NAF's arguments strike at the heart of fundamental First Amendment values. Without any supporting case law, NAF aggressively asserts that an extremely common and effective form of investigative journalism—undercover filming—constitutes *criminal* (not merely tortious) activity, including federal racketeering. Equally troubling, NAF believes that it should be allowed censor speech from investigative journalism on matters of paramount and legitimate public importance. As numerous courts have held, such investigative journalism—even when it involves deceptions to gain access to information—plays a critical role in our system of self-government. *See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999); *Desnick v. American Broad. Co.*, 44 F.3d 1345 (7th Cir. 1995). NAF's arguments on both the merits and the other factors relevant to a stay pending appeal are unconvincing. The Court should stay all discovery proceedings in this case pending its resolution of the Petition for Writ of Mandamus filed by The Center for Medical Progress; Biomax Procurement Services, LLC; and David Daleiden (together, "CMP").

I. Any injunction against CMP's speech would plainly violate both CMP's and the public's First Amendment rights, and NAF provides no convincing argument to the contrary.

NAF's principal argument under the First Amendment is that its requested injunction against CMP's speech would not be a prior restraint at all, because CMP

putatively "waived" its right to speak by signing non-disclosure agreements.[1] This argument is plainly meritless. It conflates the question whether an injunction not to speak is a prior restraint (which it obviously is), with the question whether such a prior restraint may be justified by the speaker's purportedly voluntary waiver. On the justification issue, NAF relies almost exclusively on *Perricone v. Perricone*, 292 Conn. 187 (2009), a state family-law case that (1) did not involve a matter of any legitimate public concern, and (2) explicitly states that waivers of First Amendment rights should not be enforced when the topic of speech is one of paramount public concern. *See id.* at 220 ("Factors that have weighed against the enforcement of waivers include the 'critical importance' of the right to speak on matters of public concern . . . [and] the fact that the agreement requires the suppression of criminal behavior . . . ."). NAF fails to cite any case holding that its putative interest in enforcing a state-law contractual obligation is somehow weightier than the compelling interests that the Supreme Court has held do *not* justify prior restraints on speech, such as the protection of national security and the lives of U.S. troops engaged in combat abroad. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (Black, J., concurring) ("[E]very moment's

[1] As CMP argued in its anti-SLAPP motion, NAF's complaint fails to allege sufficient facts to support a plausible inference that CMP waived its First Amendment rights at all. A063-65.

continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.").

Moreover, even if such a "waiver" had occurred, any such "waiver" of First Amendment rights would be plainly unenforceable as a matter of law, as *Perricone* itself indicates, and NAF provides no argument at all to the contrary. *See* Pet. for Writ of Mandamus, at 12-15. When determining whether to enforce a waiver of constitutional rights, courts weigh the public policies supporting and opposing enforcement of the waiver. *Leonard v. Clark*, 12 F.3d 885, 890 (9th Cir. 1994). Where a private waiver of First Amendment rights interferes with the *public's* ability to access information of paramount public interest and "critical importance," the waiver cannot be enforced. *Perricone*, 292 Conn. at 220. Regardless of the private rights among the parties, any gag order in this case violates "the public's First Amendment right to view . . . film[s] of immense significance and public interest." *Garcia v. Google, Inc.*, 786 F.3d 727, 730 (9th Cir. 2015) (Reinhardt, J. dissenting from initial denial of emergency rehearing en banc) ("*Garcia I*"). "The Constitution protects the right to receive information and ideas, and that protection is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Id.* NAF does not even purport to defend the enforceability of any "waiver" of First Amendment rights in this case, and fails even to acknowledge the First Amendment interests of

the public at stake in any prior restraint. These omissions fatally undermine NAF's position on the merits.

II. The anti-SLAPP statute applies in this case, regardless of whether CMP waived its First Amendment rights.

Moreover, even if CMP *had* waived its First Amendment rights, such a waiver would not affect whether the anti-SLAPP statute—including its stay of discovery—applies in this case. California's anti-SLAPP statute requires a two-pronged analysis: the first prong addresses whether the defendant's conduct falls within the scope of the statute's protections; the second prong considers the merits of the plaintiff's claims. *Navellier v. Sletten*, 29 Cal.4th 82, 88-89 (2002). NAF urges that the First Amendment "waiver" issue must be considered at the anti-SLAPP statute's first prong, *i.e.*, the inquiry into whether a defendant can invoke the statute's protections at all. NAF Response, at 10-11. This is plainly incorrect.

Under the anti-SLAPP framework, the issue whether there has been a waiver of anti-SLAPP rights relates to the *merits* prong of the case, not the first prong that addresses whether the statute's protections (including the stay of discovery) apply at all. NAF quotes *Navellier* for the proposition that "a defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he or she later breaches that contract." NAF Response, at 16 (quoting *Navellier*, 29 Cal.4th at 94). But NAF quotes this statement out of context; the *immediately preceding* sentence in *Navellier*

demonstrates that "waiver" is considered only during the second, "merits prong to the statutory SLAPP definition." *Navellier*, 29 Cal.4th at 94 (holding that breach of contract claim fell within the scope of the anti-SLAPP statute's protections but remanding for consideration of merits of the claim). Indeed, *Navellier* directly rejected the notion that a defendant's purported waiver of constitutional rights rendered the anti-SLAPP statute inapplicable. *See Flatley v. Mauro*, 39 Cal.4th 299, 319 (2006) (analyzing *Navellier*). Thus, CMP can invoke the anti-SLAPP statute's protections *even if* it had "waived" its First Amendment rights. And it is clear from the face of the Complaint that CMP's alleged conduct falls within the scope of the anti-SLAPP statute's protections. *See, e.g., Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 953 (9th Cir. 2013) ("California courts have held that pre-publication and pre-production acts such as investigating, newsgathering, and conducting interviews constitute conduct that furthers the right of free speech."). Moreover, the *second* prong of the anti-SLAPP analysis in this case requires only a consideration of the sufficiency of the allegations in NAF's complaint under familiar Rule 12(b)(6) standards, since the anti-SLAPP motion argues only that NAF's complaint fails to state claims for relief. *See* Doc. 66-1.

III. NAF's claim that CMP faces no imminent threat of irreparable harm is implausible and meritless.

NAF claims that CMP has not shown that discovery would implicate the Fifth Amendment testimonial privilege, because corporate defendants allegedly

lack Fifth Amendment rights. This argument plainly lacks merit. One of the most extraordinary features of this case is NAF's attempt to characterize an extremely common and effective journalistic technique—undercover filming—as necessarily involving *criminal* fraud and racketeering. Throughout its pleadings—including in its Response to this Court—NAF has characterized the conduct of the defendants as a "three-year crime spree," expressly pleading that the defendants have violated several criminal statutes: 18 U.S.C. § 1028; 18 U.S.C. § 1343; 18 U.S.C. 1962; and California Penal Code § 632 (as well as alleging state-law fraud claims closely akin to potential state criminal fraud statutes). NAF's principal strategy in the case appears to be its attempt to chill First Amendment rights by threatening undercover investigators and speakers with criminal prosecution.

In light of NAF's central theory of the case, it is simply not credible for NAF to claim that discovery does not implicate Fifth Amendment issues. On the contrary, as NAF well knows, the district court has ordered the *individual* defendants in this case to file pleadings by ***today***, September 17, 2015, in which they must state on a topic-by-topic basis whether they will assert the Fifth Amendment testimonial privilege in response to discovery requests. *See* Doc. 116. Thus, NAF's insistence on invasive discovery, before the resolution of a 12(b)(6)-type motion, confronts the individual defendants with the untenable Hobson's choice of having to decide whether to assert the Fifth Amendment testimonial

privilege in a civil case without the benefit of any ruling on NAF's highly dubious allegations of criminal conduct. California's anti-SLAPP statute guarantees defendants the substantive right to a ruling on whether a plaintiff has even pleaded a viable claim for relief—especially on claims implicating the defendant in allegedly criminal conduct—*before* a defendant must decide whether to invoke the Fifth Amendment in discovery. *See* Cal. Civ. Code § 425.16(g); *Britts v. Superior Court*, 145 Cal.App.4th 1112, 1124 (2006); *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps*, 99 Cal.App.4th 1179, 1190 (2002).

Second, NAF's claim that CMP has provided no reason to believe that discovery will implicate First Amendment associational privacy interests, NAF Response, at 17, directly contradicts NAF's own argument. On the immediately following page of its Response, NAF contends that the information it most hopes to obtain from discovery is the identities of individuals assisted CMP in its investigations and the identities of other individuals with whom CMP had any discussions regarding the subject matter presented at NAF conferences. NAF Response, at 18-19. There can be no doubt that disclosing the identities of such individuals raises serious risks of chilling freedom of association. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1160-63 (9th Cir. 2009) (granting petition for writ of mandamus based on First Amendment associational-privacy grounds); *NAACP v. Alabama*, 357 U.S. 449, 463 (1958) ("A requirement that adherents of

particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature [*i.e.*, impinging on association]. Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." (quotation omitted)). NAF's characterization of its own discovery strategy directly confirms that the discovery will implicate First Amendment associational-privacy interests.[2] Moreover, NAF's attempt to obtain pre-publication journalistic materials and the identities of confidential investigators implicates the First Amendment journalistic privilege as well. *See Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995).

IV. NAF fails to present any basis for concluding that CMP's anti-SLAPP motion necessitates evidentiary development.

Relying heavily on the district court's discovery order, NAF continues to assert that CMP's anti-SLAPP motion necessitates evidentiary development before

[2] NAF also asserts that it "urgently seeks to discover the identity of all persons to whom CMP disclosed NAF confidential information so that NAF may serve them with the TRO." NAF Response, at 18. But the parties already have agreed and stipulated, pending resolution of NAF's not-yet-filed preliminary injunction motion, that "[t]he individuals that the Complaint alleged identified themselves with the following aliases to gain access to Plaintiff's annual meetings agree to be bound by the temporary restraining order as if they were named parties in the suit: Susan Tennenbaum, Brianna Allen, Rebecca Wagner, Adrian Lopez, and Philip Cronin." Doc. 83, at 6, ¶ 7. NAF makes no claim that any of these individuals has purported to violate the TRO in the six weeks it has already been in effect.

a ruling from the district court. NAF Response, at 12-13. This position fundamentally misunderstands the anti-SLAPP motion. That motion did not contest the truth of any allegations in the Complaint. Instead, the anti-SLAPP motion—as would a Rule 12(b)(6) motion—explained that the facts alleged in the Complaint, even if true, are too sparse and not legally sufficient to state a plausible claim for relief under the *Iqbal-Twombly* standard. *See* Petition for Writ of Mandamus, at 19-22. NAF requires no factual development, via discovery, to respond to that argument. It simply needs to identify sufficient factual matter in its own Complaint to state a plausible claim for relief. And the district court's statement, quoted by NAF, that aspects of the anti-SLAPP motion turn on "facts that NAF lacks or has not yet developed," A014, all but concedes that the Complaint as written lacks sufficient factual matter to survive a motion to dismiss. Under the anti-SLAPP statute, a plaintiff is not allowed to use preliminary-injunction discovery as a vehicle to attempt to beef up the legally insufficient allegations in its complaint.

V. NAF has not pointed to any substantiated threat of harm, but instead relies on incendiary accusations that it cannot support even with citations to its Complaint.

In its Response, NAF levels the incendiary accusation that CMP acted for the purpose of "placing [NAF members] in harm's way." NAF Response at 2; *see also id.* at 1 (claiming that CMP sought "to place [NAF members] in harm's

way"). NAF does not—and cannot—point to anything, even the allegations in its own Complaint, to support this baseless assertion of intent to harm. To the contrary, as widespread media coverage of CMP's activities has demonstrated, CMP's actions uncovered widespread criminal activity in the industry that should trouble persons at all points on the spectrum of opinion about the abortion issue, and should trigger reforms within the industry. Instead, NAF's argument about the risk of harm to its members rests almost entirely on its threats from anonymous Internet commenters with no relation to the parties of the case. It is, therefore, a quintessential heckler's veto argument—one that this Court should squarely reject as inconsistent with fundamental First Amendment values. *See Garcia I*, 786 F.3d at 730; Pet. for Writ of Mandamus, at 11-12.

Speech on such matters of paramount public importance implicates core principles of self-government and our constitutional order. "Political speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process." *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1089 (9th Cir. 2002) (en banc) (Reinhardt, J., dissenting). "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). NAF cannot seek to censor political speech with which it disagrees based on nothing more than a handful of anonymous internet comments.

CONCLUSION

For the reasons stated, this Court should enter a stay of all discovery proceedings in the district court pending resolution of CMP's Petition for Writ of Mandamus.

Date: September 17, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 17, 2015, I caused a true and accurate copy of the foregoing to be served via the U.S. Court of Appeals for the Ninth Circuit's electronic-filing system (CM/ECF) in Case No. 15-72844. I certify that all participants in the case are certified CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ D. John Sauer