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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: CENTER FOR MEDICAL PROGRESS; et al.,	No. 15-72844
CENTER FOR MEDICAL PROGRESS; et al., Petitioners, v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO, Respondent, NATIONAL ABORTION FEDERATION, NAF, Real Party in Interest.	D.C. No. 3:15-cv-03522-WHO Northern District of California, San Francisco ORDER

Before: REINHARDT, TASHIMA, and RAWLINSON, Circuit Judges.

In the action underlying this petition for a writ of mandamus, real party in interest the National Abortion Federation ("the Federation") sued petitioner Center for Medical Progress et al. ("the Center"), alleging various state and federal law claims, including violations of the Racketeer Influenced and Corrupt Organizations Act, fraud, conspiracy, invasion of privacy, and breach of contract. All are based

on the Center's alleged unlawful recording of undercover videos at a Federation annual conference. The district court granted a temporary restraining order that prohibited the Center from disclosing any information learned at the conference and also granted the Federation's motion for discovery prior to the preliminary injunction hearing. The Center then filed a motion to dismiss and an anti-SLAPP motion to strike.[1] Over the Center's objection, the district court permitted the Federation to proceed with limited discovery prior to the district court's decision on the anti-SLAPP motion. The Center then filed a petition for a writ of mandamus with this court seeking to prohibit discovery. We stayed discovery proceedings in the district court so that we could adequately review the petition for a writ of mandamus.

In its petition for a writ of mandamus, the Center does not challenge the district court's decision to enter a temporary restraining order—in fact, the Center has agreed to an extension of the restraining order until the district court decides

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[1] "California law provides for the pre-trial dismissal of certain actions, known as Strategic Lawsuits Against Public Participation, or SLAPPs, that 'masquerade as ordinary lawsuits' but are intended to deter ordinary people 'from exercising their political or legal rights or to punish them for doing so.'" *Makaeff v. Trump Univ. LLC*, 715 F.3d 254, 261 (9th Cir. 2013) (quoting *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003)). Among other provisions, the "statute allows a defendant to file a 'special motion to strike' to dismiss an action before trial." *Id.* (citing Cal. Civ. Proc. Code § 425.16).

whether to enter a preliminary injunction. Instead, the Center asks us only to order the district court to stay all discovery until it rules on the preliminary injunction and the anti-SLAPP motion.

Mandamus "is a 'drastic and extraordinary remedy' reserved for 'only exceptional circumstances.'" *In re Perez*, 749 F.3d 849, 854 (9th Cir. 2014) (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed.2d 459 (2004)). Mandamus is "[g]enerally . . . unavailable in the discovery context" because "this court is particularly reluctant to interfere with a district court's day-to-day management of its cases." *Id.*

We consider five factors when reviewing a mandamus petition: "(1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression." *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977). In this case, the district court's discovery rulings were not clearly erroneous, a factor that "is a necessary prerequisite for the writ to issue," *In re Perez*, 749 F.3d at 855. The

relevant law and factual circumstances discussed below explain why this conclusion is dictated here.

First, a district court may grant limited discovery in aid of a motion for preliminary injunction when there is "good cause" for doing so. Fed. R. Civ. P. 26(d). The district court did not err in deciding that the Federation satisfied this standard because there are a number of factual questions that must be resolved before it can fully and appropriately decide the preliminary injunction motion. In its complaint, the Federation alleges that, prior to attending a Federation conference, all persons must sign confidentiality agreements that prohibit attendees from disseminating any information learned at the conference. The reason it does this, it explains, is primarily to protect the identity and personal safety of its membership, as doctors who perform abortions are often a target of harassment, violence, and even in rare instances murder at the hands of anti-abortion activists. Here, the Center has not disclosed to the Federation or the district court what information it possesses regarding the other attendees at the conference. Thus, the district court cannot determine at this stage of the proceedings whether the information the Center seeks to disclose may result in potential harm to Federation members or even whether the information the Federation seeks to enjoin was

gathered at the conference and thus is covered by the confidentiality agreements into which the Center allegedly entered.[2]

Second, and more important here, to prevail on an anti-SLAPP motion, a defendant must establish that the plaintiff's case "arises from an act in furtherance of the defendant's constitutional right to free speech." *Makaeff*, 715 F.3d at 261. When this is so, the "burden then shifts to the plaintiff . . . to establish a reasonable probability that it will prevail on its claim in order for that claim to survive dismissal." *Id.* The anti-SLAPP statute provides that "[a]ll discovery proceedings shall be stayed upon filing of a notice of motion made pursuant to" the anti-SLAPP statute. Cal. Civ. Proc. Code § 425.16(g). We have held, however, that this subpart of the anti-SLAPP statute "collide[s]" with Federal Rule of Civil Procedure 56[3] and therefore "cannot apply in federal court" if "the nonmoving party has not had the opportunity to discover information that is essential to its opposition." *Metabolife International v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (internal quotation marks omitted). Here, questions regarding whether the Center entered

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[2] As the district court notes, the Center has continued to release videos since the district court entered the restraining order, which suggests that at least some of the Center's information may not be within the scope of the confidentiality agreements. The parties have thus far only disagreed about whether one video should be released, and on that issue the district court ruled in favor of the Center.

[3] Rule 56 governs motions for summary judgment in federal court.

into a confidentiality and waiver agreement and what that agreement covers may well be "essential" to the Federation's opposition to the anti-SLAPP motion. In this connection it is significant that the California Supreme Court has held that a defendant can contractually waive the anti-SLAPP statute's protections, as the Federation contends that the Center has done here. *See Navellier v. Sletten*, 29 Cal.4th 82, 94 (Cal. 2002) ("[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."). Discovery may well thus be necessary for the Federation's defense to the anti-SLAPP motion for the same reason that it is necessary to the district court's ability to rule on the preliminary injunction. Without knowing what information the Center has obtained and whether that information is covered by the alleged confidentiality agreements, the Federation may not be able to demonstrate that, as it alleges, the Center waived its right to bring an anti-SLAPP motion by signing a confidentiality agreement. Obtaining that information takes precedence over any state-law discovery rule, especially here where, as the district court put it, the anti-SLAPP motion is "riddled with factual determinations that must be resolved." *See Metabolife*, 264 F.3d at 846 (so ruling in the Rule 56 context).

In this order, we do not consider any difficult constitutional questions nor express any view of the merits of the underlying suit. We merely decide a narrow question arising from a discovery dispute. Far from being clearly erroneous, the district court's decision to permit discovery appears to be necessary to permit it to resolve the difficult issues present in this case, and thus is consistent with Ninth Circuit law, including *Metabolife*. This court's stay entered September 17, 2015 is DISSOLVED and the petition for a writ of mandamus is DENIED.