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December 20, 2006

The Honorable Ronald George, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Response and Objection to Electronic Frontier Foundation's Request for Depublication (Cal. Rule of Court 979(b)) of Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc. (Calif. Ct. of App. Nos. A107538 & A108292, filed October 12, 2006)*

To the Chief Justice and the Associate Justices:

On behalf of Novartis Vaccines and Diagnostics, Inc., the plaintiff and respondent in the above action, we write to respond to the December 8, 2006 letter from the Electronic Frontier Foundation ("EFF") and to object to EFF's request that the Court depublish the October 12, 2006 opinion of the court of appeals in this matter.

A. Interest of Novartis Vaccines and Diagnostics, Inc.

Novartis Vaccines and Diagnostics, Inc. ("Novartis"), formerly known as Chiron Corporation, is a biopharmaceutical company headquartered in Emeryville, California. Novartis develops important vaccines and blood testing products for diseases including AIDS and hepatitis, and is required by law to conduct testing on animals. Starting in 2003, SHAC USA engaged in an unlawful campaign to harass, intimidate and terrorize Novartis' employees in an effort to express dissatisfaction related to animal testing methods used by Huntingdon Life Sciences, an organization that Novartis had worked with in the past. Specifically, SHAC USA orchestrated unlawful demonstrations called "home visits," whereby masked individuals would go to the homes of Novartis employees in the middle of the night, break windows, vandalize property, and shout threats and epithets through bullhorns. In addition, as the court of appeals found, there was sufficient evidence to support that SHAC USA was involved in the bombing of Novartis' headquarters in August of 2003. This unlawful and terrifying conduct continued from 2003 to September of 2004, when the trial court issued a preliminary injunction against SHAC USA.

Novartis writes to object to depublication of the *Novartis v. SHAC USA* opinion because doing so would encourage purported “protestors” to engage in criminal tactics, similar to those of SHAC USA, based on the erroneous belief that such unlawful activities, coordinated through a website, are immune from prosecution. Novartis, which continues to be required by law to conduct some limited testing on animals, has a strong and continuing interest in protecting itself and its employees from these unlawful acts of harassment.

B. The Opinion Should Not be Depublished.

The *Novartis* decision is important for California employers seeking to protect their employees from terrifying and unlawful harassment. The opinion, which only minimally addresses issues related to the Communications Decency Act (“the Act”) upon which EFF focuses, should remain published for at least five reasons.

1. The *Novartis* Opinion Created Significant Precedent that Protects Employers, and their Employees, Against Escalating Violent Acts of Animal Rights Terrorists.

On February 25, 2004, Novartis filed a complaint against SHAC USA and “Doe” defendants in an effort to protect itself and its employees from acts of harassment, intimidation, and violence. The lawsuit sought injunctive relief preventing SHAC USA, and those acting in concert with SHAC USA, from conducting “home visits,” making harassing phone calls, and publishing private information on the SHAC USA website. The lawsuit neither sought damages nor an order preventing SHAC USA from speaking about its views on animal rights. SHAC USA filed a special motion to strike the complaint, pursuant to California Code of Civil Procedure Section 425.16. The trial court denied SHAC USA’s anti-SLAPP motion, and SHAC USA appealed that decision along with the trial court’s decision to grant a preliminary injunction. The *Novartis* court consolidated these two appeals and affirmed both decisions of the trial court.

Biomedical research companies and research institutions have been actively litigating cases similar to *Novartis* in order to protect their employees from vigilante activism. These cases, however, have failed to be wholly successful due to the tactics of SHAC USA, and other like-minded groups, that use anonymous organizations to hide and orchestrate the illegal acts of their members. Before *Novartis*, it was unclear that an employer could pursue injunctive relief on behalf of its employees in an effort to protect employees from unlawful harassment experienced as a direct result of the employee’s affiliation with the employer. See *City of Los Angeles v. Animal Defense League*, 135 Cal. App. 4th 606 (2006); *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228 (2005). *Novartis* now provides a significant means of relief for employers and employees alike.

As the recent criminal convictions of seven SHAC USA members demonstrates, the threat to employees’ safety is real: individuals have been threatened and bombs have been planted. Addressing these real dangers, *Novartis* clarified that organizations like SHAC USA cannot engage in an unlawful conspiracy to orchestrate these activities yet claim immunity based

on arguments that its involvement constituted free speech. The court's careful decision clarified that neither the anti-SLAPP statute nor the First Amendment could be used to protect activities, like those employed by SHAC USA, that are illegal as a matter of law. The opinion, which involves a legal issue of continuing public interest, significantly contributes to the legal literature by reviewing the development of the anti-SLAPP statute and its applicability to lawsuits brought to stop illegal activity.¹

2. The Analysis of the Communications Decency Act was of Minimal Significance in Light of the Facts, Circumstances, and Legal Issues on Appeal.

The primary issue on appeal was whether the trial court erred in denying SHAC USA's motion to strike Novartis' complaint. In the court's nineteen page opinion, where it fully analyzed the California anti-SLAPP statute and its application after the recent California Supreme Court cases *Flatley v. Mauro*, 39 Cal. 4th 299 (2006), and *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260 (2006), as well as legal issues related to standing and jurisdiction, only one short paragraph is dedicated to SHAC USA's Communications Decency Act argument. This topic was neither a strong component of the briefings nor a significant area of discussion at oral argument, as the court's brief discussion and dismissal of the argument demonstrates. To depublish an entire decision, especially one as significant as *Novartis*, in light of the court's brief analysis of an inapplicable argument is unfounded.

3. The Court Correctly Applied the Communications Decency Act.

EFF voices a single complaint: the *Novartis* decision "fails to consider whether SHAC USA is a 'user' protected by Section 230." EFF Letter at 2. EFF urges depublishation because the subsequent California Supreme Court case of *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006), granted "users" immunity under the Act, and the *Novartis* court did not explicitly state whether SHAC USA was such a "user." This request is misguided in light of the *Novartis* court's full analysis of SHAC USA's conduct. The court's complete opinion, rather than the single paragraph on which EFF focuses, demonstrates that the court did not consider SHAC USA a "user" as described in *Barrett*. EFF's concerns about the opinion are therefore unwarranted.

In *Barrett*, this Court considered whether an individual who posted material, authored by a third person, to the websites of two unrelated newsgroups could be liable for the allegedly defamatory statements included in the materials. *Barrett*, 51 Cal. Rptr. 3d at 59. These specific facts of *Barrett* were the bases of the Court's analysis of whether an individual in this circumstance could be afforded protection and immunity under the Act.

Novartis is factually and materially distinguishable from *Barrett*, and the full opinion demonstrates that the court properly dismissed the argument that SHAC USA was a "user" as that term was defined and applied in *Barrett*. As the *Novartis* court explained, SHAC USA posted material to its own website that encouraged conduct that was "illegal as a matter of law."

¹ See California Rule of Court 976 (outlining necessary requirements for publication).

Novartis, 143 Cal. App. 4th at 1296. Unlike an individual who posts third-party material to a website with which he/she has no affiliation, SHAC USA posted its *own* material to its *own* website, specifically naming the places and dates for activists to “target” employees. *Id.* SHAC USA also published instructions on how to conduct unlawful protests and engage in other unlawful tactics. *Id.* at 1296-97. Furthermore, when SHAC USA posted material authored by third parties, it ratified those postings by taking credit for the conduct that occurred and praising the unlawful tactics employed. *Id.* Thus, it is clear from the court’s description of SHAC USA’s activities that it did not consider SHAC USA to be a “user” in the *Barrett* sense, i.e. posting only reports written by third-parties as SHAC USA argued in its opening brief.² To the contrary, the *Novartis* court considered SHAC USA the perpetrator of unlawful acts against Novartis and its employees, using its website to post its own material, and the ratified material of others, to encourage and orchestrate illegal acts.

4. The Opinion’s Brief Discussion of the Communications Decency Act will have No Effect on Law-Abiding Internet Users.

EFF argues that depublication is necessary in order to limit the “danger that its narrow interpretation of [the Act] will lead to unwarranted self-censorship and timidity by internet users.” EFF Letter at 3. But there is no indication that *Novartis* has had, or will have, such an effect. As discussed above, the *Novartis* opinion *did not* hold that individuals who publish exclusively third-party content on a website can be liable for defamation. To the contrary, the court found that when a party like SHAC USA conspires to conduct unlawful acts, and uses its website and its ratified postings to that website to further that conspiracy, the statements of the party can be used as evidence of that conspiracy. Unlike the concerns that EFF voices, the *Novartis* ruling will not chill ordinary users from engaging in the exchange of ideas. Instead, the decision will deter organizations like SHAC USA from posting materials to incite and orchestrate the unlawful conduct of others. Far from addressing defamatory statements posted to a public website, the *Novartis* opinion establishes that parties who commit unlawful acts, and use the internet to orchestrate those acts, can neither hide behind First Amendment protections nor the Communications Decency Act. Simply put, the use of the internet cannot otherwise immunize an unlawful conspiracy. This determination runs no risk of chilling the speech of individuals exchanging information for the purposes of discussion.

5. If *Novartis* Conflicts with *Barrett*, *Barrett* is Clearly the Controlling Authority.

EFF’s concerns that the *Novartis* decision may overshadow the analysis of the subsequent ruling in *Barrett v. Rosenthal* is unfounded. Although Novartis does not concede that the appellate decision is in conflict with *Barrett* due to the factual dissimilarities discussed above,

² Appellant SHAC USA explicitly argued in its opening brief that SHAC USA was a “user” as defined in the Act, Appellant’s Opening Brief at 44-45, thus the court considered this argument. *Chevron U.S.A., Inc. v. Workers’ Comp. Appeals Bd.*, 19 Cal.4th 1182, 1195 (1999) (It is “axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.”).

even if there were such a conflict it is clear that the most recent case from the highest court is the controlling authority. *Barrett* not only post-dated the *Novartis* opinion, it addressed Communications and Decency Act issues in detail, whereas the *Novartis* court had no need to do so. To assume that a lower-court opinion that briefly discusses these complicated issues in a cursory fashion would function as precedent, when the Supreme Court of California has clearly spoken on the issue, is unfounded.

C. Conclusion.

For the reasons stated above, Novartis Vaccines and Diagnostics, Inc. respectfully requests that the Court reject EFF's request to depublish *Novartis v. SHAC USA*.

Respectfully,

A handwritten signature in black ink, appearing to read 'D. Bookin', with a long horizontal flourish extending to the right.

Daniel H. Bookin
Attorney for Novartis Vaccines & Diagnostics,
Inc.

cc: Clerk of the Court of Appeal, First District, Division 1
Mark Goldowitz, Esq.
Shannon Keith
Kurt B. Opsahl

CERTIFICATE OF SERVICE

I, Doreen Bordessa, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Embarcadero Center West, 275 Battery Street, San Francisco, California 94111-3305. On December 20, 2006, I served the within documents:

LETTER TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES CALIFORNIA SUPREME COURT

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collecting 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 the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on December 20, 2006, at San Francisco, California.



Doreen Bordessa