

# COVINGTON & BURLING LLP

ONE FRONT STREET  
SAN FRANCISCO, CA 94111  
TEL 415.591.6000  
FAX 415.591.6091  
WWW.COV.COM

SAN FRANCISCO  
WASHINGTON  
NEW YORK  
LONDON  
BRUSSELS

RICHARD ALLEN JONES  
TEL 415.591.7065  
FAX 415.955.6565  
RJONES@COV.COM

December 20, 2006

## BY HAND DELIVERY

California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102

Re: Opposition to Request for Depublication of *Novartis Vaccines and  
Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*,  
143 Cal. App. 4th 1284 (2006)

---

To The Chief Justice and the Associate Justices

We write on behalf of the National Association of Biomedical Research ("NABR") to oppose the request of the Electronic Frontier Foundation ("EFF"), Professor Deirdre K. Mulligan, and Jack I. Lerner that this Court depublish the opinion in the above captioned case.

### **Interest of the National Association of Biomedical Research**

NABR is a national nonprofit organization dedicated to advocating sound public policy that recognizes the essential role of humane use of animals in biomedical research, higher education and product safety testing. NABR's membership comprises more than 300 public and private universities, medical and veterinary schools, teaching hospitals, voluntary health agencies, professional societies, pharmaceutical companies and other firms with an interest in animal research. NABR's members include many California academic institutions, hospitals, and corporations.

NABR supports the responsible use and humane care and treatment of laboratory animals. It believes that biomedical researchers should develop and employ alternatives to the use of live animals wherever feasible, should use as few animals as possible in biomedical research, and should minimize any pain or distress the animals may experience. For now and in the foreseeable future, however, the use of animals and the study of whole, living organisms is an indispensable element of biomedical research to improve the quality of life of people and other animals.

NABR's members have a strong interest in the issues decided by the Court of Appeals in the *Novartis* case. In recent years, animal rights activists have broken into and destroyed research facilities, homes and vehicles, and have harassed, threatened and assaulted members of the research community and their families. This lawless and violent brand of animal rights

California Supreme Court  
December 20, 2006  
Page 2

activism is escalating in frequency and destructiveness. NABR's members have been targeted by radical animal rights activists, and NABR's members have determined that they must take action to protect their employees if they are to continue their important biomedical research.

In a statement to a Congressional committee, the Chief of the Counterterrorism Section of the United States Department of Justice has identified SHAC USA, defendant and appellant in the *Novartis* case, as one of several animal rights extremist organizations engaged in a campaign of "criminal conduct . . . calculated to aggressively intimidate and harass those whom it identifies as targets."<sup>1</sup> The statement noted that "[h]arassment of other businesses, and the employees of those businesses, vandalism of property belonging to individuals . . . or, even worse, publication of private information about such individuals, their spouses and even their young children, are only some of the techniques used by SHAC and like-minded persons to coerce and intimidate companies and individuals." *Id.*

NABR's members, including universities, biomedical research companies and laboratories facing vigilante animal rights activism in California and elsewhere, rely on the courts to protect the safety and security of their workplaces, their employees, and their employees' homes and families. Given the very real threats facing the research community, including threats of bodily harm, NABR has worked hard to ensure that laws such as California's anti-SLAPP statute are not deployed in a way that renders courts powerless to provide timely protection.

### **The Court Should Deny EFF's Request for Depublication**

The EFF argues that the decision in *Novartis v. SHAC USA* should be depublished because its analysis of Section 230 of the Communications Decency Act conflicts with *Barrett v. Rosenthal*, 40 Cal. 4th 33 (Nov. 20, 2006). There is no such conflict. Moreover, depublication would not be warranted even if the *Novartis* decision were in tension with *Barrett* (which it is not) because this Court's *Barrett* decision would control.

The *Novartis* court's discussion of Section 230 is contained in only one paragraph of its 19-page opinion. 143 Cal. App. 4th at 1301. SHAC USA's attempt to avoid liability by invoking Section 230 merited only brief mention because even if SHAC USA qualified as a "provider" or "user" of an "interactive computer service" under Section 230, the statute would not immunize it from liability for the concededly unlawful acts of its followers.

---

<sup>1</sup> *Eco-terrorism: Hearing Before the Senate Comm. on Env't & Pub. Works*, 109th Cong. \_\_\_\_ (2005) (written statement of Barry Sabin, Section Chief of the Counterterrorism Division of the Department of Justice (Oct. 26, 2005)) (available at [http://epw.senate.gov/109th/Sabin\\_testimony.pdf](http://epw.senate.gov/109th/Sabin_testimony.pdf).)

California Supreme Court  
December 20, 2006  
Page 3

Section 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). As the court in *Novartis v. SHAC USA* took pains to document, the evidence of SHAC USA’s participation in an unlawful conspiracy with its followers was manifest, and included statements made by SHAC USA itself. 143 Cal. App. 4th at 1289-91, 1296-98, 1300-01. Moreover, as the court noted, the basis for SHAC USA’s liability to Novartis and its employees was the concededly unlawful actions of SHAC USA’s followers, not merely statements posted on SHAC USA’s website. *Id.* at 1296, 1300-01. This case is therefore readily distinguishable from *Barrett*, in which the claims were solely premised on speech, such as messages posted to newsgroups on the Internet referring to doctors as “quacks” and a redistributed email message alleging that one doctor had stalked women. 40 Cal. 4th at 40 n.2.

The significant and important portions of the *Novartis v. SHAC USA* decision concern (1) the application of settled principles of conspiracy liability to the analysis of an anti-SLAPP motion, and (2) the recognition of an employer’s standing to sue on behalf of its employees where the employer itself has been injured, employees have been targeted because of their employment, and obstacles prevent the employee from asserting their own rights. 143 Cal. App. 4th at 1296-1301. These principles are vitally important to NABR’s members as they increasingly confront coercive and intimidating harassment by radical animal rights activists.

For the foregoing reasons, this Court should deny EFF’s request for depublication.

Very truly yours,



Richard A. Jones  
Robert A. Long, Jr.  
Emily Johnson Henn

*Attorneys for NABR*

cc: Clerk of the Court of Appeal, First District, Division 1  
Daniel H. Bookin  
Mark Goldowitz, Esq.  
Kurt B. Opsahl

California Supreme Court  
December 20, 2006  
Page 4

CERTIFICATE OF SERVICE

The undersigned member of the bar of this Court hereby certifies that true and correct copies of the foregoing letter were served upon:

The Clerk of the Court of Appeal, First District, Division 1  
350 McAllister Street  
San Francisco, CA 94102

Mark Goldowitz, Esq.  
California Anti-SLAPP Project  
2903 Sacramento Street  
Berkeley, CA 94702

*Attorney for Defendant-Appellant Stop Huntingdon Animal Cruelty,  
USA, Inc.*

Daniel H. Bookin  
O'Melveny & Myers LLP  
Embarcadero Center West  
275 Battery Street, 26th Floor  
San Francisco, CA 94111-3344

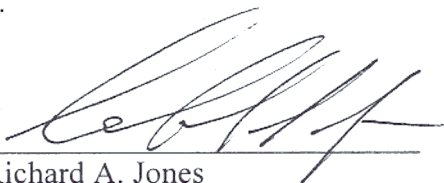
*Attorney for Plaintiffs-Respondents Chiron Corporation et al.*

Kurt B. Opsahl, Esq.  
Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, CA 94110

*Attorney For EFF, Professor Deirdre K. Mulligan and Jack I. Lerner*

by first-class mail, postage prepaid on this day.

December 20, 2006

  
Richard A. Jones