Electronic Frontier Foundation
Protecting Rights and Promoting Freedom on the Electronic Frontier

December 8, 2006

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

RE: Request for Depublication (Cal. Rule of Court 979(a))
Novartis Vaccines and Diagnostics, Inc v. Stop Huntingdon Cruelty USA, Inc.
(Calif. Ct. of App. Nos. A107538 & A108292, filed Oct. 12, 2006)

To the Chief Justice and the Associate Justices:

On behalf of the Electronic Frontier Foundation ("EFF") and Professor Deirdre K. Mulligan and Jack I. Lerner, we are writing to request depublication of *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Cruelty USA, Inc.*, (2006) 143 Cal.App.4th 1284, 2006 Daily Journal D.A.R. 13,863, Ct. of App. Nos. A107538 & A108292, October 12, 2006 ("*Novartis v. SHAC USA*").

A. Interest of the Electronic Frontier Foundation

EFF is a non-profit, member supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF is based in San Francisco. EFF has over 12,000 members from California and throughout the United States, and maintains one of the most-linked-to Web sites (http://www.eff.org/) in the world.

EFF often hears from constituents and individuals, who are concerned about potential liability for online activities and find reassurance in Section 230 of the Communications Decency Act of 1996 (47 U.S.C. § 230). As part of its mission to promote and defend free speech, EFF provides pro bono legal assistance to defend Internet users and service providers who are faced with potential liability. In addition, EFF works to help shape precedent on important Internet law issues. For example, EFF was an amicus curiae in this Court's recent decision on Section 230 in *Barrett v. Rosenthal*, (2006) __ Cal.Rptr.3d , 2006 WL 3346218, Cal., November 20, 2006, Supreme Court No. S122953 (Ct. of App. No. AO96451).

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B. Interest of Professor Deirdre K. Mulligan and Jack I. Lerner

Deirdre K. Mulligan is Clinical Professor of Law at the University of California—Berkeley School of Law (Boalt Hall) and Director of the Samuelson Law, Technology & Public Policy Clinic. Jack I. Lerner is Clinic Fellow at the Samuelson Clinic.

Professor Mulligan and Mr. Lerner are law faculty with a special interest and expertise in internet law. We are committed to the sound development of appropriate legal rules relating to the internet. The issue of the scope of protection afforded by Section 230 of the Communications Decency Act is of great public importance to the continued development of the internet. As Director of the Samuelson Clinic, Professor Mulligan submitted a brief on behalf of ten law professors with expertise in internet law as amicus curiae in *Barrett v. Rosenthal.*

Professor Mulligan and Mr. Lerner submit this letter on their own behalf, and this letter should not be attributed to the institution by which they are employed. Professor Mulligan and Mr. Lerner have no financial interest in the matter and do not represent any party in this case.

C. Why *Novartis v. SHAC USA* Should Be Depublished

The decision in *Novartis v. SHAC USA* should be depublished because its analysis of Section 230 ignores the protections Congress provided for *users* of interactive computer services, leaving only the protection for interactive computer service *providers*. (*Novartis, supra*, 143 Cal.App.4th at 1301 (Section III.A.4)).

As this Court recognized in *Barrett v. Rosenthal,* Section 230 expressly grants both providers and users the same immunity on the same terms. *Barrett, supra* at *14-17 ("By declaring that no 'user' may be treated as a 'publisher' of third party content, Congress has comprehensively immunized republication by individual Internet users."); *see also* 47 U.S.C. § 230(c)(1) ("[n]o provider *or user* of an interactive computer service shall be treated as the publisher. . . ." (emphasis added)).

However, the *Novartis v SHAC USA* opinion's analysis of Section 230 fails to consider whether SHAC USA is a "user" protected by Section 230. Since the analysis is only one paragraph, it is quoted below in full:

> Finally, SHAC USA argues that it is immune from liability under section 230 of the Communications Decency Act, 47 United States Code section 230. That *statute applies, however, only to "interactive computer services,"* which are defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . ." There is no evidence in this record that SHAC USA operates in this manner. Moreover, this argument

> was rejected in *Huntingdon Life Sciences, supra*, 129 Cal.App.4th at page 1258, footnote. 9, because there, as here, SHAC put forth "no evidence that SHAC USA's web site is an 'interactive computer service.'"

Novartis, supra, 143 Cal.App.4th at 1301 (emphasis added). The sole citation to precedent is to dicta in a footnote in *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, (2005) 129 Cal.App.4th 1228. In that case the court found defendants had "abandoned the [Section 230 defense] by not raising it in their opening brief," and then noted the lack of evidence. *Id.* at 1258 n.9.

In light of the plain language of the statute and *Barrett v. Rosenthal*, the Court of Appeal decision's reading of Section 230 is too narrow. In particular, the decision errs when it reads Section 230 as applicable "only" to interactive computer services, while neither discussing nor even acknowledging the statutory language and precedent establishing that users are also protected. *See e.g. Batzel v. Smith*, (9th Cir. 2003) 333 F.3d 1018, 1030, *cert. denied*, 124 S.Ct. 2812 (2004) (the "language of § 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services."); *Optinrealbig.com, LLC v. Ironport Systems, Inc.*, (N.D. Cal. 2004) 323 F.Supp.2d 1037, 1047 (defendant protected where it "uses interactive computer services to distribute its on-line mailing and to post the reports on its website"); *Barrett v. Fonorow*, (Ill. App. 2003) 799 N.E.2d 916, 923-24 (poster of messages was interactive computer service "provider or user").

The vibrant content that flowers throughout the Internet grows from the contributions of individuals who might otherwise never have the resources or ability to speak to a national or global audience. As the United States Supreme Court noted the Internet allows "tens of millions of people to communicate with one another and to access vast amounts of information from around the world." *Reno v. ACLU*, (1997) 521 U.S. 844, 850 (citation omitted). The Internet provides "relatively unlimited, low-cost capacity for communication" that makes possible "vast democratic forums" of all kinds. *Id.* at 870. It is truly "a unique and wholly new medium of worldwide human communication." *Id.* at 850.

Depublishing the Court of Appeal's decision will eliminate the danger that its narrow interpretation of Section 230 will lead to unwarranted self-censorship and timidity by Internet users. Otherwise, individual Internet users might become reluctant to pass on information, articles, or the comments of others that they find interesting or worthy of discussion out of fear that their inability to assess the material's accuracy or reliability will provoke ruinous litigation against them. Such a result would be contrary to the will of Congress as expressed through Section 230, and would present a chilling effect against the principles of free speech enshrined in the California and Unites States constitutions.

D. Conclusion

For the reasons stated above, EFF, Professor Mulligan and Mr. Lerner respectfully requests that this Court depublish *Novartis v. SHAC USA*.

Sincerely,

Kurt B. Opsahl, Esq.
Staff Attorney
Electronic Frontier Foundation

Deirdre K. Mulligan, Esq.
Clinical Professor of Law at the University of California—Berkeley School of Law (Boalt Hall) and Director of the Samuelson Law, Technology & Public Policy Clinic

Jack I. Lerner, Esq.
Clinic Fellow at the Samuelson Clinic

CERTIFICATION OF SERVICE

I, BARAK R. WEINSTEIN, 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 454 Shotwell Street, San Francisco, California 94110.

On December 8, 2006, I served the within documents:

LETTER TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES Re: Request for Depublication of *Novartis v. SHAC USA*

by placing the document 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:

California Court of Appeal
First District
Division 2
350 McAllister Street
San Francisco, CA 94612

Honorable Judge Steven Brick
Alameda County Superior Court
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Daniel Bookin
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I am readily familiar with the firm's practice of collection and processing correspondence for personal service and mailing. Under the firm's practice with regard to mailing, 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 postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 8, 2006, at San Francisco, California.

Barak R. Weinstein