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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KAREN MCDOUGAL, an individual,

Plaintiff,

vs.

AMERICAN MEDIA, INC., a Delaware corporation; and DOES 1 through 25, inclusive,

Defendants.

Case No. BC 698956
Assigned to the Hon. Michael L. Stern

DEFENDANT AMERICAN MEDIA, INC.'S NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE COMPLAINT PURSUANT TO C.C.P. § 425.16; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KEVIN L. VICK WITH EXHIBITS 1-8; DECLARATION OF DYLAN HOWARD WITH EXHIBITS 9-11; DECLARATION OF LEE E. GOODMAN WITH EXHIBITS 12-18

Date: April 30, 2018
Time: 8:30 a.m.
Dep't: 62
Res. # 180402302463

TO THE HONORABLE COURT, PLAINTIFF AND COUNSEL:

PLEASE TAKE NOTICE that on April 30, 2018, at 8:30 a.m. or as soon thereafter as counsel may be heard in Department 62 of the Los Angeles County Superior Court, the Hon. Michael L. Stern, presiding, located at 111 North Hill Street, Los Angeles, California 90012, defendant American Media, Inc. ("AMI") will and hereby does move this Court for an order, pursuant to California Code of Civil Procedure § 425.16 ("Section 425.16" or the "anti-SLAPP[1] statute"), striking and dismissing, in whole or, alternatively, in part, the Complaint and its sole cause of action for declaratory relief filed by plaintiff Karen McDougal ("McDougal") with prejudice and without leave to amend.[2] McDougal's cause of action for declaratory relief under Code of Civil Procedure § 1060 falls within the scope of Section 425.16(e), and, as such, the burden shifts to McDougal to establish, with admissible evidence, a probability that she will prevail on her cause of action, and all parts thereof. C.C.P. § 425.16(b)(1).[3] McDougal cannot satisfy her burden. AMI therefore requests that the Court strike and dismiss, with prejudice and without leave to amend, McDougal's cause of action for declaratory relief, or, alternatively, portions thereof, for the following separate and independent reasons:

- There was no "fraud in the execution" of the agreement between McDougal and AMI;
- McDougal ratified the agreement between herself and AMI;
- McDougal waived any claim of fraud associated with the agreement between herself and AMI;
- The agreement between McDougal and AMI is not illegal for the following separate and independent reasons:
    - The First Amendment protects AMI's editorial discretion;
    - The First Amendment protects AMI's newsgathering conduct;

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[1] SLAPP is an acronym for "strategic lawsuit against public participation." *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 57 (2002).

[2] McDougal may not amend her complaint in the face of this anti-SLAPP motion. *See, e.g., Hansen v. Calif. Dep't of Corrections and Rehab.*, 171 Cal. App. 4th 1537, 1547 (2008).

[3] The Court may strike parts of a complaint pursuant to the anti-SLAPP statute. *Baral v. Schnitt*, 1 Cal. 5th 376, 385-392 (2016)

- The agreement between McDougal and AMI does not violate the Federal Election Campaign Act ("FECA");
- Alternatively, 52 U.S.C. § 30118(a), and other relevant FECA provisions and related regulations, are unconstitutionally vague and overbroad facially and as applied to the press activities at issue here; and

• The agreement between McDougal and AMI is not against public policy.

This Motion is based on: this Notice; the attached Memorandum of Points and Authorities; the attached Declaration of Kevin L. Vick with Exhibits 1 - 8; the attached Declaration of Dylan Howard with Exhibits 9 - 11; the attached Declaration of Lee E. Goodman with Exhibits 12 - 18; the concurrently-lodged Exhibit 1; the concurrently-filed Notice of Lodging of Exhibit 1; all related pleadings and documents on file; and such further evidence or argument as may be presented at the hearing on this Motion.

AMI also reserves the right to request that the Court enter an award of attorneys' fees and costs pursuant to Code of Civil Procedure § 425.16(c).[4]

DATED: April 2, 2018

JASSY VICK CAROLAN LLP
JEAN-PAUL JASSY
KEVIN L. VICK

WILEY REIN LLP
LEE E. GOODMAN
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[4] If this Motion, or any part thereof, is granted, AMI intends to file a noticed motion to recover attorneys' fees and costs and/or a costs memorandum. C.C.P. § 425.16(c); *American Humane Ass'n v. Los Angeles Times Communications LLC*, 92 Cal. App. 4th 1095, 1103 (2001).

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I. INTRODUCTION

It was "the best of all worlds." It was a "win-win for me." Those are Karen McDougal's words. That is how she felt when she accepted AMI's offer to pay her a substantial amount of money to write articles, boost her image as a health and fitness personality, and sell an exclusive "story right" with the understanding that AMI had the right to exercise its editorial discretion *not* to publish the story. Later, Ms. McDougal sought clarification of the exclusive story right. AMI and Ms. McDougal amended their agreement to make it clear she could answer press inquiries, and Ms. McDougal "ratified and confirmed" her original agreement with the aid of her new counsel at Gibson Dunn. AMI proceeded to publish 25 of Ms. McDougal's articles, placed her on the cover of "Muscle & Fitness Hers," and featured her across its publications.

Over a year later, represented by her third lawyer, Ms. McDougal sued AMI, claiming that her contract was void in part because it prohibits her from talking to the press. It does not. Two days after filing this lawsuit, she did a one-hour interview with CNN where she vividly detailed her alleged affair with President Trump and bashed AMI before millions of viewers. Near the interview's end, Ms. McDougal voiced satisfaction that, "now, people know my truth."

Despite the Gibson Dunn-negotiated contract amendment, the CNN interview, and comments in a *New Yorker* article, Ms. McDougal now claims that the prior sale of her story right "censors" her. In reality, it is Ms. McDougal's lawsuit that targets *AMI's* First Amendment rights by advancing the novel and radical proposition that once a media company has a story about a candidate, it *must* publish that story or else be in violation of election law. She also contends that AMI was legally obligated to publish more articles than the 25 published so far. The contract she signed on the advice of two sets of lawyers, however, is to the contrary, while the First Amendment protects a publisher's editorial right to decide when, where, how, and whether to publish. Finally, Ms. McDougal claims that the "win-win" agreement she signed and profited from is now against public policy. It is not.

Because Ms. McDougal's suit targets AMI's conduct in furtherance of speech rights in connection with issues of public interest, it is subject to this motion under C.C.P. § 425.16 ("Section

425.16" or the "anti-SLAPP statute"). McDougal cannot satisfy her burden of establishing a probability of success, and this motion should be granted in full.

II. SUMMARY OF PERTINENT FACTS

In August 2016, Ms. McDougal, a former *Playboy* Playmate of the Year and model, was excited to sign what she describes as a "win-win" agreement with news publisher AMI (the "Agreement"). Ex. 1 at 38:50. McDougal alleges she was told by her lawyer, Keith Davidson, before signing the Agreement, that AMI "would buy the story *not* to publish it," which would, as McDougal puts it, "give her the best of all worlds—her private story [about her alleged affair with President Trump] could stay private, she could make some money, *and* she could revitalize her career." Compl., ¶ 47 (emphasis in original).[5] The Agreement, among other provisions, gives AMI the right and discretion, but not the obligation, to publish articles by McDougal, and also gives AMI exclusive story rights to "any relationship she has ever had with a then-married man." Compl., Ex. A at §§ 1, 3, 5-7, 9, 15. McDougal signed the Agreement, accepted $150,000 from AMI, and then wrote 19 bylined articles, was featured in another 6 articles, and was on the cover of a magazine – across four separate AMI publications. Compl., Ex. A; Howard Decl., ¶¶ 2-4; Exs. 9 - 11.

A few months later, McDougal fired Davidson, and, with the help of new lawyers at Gibson Dunn, she negotiated an amendment to the Agreement (the "Amendment"). Complaint, ¶¶ 18-19, 62-64. The Amendment stated that McDougal could freely respond to "legitimate press inquiries" regarding her alleged affair with President Trump, and it expressly "ratified and confirmed" "all of the other terms and conditions of the Agreement." *Id.*, Ex. B at 1. Shortly thereafter, McDougal provided extensive comments to the *New Yorker* about her agreement with AMI and her relationship with President Trump. *See* https://goo.gl/cDZ1C3.

On March 20, 2018, McDougal sued AMI seeking a declaratory judgment that the Agreement was void *ab initio*. Two days later, she appeared in a lengthy interview with CNN's Anderson Cooper discussing, in detail, her alleged affair with President Trump, AMI and the

[5] AMI accepts McDougal's allegations of her subjective perception of AMI's editorial objectives for purposes of this motion, but does not necessarily concede the accuracy of her allegations.

Agreement. Exs. 1, 2. She explained her hope that AMI would exercise its editorial right to "squash" the story of her alleged affair, and called that possibility a "win-win for me," as she would be "happy" to see the story "killed." Ex. 1 at 38:50-39:15. Near the end of the interview, McDougal said: "now, people know my truth." *Id.* at 51:55.

III. THE ANTI-SLAPP STATUTE APPLIES TO McDOUGAL'S SOLE CLAIM

A. The Anti-SLAPP Statute Is Construed Broadly

The anti-SLAPP statute was enacted to check "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional right of freedom of speech and petition," and it "shall be construed broadly." C.C.P. § 425.16(a). Declaratory relief suits are subject to anti-SLAPP motions. *South Sutter LLC v. LJ Sutter Partners, L.P.,* 193 Cal. App. 4th 634, 665 (2011). "Resolution of an anti-SLAPP motion involves two steps." *Baral v. Schnitt*, 1 Cal. 5th 376, 384 (2016); C.C.P. § 425.16(b)(1). First, "the defendant must establish that the challenged claim arises from activity protected by" Section 425.16(e). *Id.*[6] Second, "[i]f the defendant makes the required showing, the burden shifts" in the second step "to the plaintiff to demonstrate the merit of the claim by establishing a probability of success," *id.*, and, if this burden is not satisfied, then the claim must be stricken in whole or in part, *id.* at 385-392.

B. AMI Satisfies The First Step In The Anti-SLAPP Analysis

A defendant need only show that its alleged conduct "underlying the plaintiff's cause of action fits ***one*** of the four categories spelled out in section 425.16, subdivision (e)." *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002) (emphasis added). McDougal's claim falls within two categories.

1. McDougal's Claim Falls Within Section 425.16(e)(4)

Section 425.16(e)(4) "provides a catch-all for 'any other *conduct* in furtherance of'" speech or petition rights in connection with issues of public interest. *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 164 (2003) (emphasis in original). The *Lieberman* court concluded that

[6] Section 425.16(e) protects: "(2) any … writing made in connection with an issue under consideration or review by a … judicial body… or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." C.C.P. § 425.16(e).

newsgathering qualifies for protection under Section 425.16(e)(4) even where the plaintiff alleges that the newsgathering technique was unlawful. *Id.* at 165-166 (applying Section 425.16(e)(4) to claim for alleged violation of Penal Code § 632 for undercover recordings by a news reporter).

McDougal's sole cause of action for declaratory relief arises from: AMI's acquisition of exclusive story rights about an alleged affair with President Trump; AMI's purported editorial decision not to publish more of McDougal's articles; AMI's editorial decision not to report on her alleged affair with Trump; and AMI's alleged legal threats to McDougal to comply with the contract she signed and later "ratified and confirmed" with the assistance of her new counsel. Compl., ¶¶ 97-110. All of the foregoing targets AMI's purported "conduct in furtherance of" constitutional free speech and free press rights. C.C.P. § 425.16(e)(4). First, AMI's acquisition of McDougal's agreement to write and appear in articles and provide exclusive story rights is newsgathering, which squarely satisfies the first step in the Section 425.16(e)(4) analysis under *Lieberman*, 110 Cal. App. 4th at 164-166. Second, AMI has a constitutional and contractual right to exercise its editorial discretion *not* to publish McDougal's articles or her personal story. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-258 (1974) (holding that newspapers have a First Amendment right *not* to publish); Compl., Ex. A at §§ 1, 5, 6, 9 (affording AMI the discretionary right to publish McDougal's articles and story). Third, AMI's purported "threats of legal action" to enforce the Agreement, Compl., ¶ 101, arise from AMI's alleged speech. *Briggs v. Eden Council*, 19 Cal. 4th 1106, 1115 (1999) ("'communications preparatory to or in anticipation of the bringing of an action or other official proceeding are … entitled to the benefits of section 425.16'").

McDougal cannot dispute that all of the foregoing involved matters of public interest. "'[A]n issue of public interest'" within the meaning of Section 425.16(e) "is any issue in which the public is interested." *Nygård, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008). McDougal insists throughout her Complaint that her story about Trump, her articles and AMI's conduct are all matters of public interest. Compl., ¶¶ 21, 33, 37, 42-45, 47, 49, 53, 61, 63, 81, 88-95, 99-106, 109. Additionally, there is a public interest in persons, such as McDougal and President Trump, who are "in the public eye." *Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 1252-55 (2017). President Trump has been in the public eye for decades. *Makaeff v. Trump Univ., LLC*, 715

F.3d 254, 258 (9th Cir. 2013). The same holds true for McDougal, who was *Playboy* Playmate of the Year in 1998, and a successful fitness model, appearing in "numerous magazines." Compl., ¶¶ 6-7, 28-29; *see also Nadel v. Regents of the Univ. of Calif.*, 28 Cal. App. 4th 1251, 1270 (1994) (plaintiff can reveal herself to be "a person … in the public eye" by virtue of allegations in her complaint). The declaratory relief claim falls within the ambit of Section 425.16(e)(4).

2. McDougal's Claim Also Falls Within Section 425.16(e)(2)

The declaratory relief claim also falls within the ambit of Section 425.16(e)(2) to the extent it is based on AMI's alleged threats of legal action, which she asserts underpin, at least in part, the controversy requiring judicial resolution. Compl., ¶¶ 88, 101, 109; *Briggs*, 19 Cal. 4th at 1115.

IV. McDOUGAL CANNOT ESTABLISH A PROBABILITY OF PREVAILING

Because AMI satisfies the first step of the anti-SLAPP analysis, the burden shifts to McDougal to establish a probability of prevailing on her claim. *Baral*, 1 Cal. 5th at 384; C.C.P. § 425.16(b)(1). For McDougal, "the mere existence of a controversy is insufficient to overcome an anti-SLAPP motion against a claim for declaratory relief;" rather, she "must introduce substantial evidence that would support a judgment of relief made in [her] favor." *South Sutter,* 193 Cal. App. 4th at 670. "[T]he court must consider … whether there are any constitutional or non-constitutional defenses to the pleaded claims and, if so, whether there is evidence to negate those defenses." *Ramona Unif. Sch. Dist. v. Tsiknas*, 135 Cal. App. 4th 510, 519 (2005). McDougal alleges that the Agreement was void *ab initio* for three reasons. Compl., ¶¶ 99-106. She is wrong on all fronts, and cannot satisfy her burden in the second step of the anti-SLAPP analysis.

A. <u>There Was No Fraud In The Execution, And McDougal Ratified The Contract</u>

McDougal alleges "fraud in the execution" of the Agreement only because she now claims she thought – contrary to the language of the contract – that AMI "would be obligated to run more than a hundred columns in her name" within a two-year period. Compl., ¶ 99. Nothing in the Agreement "obligates" AMI to run ***any***, let alone over 100, of McDougal's articles. Ex. A.[7]

[7] Under the express terms of the Agreement, which included an integration clause and a waiver of the ability to rescind, AMI had the "right" (not the obligation) to run McDougal's articles, her articles are AMI's "work[s]-for-hire," and "[a]ll decisions whatsoever, whether of a creative or

1. McDougal Had Two Opportunities To Review And Ratify The Agreement

A "necessary element" of "fraud in the execution is *reasonable reliance*," and "[g]enerally, it is *not reasonable* to fail to read a contract." *Desert Outdoor Advertising v. Super. Ct.*, 196 Cal. App. 4th 866, 873 (2011) (emphasis in original; internal quotation marks omitted).[8] A contract will not be considered void due to "fraud in the execution" "if the plaintiff had a reasonable opportunity to discover the true terms of the contract," and the "contract is only considered void when the plaintiff's failure to discover the true nature of the document executed was without negligence on the plaintiff's part." *Rosencrans v. Dover Images, Ltd.*, 192 Cal. App. 4th 1072, 1080 (2011) (internal quotation marks removed). In *Rosencrans*, the plaintiff sought to void a release after suffering severe injuries at a motocross track. *Id.* at 1077. The court found no fraud in the execution even though the plaintiff presented evidence that: the defendant told him to "sign this" and said the release was just a "sign-in sheet"; plaintiff "did not know he was signing a release"; and plaintiff "was not given adequate time to read or understand" the release which he signed within "10 seconds" as he sat in his truck with around "10 cars in line behind" him. *Id.* at 1077-80.

Here, McDougal had "a reasonable opportunity" to "discover the true terms of the contract" ***twice***. *Id.* First, she alleges that she took at least a day and a night to review the three page Agreement, she communicated with her lawyer, Keith Davidson, who told her "WE CAN DISCUSS ANYTIME," and she read it sufficiently carefully to "raise[] several concerns" about specific terms. Compl., ¶¶ 48-55 (capitalization in original). McDougal's Complaint alleges a greater opportunity to understand the Agreement than the plaintiff had in *Rosencrans* where the court found no fraud in the execution. McDougal blames alleged pressure from Davidson and AMI for her purported lack of understanding; but claims that, not long after signing the Agreement, she realized the Agreement did not *obligate* AMI to run her articles, whereupon she fired Davidson.[9]

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business nature," regarding the rights granted by McDougal were to be made in AMI's "sole discretion." Compl., Ex. A at §§ 1, 5, 6, 9, 14, 15.

[8] *Accord Vulcan Power Co. v. Munson*, 932 N.Y.S.2d 68, 69-70 (N.Y. Sup. Ct. App. Div. 2011).

[9] The *Washington Post* reports that, after McDougal's Complaint was filed, Davidson asserted that he "'fulfilled his obligations and zealously advocated for Ms. McDougal to accomplish her stated goals at that time.'" *See* goo.gl/cEHxB7.

Id., ¶¶ 16-18, 55-62.[10]

McDougal's second opportunity to discover the true terms of the contract came when she hired "renowned" attorney Ted Boutrous of Gibson Dunn to negotiate an amendment to the Agreement. *Id.*, ¶¶ 18-19, 62-64. In addition to stating that McDougal could freely respond to "legitimate press inquiries" regarding President Trump, the Amendment that Boutrous helped McDougal obtain *expressly* "ratified and confirmed" "all of the other terms and conditions of the Agreement," Compl., Ex. B at 1, which includes ***all*** of the provisions that give AMI the "right" to decide, in its "sole discretion," whether to publish McDougal's articles, as well as the contract's integration clause, *id.*, Ex. A at §§ 1, 5, 6, 9, 14, 15.

2. McDougal Waived Any Fraud By Accepting The Agreement's Benefits

The Agreement also was ratified for the independent reason that McDougal kept the $150,000 and continued to prepare articles for AMI even after she had knowledge of what she now calls "fraud in the execution." Howard Decl., ¶¶ 2-4; Exs. 9-11. Civ. C. § 1589 ("acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting"); *LeClerq v. Michael*, 88 Cal. App. 2d 700, 702 (1948) ("[i]f a person retains the benefits of a contract and continues to treat it as binding he will be deemed to have waived any fraud and to have elected to affirm the contract").[11]

B. The Agreement Is Not Illegal

1. The First Amendment Protects AMI's Discretion *Not* To Publish

If AMI had exercised its editorial discretion to publish McDougal's story, she would have no argument that such publication was an illegal in-kind campaign contribution. But editors also have a First Amendment right *not* to publish, and cannot be punished for exercising that right.

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[10] At that point, McDougal was at least on inquiry notice of the purported fraud. *Kline v. Turner*, 87 Cal. App. 4th 1369, 1374 (2001) (inquiry notice of alleged fraud begins when there is "notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to [her] investigation"). McDougal or her new attorneys simply had to re-read the Agreement, the terms of which are clear.

[11] *Accord Banque Arabe Et Int'l v. Maryland Nat. Bank*, 850 F. Supp. 1199, 1212-1213 (S.D.N.Y. 1994) (acceptance of contract after inquiry notice of alleged fraud is ratification).