



1 Defendant requests a continuance on the hearing so that it may conduct a deposition. (Mot.  
2 to Continue ¶ 2.) The deposition would hopefully provide testimony demonstrating “that  
3 Weiland’s statements to Panda’s customers are *not* protected as a good faith assertion of  
4 infringement.” (*Id.* ¶ 3.) This testimony is allegedly necessary for Defendant to oppose Plaintiff’s  
5 motion to dismiss. Defendant alleges that the parties were coordinating the deposition so that it  
6 would occur in time for Defendant to oppose Plaintiff’s motion to dismiss. But negotiations broke  
7 down, and Defendant was forced to file the present ex parte motion to continue. (*Id.* ¶¶ 10–12.)

8 In California state court, discovery is automatically stayed upon the filing of an anti-  
9 SLAPP motion to dismiss, except that the court may allow specified discovery “on noticed motion  
10 and for good cause shown.” *See* Cal. Civ. Proc. Code § 425.16(g). But whether and how the  
11 discovery limiting aspects of the California anti-SLAPP statute apply in federal court is not clear.  
12 This and other district courts have interpreted Ninth Circuit precedent as requiring the application  
13 of Federal Rule of Civil Procedure 56(f) when determining whether discovery is allowed. *See*  
14 *Moser v. Triarc Companies, Inc.*, 2007 WL 3026425 (S.D. Cal. Oct. 16, 2007); *Price v. Stossel*,  
15 590 F.Supp.2d 1262 (C.D. Cal. Sept 24, 2008). That standard will be applied here.

16 Rule 56(f) requires discovery where the non-moving party has not had the opportunity to  
17 discover information essential to its opposition. *Moser*, 2007 WL 3026425, at \*3. But the Court  
18 may deny a discovery request where “discovery is not essential.” *Id.* at 2. “In particular, where  
19 the anti-SLAPP motion only identifies legal defects on the face of the pleading, the court treats it  
20 as a Rule 12(b)(6) motion for failure to state a claim.” *Id.* (internal quotations removed).

21 The Court finds that Plaintiff’s anti-SLAPP motion to dismiss Defendant’s counterclaim  
22 challenges the legal sufficiency of Defendant’s counterclaim. Defendant’s counterclaim is based  
23 on Plaintiff’s letters to Defendant’s customers. In those letters, Plaintiff informed Defendant’s  
24 customers of the instant litigation and the possibility of their liability. Plaintiff argues in its anti-  
25 SLAPP motion to dismiss that those statements are privileged. To resolve the motion to dismiss,  
26 the Court must assess whether the letters are privileged. There is no need to consider evidence  
27 beyond the pleadings.

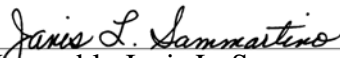
28 Plaintiff does raise an issue in its motion to dismiss that could require discovery to oppose.

1 Plaintiff argues that the counterclaim has no chance of prevailing because Plaintiff was asserting  
2 its right to advise infringers of its good faith belief that a particular product infringes. (Mot. to  
3 Dismiss § 7.) Whether Plaintiff was acting in good faith while sending the letters could require  
4 discovery. But Defendant’s reasons for discovery are inapposite in this context. Defendant asserts  
5 that Plaintiff’s letters were not sent in good faith because they were sent while “Weiland was  
6 plainly aware that Panda [had] not been selling the accused product for months.” (Mot. to  
7 Continue ¶ 3.) Whether Panda had been selling the product at the time Weiland sent the letters is  
8 irrelevant; Panda’s customers could infringe on Weiland’s patents even after Panda ceased selling  
9 the accused products. This scope of discovery is irrelevant to the anti-SLAPP motion.

10 For the reasons stated above, the Court **DENIES** Defendant’s motion to continue the  
11 hearing on the motion to dismiss. The Court **VACATES** the hearing on the motion originally set  
12 for October 14, 2010, and **RESCHEDULES** the hearing on the motion to October 29, 2010, at  
13 3:00 p.m. Defendant **SHALL FILE** any opposition to the motion to dismiss by Friday, October 8,  
14 2010. Plaintiff **SHALL FILE** any reply by Thursday, October 21, 2010.

15 **IT IS SO ORDERED.**

16 DATED: October 4, 2010

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18 Honorable Janis L. Sammartino  
19 United States District Judge  
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