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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GOPHER MEDIA LLC (formerly known as Local Clicks) dba DOCTOR MULTIMEDIA, a Nevada Limited Liability Corporation

Plaintiff,

v.

MODERN DOC MEDIA, a California business entity; THE MODERN MEDIA GROUP LLC, a California limited liability company; ANDREW HOFFMAN, an individual; and DOES 1 through 10,

Defendants.

Case No.: 22cv131-TWR(BLM)

ORDER GRANTING IN PART PLAINTIFF'S *EX PARTE* APPLICATION TO CONDUCT DISCOVERY PRIOR TO THE RULE 26(F) CONFERENCE; AND DENYING PLAINTIFF'S REQUEST FOR AN EARLY NEUTRAL EVALUATION CONFERENCE

[ECF No. 19]

Currently before the Court are Plaintiff's July 20, 2022 *Ex Parte* Application for an Order Permitting Plaintiff to Conduct Discovery Prior to the Rule 26(f) Conference [ECF No. 19 ("Application")] and Defendants' Opposition to Plaintiff's *ex parte* application [ECF No. 21 ("Oppo")]. For the reasons set forth below, Plaintiff's *ex parte* application is **GRANTED IN PART.**

BACKGROUND

Plaintiff filed its first amended complaint ("FAC") in this matter on June 6, 2022, bringing claims for (1) Misappropriation of Trade Secrets under federal law (against all Defendants); (2)

1 Misappropriation of Trade Secrets under California law (against all Defendants); (3) Unfair
2 Business Practices (against all Defendants); (4) False Advertising Under Section 43(a) of the
3 Lantham Act (against all Defendants); (5) Commercial Defamation/Trade Libel (against all
4 Defendants); (6) Trademark Infringement (against all Defendants); (7) Unfair Competition and
5 False Designation of Origin (against all Defendants); (8) Intentional and Negligent Fraud (against
6 Defendant Andrew Hoffman ("Defendant Hoffman") only); (9) Breach of Contract (against
7 Defendant Hoffman only); and (10) Cybersquatting (against all Defendants). ECF No. 13.

8 On June 16, 2022, Defendants filed a Special Motion to Strike pursuant to Cal. Code Civ.
9 Proc. § 425.16 and Partial Motion to Dismiss the First Amended Complaint ("anti-SLAPP motion").
10 ECF No. 16.

11 Plaintiff filed the motion presently before this Court on July 20, 2022, and Defendants
12 filed their opposition on July 22, 2022. ECF Nos. 19, 22.

13 **LEGAL STANDARD**

14 Under California law, a strategic lawsuit against public participation ("SLAPP") is one that
15 "seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition
16 the government for redress of grievances." Rusheen v. Cohen, 37 Cal. 4th 1048, 1055 (2006).
17 The California legislature enacted its anti-SLAPP statute "to provide a procedural remedy to
18 dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." Id. In
19 pertinent part, the anti-SLAPP statute provides:

20 A cause of action against a person arising from any act of that person in
21 furtherance of the person's right of petition or free speech under the United States
22 Constitution or the California Constitution in connection with a public issue shall
23 be subject to a special motion to strike, unless the court determines that the
24 plaintiff has established that there is a probability that the plaintiff will prevail on
25 the claim.

26 Cal. Code Civ. Proc. § 425.16(b)(1). Accordingly, once the Court determines that the claims at
27 issue are within the scope of the anti-SLAPP statute, the burden shifts to the plaintiff to show a
28 probability that it will prevail on its claims in order to defeat the special motion to strike. Id.

"In the anti-SLAPP context, 'probability' is a low bar." Roberts v. McAfee, Inc., 660 F.3d

1 1156, 1163 (9th Cir. 2011). To show a reasonable probability of prevailing, “the plaintiff must
2 demonstrate that the complaint is legally sufficient and supported by prima facie showing of
3 facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited.” Planned
4 Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 833 (9th Cir. 2018),
5 amended, 897 F.3d 1224 (9th Cir. 2018), and cert. denied sub nom. Ctr. for Med. Progress v.
6 Planned Parenthood Fed'n of Am., 139 S. Ct. 1446 (2019) (citing Metabolife Int’l, Inc. v. Wornick,
7 264 F.3d 832, 840 (9th Cir. 2001)). “[A] defendant’s anti-SLAPP motion should be granted when
8 a plaintiff presents an insufficient legal basis for his or her claims or when no sufficiently
9 substantial evidence exists to support a judgment for him or her.” Planned Parenthood, 890
10 F.3d at 833. (citing Metabolife, 264 F.3d at 840).

11 Discovery in federal court is not automatically stayed, as Cal. Code Civ. Proc. § 425.16(f),
12 which automatically stays discovery in state court, is inapplicable in federal court because it
13 conflicts with Federal Rule of Civil Procedure 56. Planned Parenthood, 890 F.3d at 833 (citing
14 Metabolife, 264 F.3d at 846). In Planned Parenthood, the Ninth Circuit explained that “[i]n order
15 to prevent the collision of California state procedural rules with the federal rules, [federal courts]
16 review anti-SLAPP motions to strike under different standards depending on the motion’s basis.”
17 Planned Parenthood, 890 F.3d at 833. The Ninth Circuit stated that “when an anti-SLAPP motion
18 to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal
19 Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated.” Id.
20 at 834. In such a situation, the focus is on the sufficiency of the pleadings, and “there’s no
21 requirement for a plaintiff to submit evidence to oppose contrary evidence that was never
22 presented by defendants.” Id. On the other hand, “when an anti-SLAPP motion to strike
23 challenges the factual sufficiency of a claim, the Federal Rule of Civil Procedure 56 standard will
24 apply.” Id. In this situation, a plaintiff must be allowed to conduct discovery and be given the
25 opportunity to “supplement evidence based on the factual challenges, before any decision is
26 made by the court.” Id.

27 Thus, as a threshold matter, the Court must determine whether the anti-SLAPP motion
28 challenges the legal or factual sufficiency of Plaintiff’s FAC. Plaintiff argues that it is entitled to

1 discovery because Defendants' anti-SLAPP motion "directly challenges whether the Plaintiff has
2 admissible evidence sufficient to establish each element of the fraud cause of action."
3 Application at 6-7. Defendants do not oppose Plaintiff's position that the anti-SLAPP motion
4 challenges the factual sufficiency of the FAC. See generally, *Oppo*. Moreover, the Court's
5 independent review of the anti-SLAPP motion, confirms that Defendants are challenging the
6 factually sufficiency of Plaintiff's fraud claim as Defendants argue "there is no admissible
7 evidence supporting each element [of the fraud claim]. ECF No. 16-1 at 14-17.

8 As a result, the Court finds that the Rule 56 standard applies, and Plaintiff is entitled to
9 conduct discovery on this issue.

10 Defendant's anti-SLAPP motion also argues that state and federal litigation privileges
11 apply because "the fraud claim and the allegations are all founded on communications
12 negotiating settlement agreements of two lawsuits[,] making Plaintiff's claims meritless." *Id.* at
13 17. Under California law, "applicability of the litigation privilege is a question of law" where
14 "there is no dispute as to the operative facts." *Hart v. Larson*, 232 F. Supp. 3d 1128, 1138 (S.D.
15 Cal. 2017) (quoting *Kashian v. Harriman*, 98 Cal. App. 4th 892, 913 (Cal. Ct. App. 2002). Based
16 on the pleadings currently before this Court, and upon reviewing the anti-SLAPP motion, it is
17 not clear whether the parties dispute the operative facts that are the bases of the Defendant's
18 position that litigation privilege applies.¹ While Plaintiff does not seek discovery on the privilege
19 issue, Plaintiff does seek discovery to investigate "whether Plaintiff or Defendant may have
20 waived any protection by entering into the Settlement Agreement as alleged in the First
21

22
23 ¹ This Court need not make a determination about whether Defendant's assertion of litigation
24 privilege is a question of law or fact, as such issue is reserved for the district judge upon his
25 review of the anti-SLAPP motion. See *Cristo v. Cayabyab*, 2019 WL 1117529, at *3 (N.D. Cal.
26 Mar. 11, 2019) (magistrate judge only considered whether the discovery Plaintiff sought was
27 essential and left the issue of whether defendant's anti-SLAPP motion challenged the legal or
28 factual sufficiency for the district judge as it went to the disposition of the motion). Further,
other than identifying it as Defendant's second anti-SLAPP argument, Plaintiff does not mention
litigation privilege in its Application. Instead, Plaintiff explicitly represents that it seeks discovery
on whether Defendant waived any First Amendment protections and does not seek discovery on
the privilege claim. Declaration of Pamela C. Chalk ("Chalk Decl."), ECF No. 19-1 at 4.

1 Amended Complaint,” regarding certain representations Defendant made. Application at 8.
2 Determining whether the parties’ conduct here amounted to a waiver is a factual inquiry that
3 courts in this Circuit have concluded may necessitate discovery. See National Abortion
4 Federation v. Ctr for Med. Progress, No. 15cv3522-WHO, 2015 WL 5071977, at *6 (N.D. Cal.
5 Aug. 27, 2015) (finding that staying discovery would conflict with Rule 56 where the complaint
6 raised factual questions of whether and to what extent defendant executed a valid waiver of
7 their First Amendment right when they entered into two agreements with Plaintiff); see also
8 Davis v. Electronic Arts Inc., No. C-10-03328 RS (DMR), 2011 WL 2621626, at *7 (N.D. Cal. July
9 5, 2011) (concluding that “discovery related to the issue of whether Defendant waived its First
10 Amendment rights is essential to Plaintiff’s opposition to an anti-SLAPP motion.”).

11 Thus, the Court finds that the Rule 56 standard applies, and Plaintiff is entitled to conduct
12 discovery on the issue of potential waiver.

13 **A. Scope of Early Discovery**

14 Plaintiff seeks the opportunity to conduct discovery on wide-ranging topics utilizing a
15 variety of unlimited discovery techniques. In counsel’s supporting declaration, Plaintiff states
16 that it

17 anticipates taking the deposition of Defendant Andrew Hoffman and perhaps other
18 third parties and propounding written discovery and requests for production of
19 documents. The discovery will be focused on the factual challenges directly raised
20 by Defendants’ anti-SLAPP Motion with respect to the elements of Plaintiff’s Fraud
21 cause of action, thereby including discovery related to the nature, extent, and
22 circumstances surrounding Defendants’ misrepresentations; Defendants’
23 concealment of facts; Defendants’ knowledge of the falsity of the representations;
24 Defendants’ intent to induce reliance; Defendants’ belief in the truth of the
25 representations; and Defendants’ intent in concealing or suppressing facts with
26 the intent to defraud Plaintiff. ... In addition, Plaintiff intends to conduct discovery
27 with respect to the issue of whether Defendants have waived any First Amendment
28 protections by entering into the Settlement Agreement regarding the first prong
of the anti-SLAPP statute.

25 Chalk Decl. at 3-4. Plaintiff argues that there is “good cause” for its requested discovery.
26 Application at 4-5. Plaintiff also argues that discovery is required because “much of this
27 information is under Defendants’ control.” Id. at 7. Plaintiff’s request provides no limitations
28 on the amount or scope of discovery.

1 Defendants oppose Plaintiff's request for discovery, arguing that Plaintiff has not satisfied
2 the requirements for discovery. *Oppo* at 6. Defendants assert that under the Rule 56 standard,
3 to obtain discovery to oppose an anti-SLAPP motion, the nonmoving party must provide an
4 affidavit or declaration identifying the specific facts it hopes to elicit and establishing that the
5 identified facts exist and are essential to its opposition. *Id.* at 6-7 (citing Fed. R. Civ. P. 56(d),
6 Williams v. Kula, No. 3:20cv1120-GPC-AHG, 2020 WL 5046864, at *5 (S.D. Cal. Aug. 26, 2020),
7 Martin Baker Aircraft Co. Ltd v. Teledyne Risi, Inc., No. 20-cv-3796, 2020 WL 13304064, at *6
8 (C.D. Cal. Oct. 6, 2020), and Nunes v. Meredith, No. 21-cv-00078, 2022 WL 2214205, at *4
9 (E.D. Cal. June 21, 2022)). Defendants argue Plaintiff fails to satisfy any of the three
10 requirements as it only generically seeks discovery related to Plaintiff's fraud allegations and the
11 issue of whether either party waived First Amendment protections when they entered into the
12 Settlement Agreements. *Id.* at 8-12. Defendants note that Plaintiff's declaration fails to mention
13 "any proposed discovery related to client solicitation, disparagement, or breach of a
14 confidentiality provision." *Id.* at 10. Defendants further argue that "'most' of the sought
15 information 'is already known to Plaintiff,'" making it nonessential under Rule 56. *Id.* at 9 (citing
16 New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1102 (C.D. Cal. 2004) and Gresset v. Contra
17 Costa Cnty., No. 12-cv-3798, 2013 WL 2156278, at *35 (N.D. Cal. May 17, 2013)). In
18 conclusion, Defendants argue that Plaintiff should not be permitted to conduct discovery, or at
19 most, be limited to four requests for production of documents, four interrogatories, and one
20 two-hour deposition of Defendant Hoffman. *Id.* at 11.

21 The Court agrees with Defendants regarding the appropriate legal standard. As several
22 courts in the Ninth Circuit have held in anti-SLAPP litigation, "Rule 56(d) requires some threshold
23 showing by the party seeking discovery that, 'for specified reasons, it cannot present facts
24 essential to its opposition' without the discovery request." Williams, 2020 WL 5046864, at *5
25 (citing Fed. R. Civ. P. 56(d) and Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443
26 (9th Cir. 1986)). Specifically, the party seeking discovery must show: "(1) it has set forth in
27 affidavit form the specific facts it hopes to elicit from further discovery; (2) that the facts sought
28 exist; and (3) that the sought-after facts are essential to oppose summary judgment." Martin

1 Baker Aircraft Company Ltd. V. Teledyne Risi, Inc., No. 20cv3796 PA (AFMx), 2020 WL
2 13304064, at *6 (C.D. Cal. Oct. 6, 2020) (citing Family Home & Fin. Ctr., Inc. v. Fed. Home
3 Loan Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008).

4 While Plaintiff did provide a declaration describing the discovery it wants to obtain and
5 the methods by which it hopes to obtain it, the descriptions are not specific and do not satisfy
6 the requirements for anti-SLAPP discovery. Plaintiff states that it wants to depose Defendant
7 Hoffman but also asserts that it may want to depose unidentified third parties and may propound
8 unidentified written discovery and requests for production of documents. Chalk Decl. at 3. Even
9 more concerning, Plaintiff provides a very broad description of the desired discovery topics, but
10 it fails to establish that the specific facts exist, fails to identify the specific person or entity that
11 possesses the facts, and fails to establish that the specific facts are essential to its opposition to
12 the anti-SLAPP motion.

13 Plaintiff's failure directly conflicts with Planned Parenthood's directive that a party be
14 allowed to conduct discovery to oppose an anti-SLAPP motion based on factual insufficiency.
15 Planned Parenthood, 890 F.3d at 833-34. The Court, therefore, will allow Plaintiff to conduct
16 discovery on the relevant issues but will limit the scope and amount of permitted discovery.

17 Plaintiff's fraud claim is limited to Defendant Hoffman. See ECF No. 13. In addition, the
18 settlement agreements at issue were signed by Defendant Hoffman but not by the other
19 defendants. As a result, there is a basis for discovery as to Defendant Hoffman. Plaintiff has
20 not identified another person or entity it wants to depose nor the information that would be
21 obtained or the relevance thereof. Accordingly, the Court grants Plaintiff's request to depose
22 Defendant Hoffman but denies the request to depose any other person or entity.

23 Based upon the parties' arguments and the Court's review of the FAC and anti-SLAPP
24 motion, the Court finds that Plaintiff may conduct discovery on (1) any facts related to the
25 elements of fraud as alleged in Count 8 of the FAC; (2) any facts challenged in Defendant's anti-
26 SLAPP motion; (3) any facts related to the circumstances surrounding the creation, execution
27 and contents of the settlement agreement, including whether Defendant Hoffman had a duty to
28 disclose he started one or more competing businesses before the execution of the settlement

1 agreements and if so, Defendant Hoffman’s intent, or lack thereof, to conceal or misrepresent
2 the information and/or to otherwise defraud Plaintiff; and (4) whether and to what extent
3 Defendant Hoffman waived his First Amendment protections as to the first prong of the anti-
4 SLAPP statute.

5 In summary, the Court **PARTIALLY GRANTS** Plaintiff’s request for discovery and
6 authorizes discovery as follows:

- 7 1. Plaintiff may take a three-hour deposition of Defendant Hoffman.
- 8 2. Plaintiff may serve Defendant Hofman four requests for production of documents.
- 9 3. The deposition and requests for production of documents are limited in scope to the
10 four categories of facts set forth above.
- 11 4. Plaintiff must complete the permitted discovery by October 7, 2022.
- 12 5. Plaintiff may not serve any discovery not explicitly authorized by this Order.

13 **B. Request to Hold ENE Ahead of Defendants’ Answer**


14 As an alternative argument, Plaintiff asserts “there is no reason to delay setting dates in
15 this case and/or ordering the Rule 26 conference take place so that the parties may proceed
16 with discovery in the normal course.” Application at 8-9. In support, Plaintiff cites to Civil Local
17 Rule 16.1(c)(1), which allows a party to request that a judge hold an early neutral evaluation
18 conference, discovery conference, or status/case management conference prior to the filing of
19 a defendant’s answer. Id. Civil Local Rule 16.1(c)(1) provides the court with discretion to “hold
20 such conferences as [it] deems appropriate.” Here, Defendants are not only moving to strike
21 Plaintiff’s FAC pursuant to California’s anti-SLAPP statute, they are also moving to dismiss five
22 of Plaintiff’s other claims. See ECF No. 16. The resolution of Defendants’ motion will dramatically
23 impact the scope of discovery and the Court finds it inappropriate to hold an early neutral
24 evaluation or case management conference until after the pending motion is resolved. Thus,
25 Plaintiff’s request to hold an early neutral evaluation conference now and for the Court to open
26 all discovery is **DENIED**.

1 **CONCLUSION**

2 For the foregoing reasons, the Court **GRANTS IN PART** Plaintiff's *Ex Parte* Application
3 to Conduct Discovery Prior to the Rule 26(f) Conference and **DENIES** Plaintiff's request to set
4 the Early Neutral Evaluation Conference.

5 **IT IS SO ORDERED.**

6 Dated: 8/10/2022

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8 Hon. Barbara L. Major
9 United States Magistrate Judge

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