JEAN-PAUL JASSY, Cal. Bar No. 205513
jpjassy@jassyvick.com
KEVIN L. VICK, Cal. Bar No. 220738
kvick@jassyvick.com
JASSY VICK CAROLAN LLP
800 Wilshire Boulevard, Suite 800
Los Angeles, California 90017
Telephone: 310-870-7048
Facsimile: 310-870-7010

LEE E. GOODMAN (*pro hac vice* application forthcoming)
lgoodman@wileyrein.com
ANDREW G. WOODSON (*pro hac vice* application forthcoming)
awoodson@wileyrein.com
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
Telephone: 202-719-7000
Facsimile: 202-719-7049

CAMERON STRACHER (*pro hac vice* application forthcoming)
cstracher@amilink.com
General Counsel - Media
AMERICAN MEDIA, INC.
4 New York Plaza, 2d Floor
New York, NY 10004
Telephone: 212-743-6513
Facsimile: 646-810-3089

Attorneys for Defendant
AMERICAN MEDIA, INC.

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
ANDREW WOODSON

AMERICAN MEDIA, INC.
CAMERON STRACHER

JEAN-PAUL JASSY
Counsel for Defendant American Media, Inc.

[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).

The key case is *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). In *Miami Herald*, the U.S. Supreme Court struck down a "right of reply" statute, with first-degree misdemeanor penalties for its violation, that required newspapers to provide a political candidate with equal space to answer criticism in the newspaper. *Id.* at 244. The Court held that the "statute exacts a penalty on the basis of content" as it "operates as a command in the same sense as a statute or regulation forbidding [the newspaper] to publish specified matter." *Id.* at 256. It dismissed potential skeptics of its holding, noting that "Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Id.*

The First Amendment-based right of editorial discretion was already well-established by the time the *Miami Herald* case reached the Supreme Court.[12] Against this backdrop, the *Miami Herald* court held the "clear implication has been that any such compulsion to publish that which 'reason' tells [the newspapers] should not be published is unconstitutional." 418 U.S. at 256. The high court concluded by reaffirming the well-established constitutional principle that editorial judgment for the content of newspapers should be left to editors and not the courts:

> A newspaper [or magazine] is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

418 U.S. at 258.[13] AMI has been well within its rights *not* to publish the McDougal-Trump story yet, and its decision to withhold publication cannot give rise to liability under the First Amendment.[14]

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[12] *See id.* at 254-255 (citing *Associated Press v. United States*, 326 U.S. 1, 20 n. 18 (1945) (district court did "not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published"), *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (emphasizing that cases before the court "involve[d] … no express or implied command that the press publish what it prefers to withhold"), *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 391 (1973) ("we affirm unequivocally the protection afforded to editorial judgment")).

[13] Our Supreme Court also recognizes that a "publisher enjoys" a "*total control* over the content of the newspaper as a private publisher." *Bailey v. Loggins*, 32 Cal. 3d 907, 918-919 (1982) (emphasis added); *see also Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042-1049 (1986) (decision not to include book on a best-seller list was protected by the First Amendment); *Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1391 (1999) ("the courts have long held that the right to

2. The First Amendment Also Protects AMI's Newsgathering

Just as the decision *not* to publish McDougal's story is squarely protected by the First Amendment and cannot serve as the basis for liability, the two alleged predicate newsgathering acts (making an inquiry to President Trump's representative and purchasing McDougal's exclusive story rights along with other services from McDougal) also enjoy protection under the First Amendment, and cannot support McDougal's claim that anything AMI did was illegal under federal election law.

Newsgathering enjoys protection under the First Amendment. In *Branzburg*, 408 U.S. at 681, the court held that "without some protection for seeking out the news, freedom of the press could be eviscerated." In *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), the court held that there is an "*undoubted* right to gather news 'from any source by means within the law[.]'" *Id.* at 11 (emphasis added; quoting *Branzburg*, 408 U.S. at 681). All of AMI's alleged conduct is newsgathering "within the law," and therefore constitutionally protected.

First, press entities routinely solicit comment from the subjects of stories. *Gonzalez v. Morse*, 2017 WL 4539262 (E.D. Cal. Oct. 11, 2017), at *2 (reporter's questions to politician protected under the First Amendment). Thus, even if AMI had reached out to President Trump's representatives, there would have been nothing sinister about seeking comment concerning McDougal's story – a story that the White House denies is true.[15]

Second, paying sources and buying exclusive story rights is routine and has been for a long time. In 1912, the *New York Times* paid $1,000 to a survivor of the Titanic for his exclusive account. Ex. 3.[16] The *New York Times* also allegedly paid Charles Lindbergh $5,000 for the story

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control the content of a privately published newspaper rests entirely with the newspaper's publisher. The First Amendment protects the newspaper itself, and grants it a virtually unfettered right to choose what to print and what not to") (emphasis removed); *accord Passaic Daily News v. N.L.R.B.*, 736 F.2d 1543, 1557 (D.C. Cir. 1984) ("newspapers have *absolute* discretion to determine the contents of their newspapers") (emphasis added).

[14] Similarly, the First Circuit ruled that forcing a group to publish information it disagrees with as a mechanism for defining "contribution" is "obnoxious" and "abhorrent" to the First Amendment and "unquestionably" unconstitutional. *Clifton v. FEC*, 114 F.3d 1309, 1313-1314 (1st Cir. 1997).

[15] Seeking comment can help avoid defamation liability. *Newton v. NBC*, 930 F.2d 662, 686 (9th Cir. 1990) (attempts to interview plaintiff dispel accusation of actual malice).

[16] Jeremy W. Peters, "Paying for News? It's Nothing New," *New York Times*, Aug. 6, 2011.

of his famous trans-Atlantic flight. Ex. 4.[17] In 1970, *Esquire* magazine paid Lt. William L. Calley of My Lai massacre infamy for a confessional interview. Ex. 3. Journalist David Frost paid former President Nixon $600,000 in 1976 for the right to exclusive interviews, which shed new light on Watergate. Ex. 5.[18] In 1998, publisher Larry Flynt offered $1 million for information regarding politicians who had engaged in extramarital affairs, which eventually led to the resignation of then House Speaker-Designate Bob Livingston. *Id.*, Ex. 6.[19] Some commentators, including ones writing in the *Columbia Journalism Review* and the *New York Times*, defend the practice of paying sources and highlight its ubiquity. *See, e.g.,* Exs. 5, 7.[20]

Third, media entities routinely decide not to run stories for all sorts of reasons – *e.g.*, the story is not sufficiently well-founded, not yet finished, not "on the record," not newsworthy, or out of step with the publication's editorial stance.[21] The First Amendment squarely bars any intrusion into those decisions. *Miami Herald*, 418 U.S. at 256-58. If McDougal's position were the law, First Amendment jurisprudence would get turned on its head. For example, if a publisher paid for a story about a candidate but ultimately had serious doubts about the story's veracity, then McDougal's rule would put the publisher in an intractable dilemma: publish the story and expose the publisher to a defamation claim brought by the candidate, or decide not to publish and stand accused of making an illegal in-kind contribution.[22] Also, under McDougal's rule, once a media

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[17] Jack Shafer, "Why Not Pay Sources?," *Slate*, April 29, 2010.

[18] Kelly McBride, *New York Times* opn., "When It's O.K. to Pay for a Story," June 9, 2015. Former Presidents Eisenhower and Johnson also received payments for interviews. *Id.*

[19] Kelly Heyboer, "Paying For It," *American Journalism Review*, April 1999. *See also* John Cook, "Pay Up: Sources have their agendas. Why can't money be one?," *Columbia Journalism Review*, May/June 2011.

[20] Although some may frown on the practice of paying sources, such ethical questions are not the province of the courts: a "responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Miami Herald*, 418 U.S. at 256; *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 858 (1986) (same); *see also Savage v. Pacific Gas & Elec. Co.*, 21 Cal. App. 4th 434, 445 (1993) (declining to wade into differing opinions about journalistic ethics).

[21] *See* Jack Shafer, "Why Did NBC News Sit On The Trump Tape For So Long?," *Politico*, Oct. 10, 2016; Howard Kurtz, "Newsweek's Melted Scoop," *Washington Post*, Jan. 22, 1998 at C1 (explaining *Newsweek*'s decision not to run Lewinsky story concerning President Clinton).

[22] *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (actual malice can be shown with "sufficient evidence" that a publisher "entertained serious doubts as to the truth of his publication").

entity "coordinates" with a candidate by making a routine inquiry about the veracity of a story, the publisher faces a Hobson's choice: either publish, or stand accused of making an illegal in-kind contribution.

Fourth, even assuming AMI's editorial decision not to run the McDougal story was animated by a desire to support the candidacy of Donald Trump, and did benefit him – which AMI does not concede – it is routine and constitutionally protected for the media to express a political view. *Miami Herald*, 418 U.S. at 255 (newspapers have a right to advance their political views). In *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 12-13 (1986), the high court struck down an order requiring a utility company to send customers third party materials critical of the utility's views. Relying extensively on *Miami Herald*, the plurality explained that, "[w]ere the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection [for speech] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Id.* at 16. News publishers have helped and hurt politicians from time immemorial. Leading periodicals often endorse and excoriate individual candidates. For example, in 2016, among the 100 largest U.S. newspapers, 57 newspapers endorsed Hillary Clinton, while only two endorsed Donald Trump. Ex. 8.

3. The Agreement Does Not Violate The Federal Election Campaign Act

McDougal's allegation that the Agreement is illegal under the Federal Election Campaign Act ("FECA") is wrong as a matter of law because the FECA does not regulate the press. The FECA prohibits corporations from making a "contribution" to a federal candidate, 52 U.S.C. § 30118(a), but a "Press Exemption" exempts from the definition of "expenditure" and "contribution" all costs incurred by the press in covering or publishing news and editorials:

> Any cost incurred in covering or carrying a news story, commentary, or editorial by any . . . newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate.[23]

[23] 11 C.F.R. § 100.73; *see also* 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. § 100.132. Congress emphasized when it passed the Press Exemption in 1974 that "it is not the intent of the Congress in the present legislation to limit or burden *in any way* the First Amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the newspapers, TV networks, and

The Press Exemption is broad and protects all costs incurred by a press publication to gather and cover news, pay journalists and researchers, publish and distribute news, as well as its editorial decisions to publish (or not publish)[24] information about campaigns and candidates.[25] In accordance with the seminal decision in *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308 (D.D.C. 1981), the FEC has routinely dismissed allegations of FECA violations against press entities under the Press Exemption so long as the press entity is not owned or controlled by a political committee, party or candidate and conducts legitimate press functions. Under the exemption, "[n]o inquiry may be addressed to sources of information, research, motivation, connection with the campaign, etc.,"[26] including coordination with campaigns.[27] It also exempts "claims of media bias or breaches of journalistic ethics."[28]

Here, the articles and story right that McDougal contracted to provide AMI are routine services and content acquired to produce news and information. AMI's exercise of editorial discretion to decide whether, when, and how to publish McDougal's story is also a legitimate press function exempt from regulation. Therefore, AMI's costs to acquire this news content are not an illegal corporate political "expenditure" or "contribution" to a federal candidate as a matter of law.

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other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Congress, 2d Sess. at 4 (1974) (emphasis added).

[24] FEC Matter Under Review ("MUR") 5562/5570 (Sinclair) (finding no contribution or expenditure where Sinclair decided not to air a documentary film critical of John Kerry). Pertinent MUR documents are attached as exhibits to the Goodman Declaration.

[25] *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1214-15 (S.D.N.Y. 1981) (exempting costs of consultant to prepare special engineering report); MUR 5569 (KFI-AM 640), First Gen. Counsel's Report at 9 (exempting Burbank radio station's costs of staging "Fire [David] Dreier" rallies outside candidate's office).

[26] *Reader's Digest*, 509 F. Supp. at 1215.

[27] MUR 5569 (KFI-AM 640), First Gen. Counsel's Report at 7 (exempting radio show's on-air interviews with David Dreier's opponent Cynthia Matthews); MURs 5540/5545, Statement of Reasons of Comm'rs Toner, Mason, Smith at 3 (finding no in-kind contribution from decision, in alleged coordination with John Kerry campaign, to air a *false* story about President Bush's national guard service, in part, because "[a]llegations of coordination are of no import when applying the press exemption").

[28] MURs 5540/5545 (CBS), Statement of Comm'r Weintraub at 2; *accord* MUR 5569 (KFI-AM 640), First Gen. Counsel's Report at 7 (exempting biased on-site "rally" to "fire [David] Dreier"); MURs 4929/5006/5090/5117 (Los Angeles Times), Statement of Reasons by Comm'rs Wold, McDonald, Mason, Sandstrom, Thomas ("Unbalanced news reporting and commentary are included in the activities protected by the media exemption.").

In addition to the Press Exemption, AMI's payment to McDougal is not a "contribution" because the purpose of the payment manifestly appears on the face of the Agreement to have been for the purchase of journalistic services, content, and a valuable story right.[29] Moreover, the expansive interpretation of "contribution" advanced by McDougal would render the FECA unconstitutionally vague and overbroad. There is no precedent or guidance treating newsgathering or an editorial decision not to publish as an illegal in-kind contribution.[30] Thus, AMI had no notice that its conduct might violate McDougal's read of the FECA. McDougal's proposed rule also is unconstitutionally overbroad because it could be applied to punish any media entity that incurs costs to secure a source or story, seeks reaction from a candidate, and then decides not to publish the story.[31] Even were the Court to entertain such a specious statutory interpretation, the Court would be required to interpret the FECA to avoid constitutional infirmity under the First Amendment.[32]

C. <u>The Agreement Is Not Against Public Policy</u>

"[U]nless it is *entirely plain* that a contract is violative of sound public policy, a court will *never* so declare. The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and ... should be exercised only in cases *free from doubt*." *City of Santa Barbara v. Superior Ct.*, 41 Cal. 4th 747, 777 n. 53 (2007)

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[29] *See* 52 U.S.C. § 30101(8)(a) (definition of "contribution" requires payment be made "for the purpose of influencing an election," rather than other, non-election purposes); 11 C.F.R. § 113.1(g)(6) (a payment made "irrespective of candidacy" is not a "contribution"). The fact that AMI received, in exchange for $150,000, services and assets, which it has used for journalistic purposes, confirms that it did not donate the value to a federal campaign. The fact that a business expense by AMI may have incidentally benefited a campaign does not transform the expense into a "contribution." *See Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986).

[30] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (a law is unconstitutionally vague if "it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute'"); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (vague laws with "uncertain" boundaries are especially dangerous in the First Amendment arena); *cf. Clifton v. FEC*, 927 F. Supp. 493, 499 (D. Me. 1996) (observing that the FECA "does not make corporate expenditures, occurring after contact with a candidate, into contributions").

[31] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (holding the definition of "contribution" must be interpreted narrowly to capture only payments "unambiguously related to the campaign"). AMI may challenge the law as overbroad even as applied to third parties. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

[32] *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (courts must interpret statutes to avoid constitutional doubt).

(emphasis added; internal quotation marks omitted; ellipses in original). There are ample reasons to doubt McDougal's contention that the Agreement violates public policy.

1. The Agreement Allows McDougal To Speak, And She Already Has

The basis of McDougal's "public policy" claim is that the Agreement allegedly "represents an impermissible effort to censor and distort" McDougal's speech. Compl., ¶ 105. That claim rings hollow. McDougal alleges that she hoped AMI would exercise its editorial discretion not to publish, or in her words "squash," her story about Trump. She called it the "best of all worlds" and a "win-win for me" if AMI would *not* publish the story. *Id.*, ¶ 47; Ex. 1 at 38:50. In any event, the Amendment expressly allows McDougal to speak to the press about her alleged affair with Trump, and, she did so in her comments to the *New Yorker* and in her one-hour interview on CNN watched by millions. Compl., Ex. B; Exs. 1, 2.[33]

2. Public Policy Supports Enforcing Contracts, Including This Agreement

Public policy generally favors enforcing contracts: "Freedom of contract is an important principle, and courts should not blithely apply public policy reasons to void contract provisions." *Kaufman v. Goldman*, 195 Cal. App. 4th 734, 745 (2011) (internal quotations omitted). Last week, the Court of Appeal observed that film and television producers routinely pay for "access" to a "'story'" the "producers would not otherwise have[.]" *De Havilland v. FX Networks, LLC*, -- Cal. App. 5th --, 2018 WL 1465802 (Mar. 26, 2018), at *8; *see also Navellier*, 29 Cal. 4th at 94.

3. Public Policy Supports The Freedom Of Prelitigation Communications

McDougal's "public policy" argument also is premised on receiving AMI's alleged "threats of legal action" to enforce its rights under the Agreement. Compl., ¶¶ 101, 109. Even if they occurred, such "prelitigation communications" – far from violating general assertions of public policy urged by McDougal – would be ***speech*** *absolutely protected from liability* under the

[33] McDougal alleges that AMI "used" a "PR Firm" to "silence" her. Compl., ¶¶ 66-73. The Amendment states only that AMI would "retain the services of" PR professionals for a total of six months beginning December 1, 2016. *Id.*, Ex. B. *Nothing* in the Amendment required McDougal to follow their advice. She was always free under the Amendment to "respond to legitimate press inquiries," which she has done. *Id.* Moreover, the six-month period for which the PR professionals were retained under the Amendment expired at the end of May 2017 – over 10 months ago. *Id.*

litigation privilege, Civil Code § 47(b), which supports the "broadly applicable policy of assuring litigants 'the utmost freedom of access to the courts to secure and defend their rights.'" *Rubin v. Green*, 4 Cal. 4th 1187, 1193-95, 1203 (1993) ("policies underlying section 47(b)" barred claim for injunctive relief).[34] Public policy supports *AMI's* right to engage in prelawsuit communications, not McDougal's request to void contracts because of AMI's exercise of such rights.

4. Public Policy Favors AMI's Exercise Of Its First Amendment Rights

In *Miami Herald*, the Supreme Court rejected some of the same purported "public policy" arguments advanced by McDougal here. Compl., ¶¶ 101-103. The court favored the First Amendment-based "exercise of editorial control and judgment," which includes "[t]he choice of material to go into a newspaper" and its "treatment of public issues and public officials—whether fair or unfair," and disapproved a lower court's opinion that the right of reply statute "enhanced" free speech and "furthered the 'broad societal interest in the free flow of information to the public.'" 418 U.S. at 245, 258. The Court came to this conclusion over vigorous argument that the "First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market," and that the "'uninhibited, robust' debate is not 'wide-open' but open only to a monopoly in control of the press." *Id.* at 251-252. Public policy favors AMI's First Amendment right to make editorial judgments over McDougal's private effort to take back the right to re-sell her story.

V. CONCLUSION

AMI respectfully requests that the Court grant its anti-SLAPP motion in full.

DATE: April 2, 2018

JEAN-PAUL JASSY
Counsel for Defendant American Media, Inc.

[34] The "litigation privilege is absolute" – *i.e.*, if it applies, it does not matter "whether the communication was made with malice or the intent to harm." *Kashian v. Harriman*, 98 Cal. App. 4th 892, 913 (2002). New York offers the same broad protections for prelitigation communications. *Front, Inc. v. Khalil*, 24 N.Y.3d 713, 719-720 (2015).