

1 M. REED HOPPER, Cal. Bar No. 131291
E-mail: mrh@pacificlegal.org
2 ANTHONY L. FRANÇOIS, Cal. Bar No. 184100
E-mail: alf@pacificlegal.org
3 Pacific Legal Foundation
930 G Street
4 Sacramento, California 95814
Telephone: (916) 419-7111
5 Facsimile: (916) 419-7747

6 *See next page for additional Attorneys for*
Plaintiffs and Counterclaim-Defendants
7

8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 DUARTE NURSERY, INC., a California Corporation;)
and JOHN DUARTE, an individual,)

12 Plaintiffs,)

13 v.)

14 UNITED STATES ARMY CORPS OF ENGINEERS;)
15 et al.,)

16 Defendants.)

17 UNITED STATES OF AMERICA,)

18 Counterclaim-Plaintiff,)

19 v.)

20 DUARTE NURSERY, INC., a California Corporation;)
and JOHN DUARTE, an individual,)

21 Counterclaim-Defendants.)
22

No. 2:13-cv-02095-KJM-AC
(TEMP)

**PLAINTIFFS' POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR STAY PENDING
APPEAL OF DISMISSAL OF
FIRST AMENDMENT
RETALIATION CLAIM**

Hearing Date: August 26, 2016
Time: 10:00 a.m.
Court Room: 3 - 15th Floor
Judge: Kimberly J. Mueller

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

23
24
25
26
27
28

1 *Additional Attorneys for*
2 *Plaintiffs and Counterclaim-Defendants*

3 DAVID M. IVESTER (Bar No. 76863)
divester@briscoelaw.net
4 PETER PROWS (Bar No. 257819)
pprows@briscoelaw.net
5 Briscoe Ivester & Bazel LLP
155 Sansome Street, Seventh Floor
6 San Francisco, CA 94104
Telephone: (415) 402-2700
7 Facsimile: (415) 398-5630

8 GERALD E. BRUNN (Bar No. 107004)
gbrunn@brunn-flynn.com
9 Law Offices of Brunn & Flynn
928 12th Street, Suite 200
10 Modesto, CA 95354
Telephone: (209) 521-2133
11 Facsimile: (209) 521-7584

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INTRODUCTION**

2 Plaintiffs have filed a notice of appeal from the portion of the Court’s June 10, 2016, Order
3 dismissing their First Amendment retaliation claim as barred by sovereign immunity, under the
4 collateral order doctrine. ECF 219.¹ Plaintiffs now seek a discretionary stay from this Court until
5 the Ninth Circuit’s resolution of Plaintiffs’ pending appeal on the sovereign immunity question.

6 **I**

7 **STATEMENT OF THE CASE**

8 Plaintiffs filed this case on October 10, 2013, alleging that Defendant Army Corps of
9 Engineers violated Plaintiffs’ procedural due process rights by ordering Plaintiffs to stop all work
10 in waters of the United States on Plaintiffs’ property, without a hearing. ECF 1. The Army Corps
11 unsuccessfully moved to dismiss the case, ECF 27 (April 23, 2014, Order), then Defendant United
12 States filed a counterclaim against Plaintiffs for allegedly “deep ripping” the same property in
13 violation of the Clean Water Act, ECF 28 at 27 (“deep ripping” allegations). On September 3, 2015,
14 with leave of the Court, Plaintiffs filed their Second Amended Complaint alleging a supplemental
15 claim against both Defendants for First Amendment retaliation. ECF 90 at 14-16 (retaliation
16 allegations).² On June 10, 2016, the Court dismissed Plaintiffs’ First Amendment retaliation claim
17 on sovereign immunity grounds. ECF 195 at 35-37. In the same order, the Court granted the
18 government’s summary judgment motion on its Clean Water Act counterclaim as to liability. As
19 a result, the only remaining triable issues are Plaintiffs’ affirmative defenses to the counterclaim,
20 and the government’s claimed penalty.

21 On July 27, 2016, Plaintiffs filed their notice of appeal from the dismissal of their retaliation
22 claim. Plaintiffs’ appeal is brought under the collateral order doctrine; in the alternative they will
23 ask the Ninth Circuit to treat the appeal as a petition for writ of mandate. Plaintiffs bring this motion

24 _____
25 ¹ Plaintiffs will ask the Ninth Circuit to treat the notice of appeal as a petition for writ of mandamus
26 in the alternative, if the dismissal of the retaliation claim is held not to be an appealable collateral
order.

27 ² The government argued that the proposed retaliation claim was inadequately pled and amendment
28 was therefore futile, see ECF 89 at 5:12-13, but the Court analyzed the allegations and ruled that
the claim as pled was “legally sufficient,” *id.* at 6:7-18.

1 in order to stay the remaining trial pending a decision of the Ninth Circuit on whether sovereign
2 immunity bars Plaintiffs' retaliation claim against the government.

3 II

4 STATEMENT OF LAW

5 **A. Plaintiffs' Remedy Under Their First Amendment Retaliation**
6 **Claim Would Be an Injunction Against Further Prosecution**
7 **of the Government's Clean Water Act Counterclaim**

8 A First Amendment retaliation claim requires that plaintiff ultimately show "three elements:
9 (1) that the plaintiff was engaged in a constitutionally protected activity, (2) that the defendant's
10 actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from
11 continuing to engage in that activity; and (3) that defendant's adverse action was substantially
12 motivated as a response to the plaintiff's exercise of constitutionally protected conduct." March 23,
13 2014, Order on United States' Second Motion to Dismiss, ECF 63, at 7:26 - 8:3 (citing *Schneider*
14 *v. County of Sacramento*, Civ. No. S-12-2457, 2014 U.S. Dist. WL 4187364, at *8 (E.D. Cal.
15 Aug. 21, 2014), internal citations omitted).

16 Once this prima facie showing is made, the burden shifts to the government to show that it
17 would have taken the same action even without the plaintiff's First Amendment activity. *Mt.*
18 *Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). This inquiry requires the
19 government to show that it would have acted as it did against the plaintiff, not merely that it could
20 have done so. *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1315 (9th Cir. 1989).

21 Injunctive relief is an available remedy for a First Amendment retaliation claim.
22 *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995) (injunction
23 against immigration legalization hearings that use undisclosed classified information to retaliate
24 against exercise of right of association), *vacated on other grounds*, by *Reno v. American-Arab Anti-*
25 *Discrimination Comm.*, 525 U.S. 471 (1999); *Denney v. DEA*, 508 F. Supp. 2d 815 (E.D. Cal. 2007)
26 (physician had standing to seek injunctive relief against federal investigation retaliating against his
27 speech in favor of medical marijuana). If the Ninth Circuit holds that Plaintiffs' retaliation claim
28 is not barred by sovereign immunity, then the relief available on remand to Plaintiffs would be an
injunction against any remaining proceedings under the counterclaim.

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1 **B. The Court Has Discretion To Stay Proceedings**
2 **To Avoid Inequity to the Moving Party**

3 “A district court has inherent power to control disposition of the causes on its docket in a
4 manner which will promote economy of time and effort for itself, for counsel, and for litigants.”
5 *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Exercise of this power is left to the sound
6 discretion of the trial court. *Id.* The interests which the Ninth Circuit considers in reviewing an
7 order to stay are (1) the possible damage that may result from granting the stay, (2) “the hardship
8 or inequity which a party may suffer in being required to go forward” and (3) “the orderly course
9 of justice measured in terms of the simplifying or complicating of issues, proof, and questions of
10 law which could be expected to result from a stay.” *Id.* (citing *Landis v. North American Co.*, 299
11 U.S. 248, 254-55 (1936)).

12 This Court has granted stays pending resolution of questions of law in the Ninth Circuit. *See*,
13 *e.g.*, *Wessel v. Sisto*, No. CIV-08-1082, 2009 U.S. Dist. WL 2949031 (E.D. Cal., Sept. 14, 2009)
14 (habeas proceeding stayed pending Ninth Circuit en banc rehearing of key case); *Morgan Tire of*
15 *Sacramento, Inc. v. Goodyear Tire & Rubber Co.*, No. 2:15-cv-00133, 2015 U.S. Dist. WL 3623369
16 (E.D. Cal., June 9, 2015) (granting unopposed stay pending Ninth Circuit review by petition for writ
17 of mandamus from order transferring case); *Dameron Hosp. Ass’n v. State Farm Mut. Auto. Ins.*
18 *Co.*, No. 2:12-cv-02246, 2013 U.S. Dist. WL 5718886 (E.D. Cal., Oct. 15, 2013) (stay granted while
19 legal issue of first impression in state-law-based claim pending in California Court of Appeal);
20 *Pickup v. Brown*, No. 2:12-cv-02497, 2013 U.S. Dist. WL 411474 (E.D. Cal., Jan. 29, 2013)
21 (granting jointly requested stay pending appeal of preliminary injunction ruling in Ninth Circuit).

22 **III**

23 **ARGUMENT**

24 **A. Granting A Stay Would Result In Little To No Possible Damage**

25 The remaining issues to be tried include Plaintiffs’ affirmative defenses to the counterclaim,
26 and the amount, if any, of a civil penalty and any other relief sought by the government. The Ninth
27 Circuit does not generally consider a delay in the collection of damages to be “possible damage”
28 under this factor. *CMAX*, 300 F. 2d at 268; *see also Lockyer v. Mirant Corp.*, 398 F. 3d 1098,

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1 1110-11 (9th Cir. 2005) (analyzing cases). Nor has the Corps ever identified time sensitive
2 corrective measures required by Duarte Nursery’s plowing, so delaying trial would not result in any
3 damage to any waters of the United States located there. In fact, the Army Corps ordered Plaintiffs
4 to “cease all work” in any waters of the United States, and has never modified that order, even
5 during these proceedings. And, Plaintiffs have complied with the cease and desist order for the past
6 three and half years. There is no ongoing or threatened additional action which the United States
7 claims violates the Clean Water Act. ECF 195 at 11 (plowing took place in November and
8 December of 2012); cf *Mirant Corp.*, 398 F.3d at 1111-12 (stay inappropriate where suit seeks to
9 enjoin ongoing and future harm). A stay of the remaining trial proceedings would not result in any
10 damage.

11 **B. Refusing a Stay Would Be Inequitable to Plaintiffs,
12 Who Would Thereby Be Deprived of Effective Relief
13 Even If the Ninth Circuit Ultimately Holds that Sovereign
14 Immunity Does Not Bar Their Retaliation Claim**

15 As discussed above, the relief sought by Plaintiffs on the retaliation claim is an injunction
16 barring further prosecution of the counterclaim. ECF 90 at 21:10-13. If the Ninth Circuit ultimately
17 holds that sovereign immunity does not bar Plaintiffs’ retaliation claim, then on remand, even if
18 Plaintiffs prevail in meeting their prima facie burden, there will be little or no effective relief if the
19 government has already subjected Plaintiffs to trial on the counterclaim remedy. It would be
20 inequitable to require Plaintiffs to proceed to trial on the counterclaim remedy when they may
21 ultimately be able to enjoin the prosecution of the entire counterclaim if the Ninth Circuit holds that
22 it is not barred by sovereign immunity. This inequity more than outweighs any minor harm to the
23 United States that might result from a stay during appeal of the sovereign immunity ruling. cf.
24 *Dependable Highway Express, Inc., v. Navigators Ins. Co.*, 498 F. 3d 1059, 1066 (9th Cir. 2007)
(movant must show hardship or inequity where stay would possibly damage another party).

25 **C. A Stay Would Simplify Issues for Any Remaining Trial
26 By Ensuring That Relief Is Available on Plaintiffs' Retaliation
27 Claim If the Ninth Circuit Holds It Is Not Barred by Sovereign Immunity**

28 If the Ninth Circuit holds that sovereign immunity does not bar the retaliation claim, it will
be remanded to this Court. If, at the time of remand, Plaintiffs have already been subjected to trial

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1 on the government's remedy under the counterclaim, then the Court would be faced with the
2 difficult legal issue of how to fashion an appropriate remedy if Plaintiffs prevail on the retaliation
3 claim. The Court may have to consider whether to reconsider or vacate its earlier rulings on the
4 counterclaim, or whether to enter an order barring enforcement of any remedy that the government
5 might win, or whether the government could be barred from defending subsequent appellate
6 proceedings on the counterclaim. None of these would provide Plaintiffs much in the way of
7 effective relief, and all would raise legal and procedural issues far more complicated than Plaintiffs'
8 proffered approach. The court should stay the remaining proceedings until the Ninth Circuit is heard
9 from on whether sovereign immunity bars the retaliation claim, and then, if the Ninth Circuit
10 reverses, hold trial on the retaliation claim in conjunction with the remaining triable issues in the
11 case.

12 **CONCLUSION**

13 The Court should stay further trial proceedings until the Ninth Circuit resolves Plaintiffs'
14 pending appeal of whether the retaliation claim is barred by sovereign immunity.

15 DATED: July 29, 2016.

16 Respectfully submitted,

17 M. REED HOPPER
18 ANTHONY L. FRANÇOIS
19 DAVID M. IVESTER
20 PETER PROWS
21 GERALD E. BRUNN

22 By /s/ Anthony L. François
23 ANTHONY L. FRANÇOIS

24 *Attorneys for Plaintiffs and Counterclaim-*
25 *Defendants Duarte Nursery, Inc., et al.*
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **PLAINTIFFS' POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR STAY PENDING APPEAL OF DISMISSAL OF FIRST AMENDMENT RETALIATION CLAIM** have been served through the Court's CM/ECF system on all registered counsel this 29st of July, 2016. Additionally, I hereby certify that copies of the foregoing documents have been hand delivered to GREGORY T. BRODERICK, Assistant United States Attorney, at 501 I Street, Suite 10-100, Sacramento, California, 95814 this 29st of July, 2016.

DATED: July 29, 2016.

Respectfully submitted,

/s/ Anthony L. François
ANTHONY L. FRANÇOIS

*Attorneys for Plaintiffs and Counterclaim-
Defendants Duarte Nursery, Inc., et al.*

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28