ORIGINAL

S164174

IN THE SUPREME COURT OF CALIFORNIA

SIMPSON STRONG-TIE COMPANY, INC.,

Plaintiff and Appellant,

vs.

PIERCE GORE and THE GORE LAW FIRM,

Defendants and Respondents.

APPEAL FROM A DECISION BY THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT
CASE NO. H030444

REPLY BRIEF ON THE MERITS

(Service on Attorney General and District Attorney required by Bus. & Prof. Code, §§ 17209, 17536.5)

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INTRODUCTION

Building a responsible and successful business like Simpson Strong-Tie Company is never easy, especially during perilous economic times. Lawyers do no public service when they defame such businesses in the course of using commercial advertising to solicit clients for a contemplated lawsuit that never materializes for lack of an aggrieved party. And the law does no public service by cloaking such defamation under the protection of California's anti-SLAPP statute, Code of Civil Procedure section 425.16.[1/] Recognizing this, the Legislature has exempted some forms of commercial speech from the anti-

1/ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

SLAPP statute's scope by enacting Code of Civil Procedure section 425.17. At stake in this case is the efficacy of those exemptions to protect California businesses.

This reply brief addresses various ways in which this court can ensure that section 425.17's commercial speech exemptions remain viable. First, the moving defendant on an anti-SLAPP motion should have the burden of persuasion with respect to the applicability of the exemptions. Allocating this burden to the defendant in the present case – attorney Pierce Gore – is required by Evidence Code section 500 and is consistent with the overarching principle that a burden of persuasion should be borne by the party who has *peculiar knowledge* concerning the germane facts. Here, that party is Gore. At this stage of the lawsuit, where discovery is stayed during the pendency of Gore's anti-SLAPP motion, Simpson cannot uncover the germane facts, which are known only to Gore. Placing the burden of persuasion on a party barred from discovering the facts would be unjust.

Second, on an appeal from an anti-SLAPP dismissal, the reviewing court should accept as true all facts alleged in the plaintiff's complaint as well as all facts that the court may infer from those expressly alleged. Protection of the right to a trial on the merits demands this stringent approach to appellate review of an anti-SLAPP dismissal. In the present context, this means the statement that gives rise to this lawsuit – Gore's newspaper advertisement, in which he defamed Simpson while soliciting potential clients for a contemplated lawsuit – must be read as triggering section 425.17's "content and purpose" exemption. The salient factual inference – that Gore has investigated the companies named in the advertisement and has discovered that they are selling defective screws – is the sort of "representation of fact" about Gore's business operations or services (§ 425.17, subd. (c)) that necessarily invokes the "content and purpose" exemption.

Third, in interpreting section 425.17's "course of delivery" exemption, this court should look to the statute's plain language, which makes the exemption applicable where "[t]he intended audience is an actual or *potential* buyer or customer." (§ 425.17, subd. (c)(2), italics added.) Among the services Gore provides as a class action lawyer are assembling a class and recruiting class representatives. Through his newspaper advertisement, Gore was delivering those services to an unassembled and unrepresented class of *potential* litigants – which necessarily triggers the "course of delivery" exemption if the word "potential" in the statute is to have any meaning.

LEGAL DISCUSSION

I.

THIS COURT MUST ACCEPT AS TRUE THE EVIDENCE FAVORABLE TO SIMPSON.

Gore takes great liberties with the evidence, spinning a one-sided story – Gore's side – of purported diligence by Gore before running his advertisement, which he contrasts against Simpson's alleged rush to court with a hidden agenda. Gore has disregarded the standard of review on an appeal from an anti-SLAPP dismissal, which is that the court must "accept as true the evidence favorable to the plaintiff." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3, internal quotation marks omitted.)

Thus, the evidentiary backdrop for this appeal is Simpson's side of the story, not Gore's. Simpson's story is that of:

- A responsible and exemplary company – Simpson – which took the lead in its industry to research the corrosive effect of

pressure-treated wood on metal fasteners and provide consumers, builders and architects with the information needed to choose safely among various types of screws for use with pressure-treated wood. (See Opening Brief On the Merits 6-8 (OBOM).)

- A lawyer – Gore – who unsuccessfully used newspaper advertising to troll for clients for a lawsuit against Simpson without first speaking to a single user of a Simpson product, or discovering a single incident of wood deck collapse caused by a Simpson product, or even visiting a hardware store and looking at a Simpson product or reading a Simpson's point-of-sale consumer notice – instead relying on second-hand statements by television news reporters – and who now pleads his shoddy legwork as a license to defame. (See OBOM 10; Answer Brief On the Merits 7-9 (ABOM).)

- A diligent effort by Simpson – through two letters to Gore, both of which went unanswered – to avoid litigation by asking Gore to cease publishing such advertising directed at Simpson and to provide any information showing that Simpson's galvanized screws were not performing properly, so that Simpson could promptly address any product or consumer problem. (See Appellant's Appendix 443, 447 (AA).)

- Further diligence by Simpson to confirm with its statistical survey, before commencing litigation, that the advertisement had damaged Simpson by causing a 40% increase in the number

> of consumers who thought it likely that Simpson's galvanized screws are defective and a 27% increase in the number of consumers who would be unlikely to buy Simpson's galvanized screws – which in fact are not defective and have never caused any harm. (See OBOM 11-12.)

Gore's attack on the statistical survey as failing "to measure actual sales lost" (ABOM 13) is typical of the answer brief's evidentiary slant in Gore's favor. Simpson's side of the story – the side this court must accept – is that it was not possible to measure actual sales lost until months after the advertisement appeared, at Simpson's fiscal year-end accounting. Simpson would not have sued Gore if the survey had not demonstrated significant damage from Gore's advertisement. And the damage would only have been exacerbated had Gore continued to target Simpson in such advertising while Simpson waited for its accountants to crunch the numbers at year's end. Simpson sought to mitigate the damage by expeditiously asking the superior court to issue a very narrow injunction, limited only to prohibiting Gore from including Simpson's name in such advertising (and without prohibiting Gore from otherwise advertising about corrosion risks). (AA 13.) That could not have been done effectively by waiting for the accountants. Viewing the evidence in the light most favorable to Simpson, the statistical survey is properly regarded as responsible diligence rather than part of a rush to litigate.

II.

GORE HAS THE BURDEN OF SHOWING THAT HIS ADVERTISEMENT FALLS OUTSIDE SECTION 425.17'S EXEMPTIONS.

A. The facts germane to the exemptions are peculiarly within Gore's knowledge and will remain there without discovery.

On the first issue presented for review – which party bears the burden of persuasion with respect to the applicability of section 425.17's anti-SLAPP exemptions – Simpson's opening brief on the merits explains that allocating this burden to Gore is consistent with the overarching principle that a burden of persuasion should be borne by the party who has *peculiar knowledge* concerning the particular fact to be proven. (E.g., *Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 234.) In the present context, this means Gore should bear the burden of persuasion with regard to the commercial speech exemptions because his subjective purpose for running his advertisement (which is germane to the "content and purpose" exemption) and whether the advertisement was typical of his business transactions (which is germane to the "course of delivery" exemption) are both facts as to which he has peculiar and indeed exclusive knowledge. (See OBOM pp. 22-23.)

Gore's answer brief does not meaningfully respond to this point. (See ABOM 24, fn. 5.) His brief does, however, cite a number of cases that *make* Simpson's point.

For example, the cases Gore cites as presenting "the closest parallel" to the present case – *People v. Mower* (2002) 28 Cal.4th 457 and *People v. Neidinger* (2006) 40 Cal.4th 67 (ABOM 21) – actually allocated to the

defendants in those cases the burden of proving an exonerating fact in a criminal prosecution, because of the "peculiar knowledge" rule: "The rule of convenience and necessity declares that, unless it is 'unduly harsh or unfair,' the 'burden of proving an exonerating fact may be imposed on a defendant if its existence is "*peculiarly" within his personal knowledge* and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient.'" (*People v. Mower, supra,* 28 Cal.4th at p. 477, italics added, quoting *In re Andre R.* (1984) 158 Cal.App.3d 336, 341-342; accord, *People v. Neidlinger, supra,* 40 Cal.4th at p. 74.) Likewise here, Gore should have the burden of proving the facts germane to the commercial speech exemptions because he has peculiar and exclusive knowledge of those facts.

Gore cites *Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183 for the proposition that the burden of proving an exception to an exclusion (which is not even what the commercial speech exemptions are) normally lies with the party invoking the exception. (See ABOM 18.) But *Aydin*, too, considered the "peculiar knowledge" rule, acknowledging that even the burden of proving an exception to an exclusion is subject to being "allocated in a manner at variance with the general rule" in accordance with "the knowledge of the parties concerning the particular fact." (*Aydin Corp. v. First State Ins. Co., supra,* 18 Cal.4th at p. 1193, internal quotation marks omitted.) In *Aydin* there was "no compelling reason to alter the normal allocation of the burden of proof" (*ibid.*), but there is here, given Gore's peculiar and exclusive knowledge of the facts germane to the commercial speech exemptions.

Similarly, Gore cites *Sun 'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671 and its progeny as examples of a situation where the party claiming an exception – there, delayed discovery of a claim as an exception to the statute of limitations – has the burden of proving the facts demonstrating the exception. (See ABOM 18-29.) Again, however, that is a situation where

the party claiming the exception (there, the plaintiff) has peculiar knowledge of the facts (there, concerning the time when the plaintiff discovered the claim) and thus should bear the burden of proving those facts. Here, that party is Gore, not Simpson, so that Gore should be allocated the burden of persuasion.

The "peculiar knowledge" rule is especially important in the unique context of an anti-SLAPP motion, because the filing of the motion *immediately stays all discovery*. (See Code Civ. Proc., § 425.16, subd. (g).) That means the facts germane to the commercial speech exemptions not only are within Gore's peculiar knowledge but will *remain* there as the anti-SLAPP motion is litigated, because Simpson cannot use discovery to uncover those facts. It would be unfair to require Simpson to prove the germane facts when Simpson has no opportunity to discover them.[2/]

B. The rule of *Norwood v. Judd* on proving an exemption has been superseded by Evidence Code section 500.

Gore seems to think the old rule of *Norwood v. Judd* (1949) 93 Cal.App.2d 276. 282 – stating that "[o]ne claiming an exemption from a general statute has the burden of proving that he comes within the exception" – must have survived the 1967 enactment of Evidence Code section 500 because a few post-1967 decisions that Gore cites have mentioned the old rule or have reached conclusions seemingly consistent with it. (See ABOM 15-17.) Those decisions, however, did not *address* the question whether section 500 supersedes *Norwood v. Judd* and thus are not authority on that question, which is one of first impression for this court to decide in the first instance. (See,

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2/ Indeed, the trial court failed to allow Simpson to conduct limited discovery on another fact within Gore's peculiar knowledge – his state of mind, for purposes of demonstrating actual malice – a point the Court of Appeal expressly declined to reach. (See typed opn. p. 34.)

e.g., *Styne v. Stevens* (2001) 26 Cal.4th 42, 57, fn. 8 ["cases are not dispositive authority for points not directly considered"].)

The answer to that question lies in the plain language of section 500, which, in pertinent part, now requires a party to prove "each fact . . . the nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) Because the nonexistence of facts invoking the commercial speech exemptions is essential to Gore's assertion of anti-SLAPP protection, section 500 allocates the burden of persuasion to Gore.

Gore questions the notion that section 500 could have "*sub silentio* rejected the well-established rule" of *Norwood v. Judd*. (See ABOM 14.) But there is nothing unusual about a statute superseding previous case law *sub silentio*. As Witkin observes: "A decision correct when rendered will, of course, lose its force as a precedent if a later statute changes the rule. But difficulty may be encountered in determining whether a statute in general language, not clearly directed to the rule of the case, nevertheless undermines it to the extent that it is ripe for repudiation." (Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 520, pp. 587-588.) It is plain, however, that section 500 undermines *Norwood v. Judd* such that "it is ripe for repudiation" (*ibid.*) – even though section 500 does not specifically address the rule of that case – because of the statute's shift of focus away from the former question of who holds the so-called "affirmative of the issue," which was the jurisprudential underpinning for *Norwood v. Judd*.[3/] (See OBOM 21-22.) Indeed, the

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3/ Gore comments that *Norwood v. Judd* "does not even mention" former Code of Civil Procedure section 1981, which had codified the old rule allocating the burden of proof to the party who holds the "affirmative of the issue." (See ABOM p. 16.) This court made clear, however, in *Colonial Ins. Co. v. Ind. Acc. Com* (1945) 27 Cal.2d 437, 440-441, that the former "affirmative of the issue" rule was the underpinning for that case's expression of the former rule on the burden of proving an exemption – i.e., for the rule subsequently restated in *Norwood v. Judd*.

Evidence Code supersedes prior cases *sub silentio* in many respects. (See, e.g., *Lane & Pyron, Inc. v. Gibbs* (1968) 266 Cal.App.2d 61, 66-67 [pre-1967 cases on presumptions of consideration and legality in lawsuits for collection on gambling-tainted checks are superseded *sub silentio* by Evidence Code section 600].)

Norwood v. Judd itself addressed the phenomenon of courts recognizing that, even though later cases may cite a decision, it still could have been previously overruled *sub silentio*. The court there scrutinized case law to conclude that an old decision precluding lawsuits between partners where the business had been unlawfully conducted without a license had been subsequently overruled *sub silentio*, even though the overruled decision had, "on occasion, been cited in later cases." (*Norwood v. Judd, supra,* 93 Cal.App.2d at p. 288.) *Norwood v. Judd* itself demonstrates that superseded case law does not survive merely because no court previously realized the supersession.

In any event, even if *Norwood v. Judd* did survive Evidence Code section 500, one of the cases Gore cites – *Miller v. Superior Court* (2002) 101 Cal.App.4th 728 – makes clear that an overarching principle is the "peculiar knowledge" rule, which allocates the burden of persuasion regarding the commercial speech exemptions to Gore because the facts germane to the exemptions are within his peculiar knowledge. (See *ante*, pp. 6-8.) Although, as Gore points out (see ABOM 16), *Miller* required a prosecutor to prove excusable neglect as establishing an exception to a statutory bar of a third prosecution after two prior dismissals, the *reason* for the holding was the "peculiar knowledge" rule: The court described the rule and explained that "the prosecution will have greater knowledge of the circumstances leading up to a dismissal of its case and ready access to the evidence needed to establish excusable neglect." (*Miller v. Superior Court, supra,* 101 Cal.App.4th at p.

747.) That is why *Miller* allocated the burden of persuasion as it did. The same policy calls for allocating the burden of persuasion regarding the commercial speech exemptions to Gore.

C. The rule of *Bach v. McNellis* on alleging an exemption is a rule of pleading that does not affect the burden of persuasion.

Gore relies on a *rule of pleading* set forth in *Bach v. McNellis* (1989) 207 Cal.App.3d 852 pertaining to situations where a cause of action in a complaint is based on a statutorily-prescribed liability that is itself limited by another statute. The rule is that the complaint need not allege facts negating the limitation if it is contained in the statute, but the complaint must do so if the limitation is contained in another statute. (See *id.* at p. 865.) Gore seems to think this rule of pleading is analogous authority for imposing the burden of persuasion on Simpson because the commercial speech exemptions are prescribed not in the anti-SLAPP statute itself but rather in section 425.17. (See ABOM 17-18.) The analogy fails because of Evidence Code section 500, which *directly* prescribes the burden of persuasion here. The rule of *Bach v. McNellis* is *only* a rule of pleading, and it cannot be extended by analogy to affect the burden of persuasion when section 500 prescribes that burden.

D. As a matter of stare decisis, *Equilon* and *Navellier* give Gore the burden of persuasion.

Gore contends this court's decisions in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53 (*Equilon*) and *Navellier v. Sletten* (2002) 29 Cal.4th 82 cannot be stare decisis regarding "the proper

interpretation" of section 425.17 because those decisions predate the statute. (See ABOM 27, fn. 8.) But Gore misunderstands what we contend is stare decisis, which is that the two-pronged anti-SLAPP analysis and its burden-shifting process applies on *all* anti-SLAPP motions, so that the Court of Appeal here erred in rejecting that so-called "supposition." (Typed opn. p. 7; see OBOM 17-19.) If, as a matter of stare decisis, the defendant's first-prong burden on an anti-SLAPP motion is to show "that the challenged cause of action is one arising from *protected activity*" (*Equilon, supra,* at p. 67, italics added), then the defendant necessarily must show that the activity is not exempt from such protection. Thus, as a matter of stare decisis, the defendant's first-prong burden necessarily includes the proof of an exemption prescribed by section 425.17.

It makes no difference that the two cases establishing this binding precedent predate section 425.17. (See ABOM 27, fn. 8.) Stare decisis is a rule of *continuity in the law* (see, e.g., *Ciani v. Superior Court* (1985) 40 Cal.3d 903, 923-924) by which, as a matter of policy, a rule declared in a given case will apply in future cases absent a superseding statute or judicial decision. Section 425.17 does not supersede the rule of *Equilon* and *Navellier*, nor does any Supreme Court decision – not even *Soukup v. Law Offices of Herbert Hafif, supra,* 39 Cal.4th 260. Thus, stare decisis assures continuity in the law here by requiring universal application of the two-pronged anti-SLAPP analysis on all anti-SLAPP motions, including this one – the necessary consequence of which is that Gore's first-prong burden includes the burden of persuasion regarding section 425.17's exemptions.

E. The burden of persuasion should arise if and when the plaintiff invokes an exemption.

Gore poses a rhetorical question – whether he would have been obligated to disprove the commercial speech exemptions in his anti-SLAPP motion even if Simpson had never invoked them. Gore answers "[o]f course not," and then warns of a consequent risk of waiver when a defendant's anti-SLAPP motion fails to demonstrate the nonexistence of all exemptions from anti-SLAPP protection. (See ABOM 24-25.)

This court, however, can provide a simple procedural solution to this phantom of a problem by prescribing a rule of burden-shifting similar to the burden-shifting rule encompassed in the two-pronged anti-SLAPP analysis set forth in *Equilon* and *Navellier*, where the plaintiff need not prove a probability of prevailing *unless and until* the defendant proves anti-SLAPP protection. (See OBOM 16.) Gore is right that it makes no sense to require a defendant invoking anti-SLAPP protection to demonstrate the nonexistence of an exemption from such protection in the defendant's opening salvo – that is, in the anti-SLAPP motion itself – before it is known whether the plaintiff will invoke the exemption. The initial burden should be on the plaintiff to invoke the exemption in opposition to the anti-SLAPP motion. But if that happens – and in most cases it will not – the burden should then shift to the defendant to disprove the invoked exemption, in reply to the plaintiff's opposition. This is procedural common sense: There will be no risk of waiver by failure to disprove all exemptions in the anti-SLAPP motion if the obligation to do so only arises *if and when* the plaintiff invokes the exemption in opposition to the motion, whereupon the defendant must sustain the burden of persuasion in his or her reply memorandum. And then it will be the defendant in exclusive

possession of salient evidence who must meet that burden – not the plaintiff who has been deprived of discovery.

III.

THE COMMERCIAL SPEECH EXEMPTIONS ARE PROPERLY CONSTRUED TO INCLUDE GORE'S ADVERTISEMENT.

A. Even narrowly construed, the plain language of section 425.17 exempts this case from the anti-SLAPP statute.

After Gore filed his answer brief on the merits, this court held in *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 316, 319 (*Club Members*) that, as an exception to the broadly-construed anti-SLAPP statute, the "public interest lawsuit" exemption prescribed by Code of Civil Procedure section 425.17, subdivision (b), is to be narrowly construed. By parity of reasoning, this court might likewise conclude that the commercial speech exemptions prescribed by subdivision (c) of section 425.17 should be narrowly construed.

Narrow statutory construction, however, does not resolve the second issue presented for review – whether subdivision (c) exempts from anti-SLAPP protection a commercial advertisement by a lawyer soliciting clients for a contemplated lawsuit. That issue can be resolved without resort to general rules of statutory construction because the language of section 425.17 lends itself to application according to its *plain meaning*. As this court observed in *Club Members*, a statute's "plain meaning" is determinative, and "[i]f the language is clear and unambiguous there is no need for construction

. . . ." (*Club Members, supra,* 45 Cal.4th at p. 316, internal quotation marks omitted.)

Gore's argument regarding section 425.17's legislative history provides an example of how the statute's plain meaning resolves questions presented in this case. Gore's answer brief includes an extensive discussion of legislative history in an attempt to demonstrate that the Legislature intended section 425.17 to curb only *corporate* abuse of the anti-SLAPP statute. Gore argues that section 425.17 was targeted *only* at powerful corporations to prevent them from misusing the anti-SLAPP statute. (See ABOM 47-55.) The legislative history does indeed indicate that corporations had been expressly targeted by *one* of section 425.17's sponsors, the Consumer Attorneys of California (CAOC). (See Sen. Com. on Judiciary, Rep. on Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003, p. 4 ["The Consumer Attorneys of California (CAOC), sponsors of SB 515, assert that SB 515 is needed to stop corporate abuse of the [anti-SLAPP] statute . . . .].) But the plain language of section 425.17 targets "abuse" of the anti-SLAPP statute (§ 425.17, subd. (a)) – not just corporate abuse, but *all* abuse. Thus, there is no need for construction by reference to extrinsic aids like legislative history, because the statutory language is clear and unambiguous. (*Club Members, supra,* 45 Cal.4th at p. 316.). The statute says what it says: "abuse," not "corporate abuse."

Consequently, Gore cannot escape section 425.17's commercial speech exemptions merely because he is not a corporation. The statute's plain language says otherwise, targeting commercial speech by *all* anti-SLAPP abusers – not just corporate abusers, powerful or not. And, indeed, it would be nonsensical to make section 425.17's application to Gore's advertisement dependent on the technical legal structure of his law practice. If Gore practiced as a professional corporation with the letters "PC" after his name,

would he only then be within the scope of section 425.17? So he would argue. But that irrational position is like the discredited notion that the anti-SLAPP statute itself targets only lawsuits by corporations. (See, e.g., *Moraga-Orinda Fire Protection Dist. v. Weir* (2004) 115 Cal.App.4th 477, 482 [rejecting argument that Legislature intended anti-SLAPP statute "to apply to tort actions brought by large corporations," because "[n]o such limitation appears on the face of the statute, and it has not been so construed by the courts"].) That sort of reasoning makes no more sense for section 425.17 than it makes for section 425.16.

This is just one example of how section 425.17's plain language determines its application to advertisements like Gore's that solicit clients for a contemplated lawsuit. We next demonstrate other ways in which the statute's plain language, as illuminated by decisional law, encompasses Gore's advertisement – so that, even narrowly construed, section 425.17 exempts this lawsuit from the anti-SLAPP statute.

B. The "content and purpose" exemption applies here because of factual inferences in Gore's advertisement.

On the first of the two commercial speech exemptions – what we call the "content and purpose" exemption (see OBOM 15) – Gore's principle argument is that this exemption cannot apply to his advertisement because it contains no "representations of fact" as required by subdivision (c)(1) of section 425.17. (See ABOM 37-41.) The opening brief on the merits, however, describes a factual representation that is necessarily *inferred* from the advertisement – that Gore has investigated the companies named in the advertisement and has discovered that they are selling defective screws. (See OBOM 33-34.) Gore's answer brief does not dispute that it is reasonable to

draw this factual inference. Rather, he contends the issue whether that inference *must* be drawn in the present procedural posture of this case "is not before this Court." (ABOM 40.)

Gore is wrong. This issue implicates the standard of appellate review for an anti-SLAPP dismissal – that the appellate court must accept as true all facts alleged in the plaintiff's complaint, a corollary of which is that the court must draw from those allegations all reasonable factual inferences in the plaintiff's favor. (Cf. *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403 [on appeal from demurrer dismissal, "the reviewing court must accept as true not only those facts alleged in the complaint but also facts that may be implied or inferred from those expressly alleged"].) The applicable standard of review is central to *every* appeal, and thus any issue regarding that standard is necessarily encompassed in the court's decision-making process. Consequently, on review by this court, the parties may argue any issue regarding the standard of appellate review as being "fairly included" in the issues on which the court granted review. (Cal. Rules of Court, rule 8.516(a)(1).) Whether all factual inferences must be drawn in Simpson's favor on this anti-SLAPP appeal is just such an issue.

Gore also argues that the cases on this point address only the second prong of anti-SLAPP analysis and thus require appellate courts to view all factual allegations in the plaintiff's favor solely for purposes of determining whether the plaintiff has demonstrated a probability of prevailing on the claim. (See ABOM 40.) Again, Gore is wrong. For example, in *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279, 1284, the court invoked this rule of appellate review yet resolved the appeal solely on the first prong of anti-SLAPP analysis because such resolution made it unnecessary to address the second prong. Similarly, in *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1262, 1270, the court invoked this rule yet resolved the appeal solely on

the first prong of anti-SLAPP analysis because the plaintiff had made no showing on the second prong.

As a matter of policy, this rule of appellate review applies to *any* final disposition without trial, such as a defendant's summary judgment or a demurrer dismissal: On appeal, all presumptions favor the plaintiff, the court accepts the complaint's allegations as true, and evidence is viewed in the light most favorable to the plaintiff. (See, e.g., *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 717 [summary judgment]; *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 82 [demurrer dismissal].) The right to a trial on the merits demands this stringent approach to appellate review of a non-trial disposition. (See, e.g., *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42 [plaintiff's allegations must be liberally construed because justice "is not served when technical forfeitures prevent a trial on the merits"].) This policy consideration applies equally to appellate review of a first-prong anti-SLAPP dismissal, where the plaintiff is likewise denied a trial on the merits. As a matter of procedural fairness, and to protect the right to a trial on the merits, the appellate court must accept the plaintiff's allegations as true and draw all inferences in the plaintiff's favor in determining whether the anti-SLAPP statute applies to the activity giving rise to the lawsuit.

Thus, the applicable standard of appellate review requires this court to infer from Gore's advertisement the factual assertion that Gore has investigated the companies named in the advertisement and has discovered that they are selling defective screws. That inferred assertion is what gives rise to this lawsuit, by which Simpson seeks to litigate its point that its screws are *not* defective. And because the inferred assertion is a "representation of fact" (§ 425.17, subd. (c)(1)), it triggers the "content and purpose" exemption from anti-SLAPP protection.

The Court of Appeal conceded that "[s]ome readers might surmise that Gore conducted an investigation," but the court concluded that "[r]easonable readers" – as contrasted with "unusually imaginative readers" – "would refrain from any such speculation, since the advertisement affords no basis for it." (Typed opn. pp. 11-12.) Here the court crossed the line from objective to subjective assessment of possible inferences from Gore's advertisement – and thus violated the rule requiring the court to draw all reasonable factual inferences in Simpson's favor – because the advertisement *does* form a basis for inferring that Gore had investigated the companies named in his advertisement (a point Gore does not even dispute). That is the most plausible explanation for – and, indeed, it is actually *is* – how Gore came to believe that readers might, as the advertisement put it, "have certain legal rights" against those companies and "be entitled to monetary compensation, and repair or replacement" of their decks. (AA 4.)

Gore contends this factual representation cannot invoke the "content and purpose" exemption because the statement purportedly is different from certain examples of commercial speech mentioned in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939 (*Kasky*). (ABOM 37-38; see OBOM 35-36.) *Kasky* commented that "references to services" in commercial speech "would include not only statements about the price, availability, and quality of the services themselves, but also, for example, statements about the education, experience, and qualifications of the persons providing or endorsing the services." (*Kasky, supra,* at p. 961.) Gore relies on one of the weaker maxims of construction, *ejusdem generis*, which favors a narrow construction of a general expression if it is followed by particular examples, restricting the general expression to things that are similar to the particular examples. (ABOM 35; see, e.g., *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.) *Ejusdem generis* does not help Gore, however, for several reasons. First, *Kasky's* use

of the word "includes" when listing examples of "references to services" (*Kasky, supra,* at p. 961) indicates the list was not intended to be restrictive. "[T]he term 'including' preceding a list of examples is not always used as a term of limitation." (*Ortega Rock Quarry v. Golden Eagle Ins. Corp.* (2006) 141 Cal.App.4th 969, 981.) Rather, that term is "ordinarily a term of enlargement rather than limitation." (*Id.* at p. 982, internal quotation marks omitted.) Second, *ejusdem generis* does not apply where context demonstrates a contrary intention. (*Id.* at p. 985.) The context of *Kasky*, describing a broad variety of types of references to services, indicates that the list was not intended to be restrictive. Finally, Gore's inferred assertion to potential customers – that he has investigated Simpson and has discovered that it is selling defective screws – is similar to the examples in *Kasky*, in that all are intended to generate business.

Gore (like the Court of Appeal) insists that the three elements of the "content and purpose" exemption must "coincide in a single statement" (ABOM 5, 36; see typed opn. p. 13), so that the "statement" about Gore's business operations or services must have been the same "statement" as that giving rise to this lawsuit (ABOM 34). The plain language of section 425.17, however, says nothing of the sort. (See OBOM 33.) Such a requirement could lead to absurd results, for it would enable a tortfeasor to evade the commercial speech exemptions simply by dividing a defamatory statement into two sentences – e.g., by using a period instead of a comma – in order to distribute the elements of the "content and purpose" exemption among two so-called "statements" instead of a single "statement." It makes no sense to enable Gore, for example, to acquire anti-SLAPP protection merely by allocating his defamatory inference and his identity as a lawyer (which is crucial to the inference) among separate sentences. That would also be inconsistent with Justice Traynor's admonition that the law of defamation looks to "the sense

and meaning under *all the circumstances* attending the publication." (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546-547, italics added.)

But even if section 425.17 prescribes such a requirement, it is satisfied here. The inference that Simpson's screws are defective is part of the inference that lawyer Gore discovered the purported defect by investigating Simpson – which is a statement about Gore's business operations or services.

C. The "course of delivery" exemption applies here because Gore was delivering his services to a class of potential litigants by attempting to assemble the class and recruit class representatives.

On the second of the two commercial speech exemptions – what we call the "course of delivery" exemption – Gore's principle argument is that, absent having any client for the lawsuit he hoped to create when he ran his advertisement, the advertisement cannot have been "made in the course of delivering . . . services" (§ 425.17, subd. (c)(1)) because, as Gore puts it, his services "were not being delivered to anyone." (ABOM 42.)

The key to resolving this point is Gore's self-described status as a "class action lawyer." (AA 124.) It is indeed true that Gore lacked a client when he ran the advertisement. To this day, he still has no client, and no doubt he never will. Indeed, nobody has filed the lawsuit against Simpson that Gore had hoped to create. But that does not mean Gore was not delivering services to anyone when he ran the advertisement. To the contrary, he was delivering services to an unassembled and unrepresented *class of potential litigants* by attempting to assemble the class and recruit class representatives. (See *Kincade v. General Tire & Rubber Co.* (5th Cir. 1981) 635 F.2d 501, 508

["the 'client' in a class action consists of numerous unnamed class members as well as the class representatives"]; see also *7-Eleven Owners For Fair Franchising v. The Southland Corporation* (2000) 85 Cal.App.4th 1135, 1159 [class action counsel's "duty runs to the class as a whole"].) Among the services Gore provides as a class action lawyer are assembling the class and recruiting class representatives. As Gore put it in the Court of Appeal, his advertisement was something that "plaintiffs' class action lawyers routinely use" to perform those services. (Respondent's Brief 53.) He is now judicially estopped to claim otherwise. (See OBOM 44.) That provision of services is what invokes the "course of delivery" exemption here.

This proposition is not merely theory, but is rooted in the plain language of section 425.17. An element of the "course of delivery" exemption (indeed, of both commercial speech exemptions) is that "[t]he intended audience is an actual or *potential* buyer or customer." (§ 415.17, subd. (c)(2), italics added.) This statutory construct necessarily puts members of a class of potential litigants squarely within the ambit of the "course of delivery" exemption. Otherwise, the word "potential" in subdivision (c)(2) of section 425.17 would be meaningless for purposes of the "course of delivery" exemption – consigned to the status of surplusage, a construction that is to be avoided. (See, e.g., *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330 ["whenever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage"].)

Gore attempts to distinguish the cases interpreting various other statutory usages of the phrase "in the course of" as authority for Simpson's interpretation of the "course of delivery" exemption (see OBOM 38-41), arguing that those cases should be read restrictively to their facts or to the particular statute at issue. (See ABOM 45-46.) These are classic distinctions

without a difference. The Legislature is presumed to know how terms of art like "in the course of" have been judicially interpreted. (See, e.g., *In re Marriage of Demblewski* (1994) 26 Cal.App.4th 232, 236 [phrase "statement of decision" is "a precise term of art," the usage of which the Legislature is presumed to understand]; *Allis-Chalmers Corp. v. City of Oxnard* (1981) 126 Cal.App.3d 814, 819 ["The Legislature is presumed to have knowledge of existing judicial decisions and to have enacted statutes in the light thereof."].) The Legislature presumably knew the historical significance of that phrase when choosing to include it in section 425.17.

Gore makes virtually no attempt to defend the Court of Appeal's holding that, for the "course of delivery" exemption to apply, the statement in question must have occurred "while" the defendant is delivering goods or services. (Typed opn. p. 14; see ABOM 46-47.) This court's opinion in *Club Members, supra,* 45 Cal.4th 309, provides an analogy demonstrating why that holding is wrong. One of this court's stated reasons in *Club Members* for narrowly construing section 425.17's exemption for public interest lawsuits (see *ante*, p. 14) is that subdivision (b) of section 425.17 excludes from the scope of the anti-SLAPP statute "any *action* brought solely in the public interest or on behalf of the general public" if certain conditions exist. (§ 425.17, subd. (b), italics added.) In contrast, the commercial speech exemptions prescribed in subdivision (c) apply to "any *cause of action*" if certain conditions exist. (§ 425.17, subd. (c), italics added.) *Club Members* observed that the Legislature's use of the word "action" in subdivision (b) results in a more restrictive application of the public interest lawsuit exemption than the more expansive application of the commercial speech exemptions resulting from the use of the phrase "cause of action" in subdivision (c), in that "the public interest exception only applies if the *entire action* is brought solely in the public interest." (*Club Members, supra,* 45 Cal.4th at p. 320.) "The

Legislature clearly distinguished between an 'action' and a 'cause of action' in drafting subdivisions (b) and (c) of section 425.17 and treated them differently." (*Ibid.*)

This is an instance where the general proposition that section 425.17 is to be narrowly construed (see *ante*, p. 14) is supplanted by the statute's plain language, where the phrase "cause of action" in subdivision (c) gives the commercial speech exemptions broader application than the narrow application the word "action" in subdivision (b) gives the public interest lawsuit exemption. Similarly, by using the phrase "in the course of," the Legislature intended to give the "course of delivery" commercial speech exemption a broader application than the Court of Appeal gave the exemption.

D. The nature of Gore's advertisement as an effort to drum up business places it within the scope of the commercial speech exemptions.

Finally, Gore enunciates – but expressly declines to address – a question he says can be inferred from the second issue that is before this court: whether lawyers who are named as defendants in civil litigation are, "due to the nature of the services they provide," outside the scope of section 425.17's commercial speech exemptions. (ABOM 55, fn. 25.) Gore is slightly off the mark here. It is not the nature of the services Gore provides, but the nature of the vehicle he used to solicit potential clients for those services – commercial advertising – that invokes section 425.17's exemptions. Such commercial speech by lawyers trolling for clients is not meant to contribute to the marketplace of ideas. That is why the Legislature has chosen to exempt such speech from anti-SLAPP protection. Gore was not speaking his mind here; he simply was attempting to drum up business by producing a client to create a lawsuit.

Lawyers who use commercial advertising to solicit business are hardly prototypical SLAPP victims. Further, they have at their disposal various devices to protect themselves from abusive litigation – such as professional incorporation, limited liability partnership, and insurance for liability and defense costs through comprehensive general liability and malpractice coverage.[4/] Thus, lawyers have even less need for their advertising to be cloaked in anti-SLAPP protection than do most commercial speakers. (See OBOM pp. 30-31.) That is why the answer to the second issue presented for review – whether section 425.17 exempts from anti-SLAPP protection an advertisement by a lawyer soliciting clients for a contemplated lawsuit – should be *no*.

CONCLUSION

Gore contends this court should not interpret section 425.17's commercial speech exemptions in a way that deprives all advertisements of anti-SLAPP protection. (ABOM 54.) Simpson agrees. But that is not what Simpson is requesting. Simpson asks only that the court interpret section 425.17 according to its plain meaning. Not all advertisements will fall within the plain meaning of the "content and purpose" exemption, but only those that, like Gore's, contain express or implied "representations of fact about that person's or a business competitor's business operations, goods, or services." (§ 425.17, subd. (c)(1).) Not all advertisements will fall within the plain

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4/ Gore states in carefully-chosen words (which lack support in the record) that he is not insured "for this claim" (ABOM 51, fn. 23), but he does not address his *costs of defending* against this claim – thus suggesting the possibility that his insurer is denying coverage of the claim but is paying his defense costs under a reservation of rights. And even if Gore is uninsured, that does not make him a special case for anti-SLAPP protection as a substitute for the various protective devices that are available to lawyers.

meaning of the "course of delivery" exemption, but only those that, like Gore's, are published "in the course of delivering the person's goods or services" to potential customers. (*Ibid.*) Strict adherence to the language of section 425.17 will serve the Legislature's purpose of curbing abuse of the anti-SLAPP statute by commercial speakers while retaining the efficacy of the anti-SLAPP statute to protect the sort of speech it is intended to protect. Even narrowly construed, section 425.17 applies to Gore's newspaper advertisement, which thus lacks anti-SLAPP protection. The trial court and the Court of Appeal erred in holding otherwise.

And what of the hypothetical Dr. John Jones, of whom we spoke in our opening brief on the merits? (See OBOM 45.) Gore's answer brief fails to address the critical point that the Court of Appeal's approach in this case would give lawyers carte blanche to defame Dr. Jones with impunity – under the cloak of anti-SLAPP protection – as they emulate Gore and go advertising in search of a lawsuit.

Not just large corporations, but also the storefront business owner, the small family-owned corporation, the health care provider, the architect, the builder . . . *all* are at risk of this kind of tortious commercial speech if it is cloaked in an all-encompassing blanket of anti-SLAPP protection. If this court affords such protection to Gore's advertisement, it will become a template for defamation with impunity by lawyers using commercial speech to troll for business. That is something the Legislature never intended in enacting section 425.16, and is the sort of thing the Legislature intended to quell in enacting section 425.17.

For the foregoing reasons, and for those set forth in the opening brief on the merits, this court should reverse the Court of Appeal's judgment and direct the Court of Appeal to reverse the superior court's judgment and deny Gore's anti-SLAPP motion.

Dated: January 26, 2009

Respectfully submitted,

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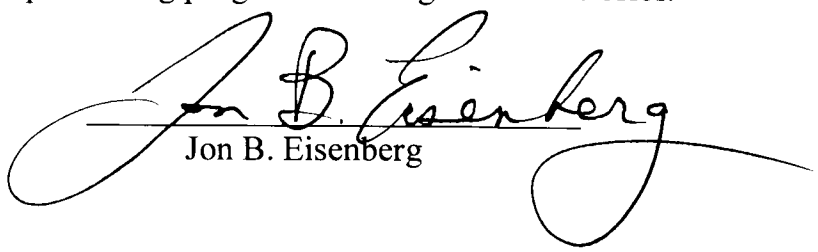
CERTIFICATE OF WORD COUNT

The text of this brief consists of 7,636 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: January 26, 2009



Jon B. Eisenberg

PROOF OF SERVICE
[C.C.P. § 1013a]

Re: Simpson Strong-Tie Company v. Gore
S164174

I, Jessica Dean, declare as follows: I am employed in the County of San Francisco, State of California and am over the age of eighteen years. I am not a party to the within action. My business address is 180 Montgomery Street, Suite 2200, San Francisco, California, 94104. I am readily familiar with the practice of Eisenberg and Hancock, LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On *January 26, 2009*, I served the within document entitled:

- **REPLY BRIEF ON THE MERITS**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 26, 2009, at San Francisco, California.

Jessica Dean