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Honorable Ronald M. George, Chief Justice
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Simpson Strong-Tie Company, Inc. v. Gore*, No. S164174

Dear Chief Justice George and Associate Justices:

This letter brief by Simpson Strong-Tie Company, Inc., replies to the supplemental brief filed by Pierce Gore on March 11, 2010 (hereafter "Gore Suppl. Brief"). In this letter brief, we refute Gore's argument that Code of Civil Procedure section 425.17's "course of delivery" exemption includes a shorthand incorporation of the "consists of representations of fact about" element of the statute's "content and purpose" exemption, and we reiterate that the "course of delivery" exemption includes a commercial content component.

1. Gore's "short-hand" argument makes no sense and would make surplusage of the word "any" in subdivision (c)'s first paragraph.

Gore's supplemental brief posits an implausible reading of the "course of delivery" exemption prescribed by subdivision (c)(1) of section 425.17. According to Gore, the appearance of the phrase "the statement or conduct" at the outset of the "course of delivery" exemption is meant to be, as Gore puts it, "short-hand (so to speak)" (Gore Suppl. Brief p. 4) for the entire clause "[t]he statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services," which appears at the outset of subdivision (c)(1)'s "content and purpose" exemption. This shorthand, says Gore, "incorporates the identical content requirement" (Gore Suppl. Brief p. 4) of the "content and purpose" exemption into the "course of delivery" exemption.

The reading Gore posits is too implausible to accept. If the Legislature had meant to incorporate the "consists of representations of fact about" element of the "content and purpose" exemption into the "course of delivery" exemption, it would have been easy for the Legislature to have done so, simply by *entirely omitting* the phrase "the statement or conduct" where it appears for the second time at the outset of the "course of delivery" exemption. There would have been no need to use shorthand to achieve a desired purpose when that purpose could have been achieved by using *no words at all*. And if the Legislature *had* meant to incorporate previous language by the use of shorthand, the appropriate shorthand phrase would have been "*such* statement or conduct," not "*the* statement or conduct." Gore is right when he says the Legislature's "careful delineation "of the two

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commercial speech exemptions describes "two different contexts." (Gore Suppl. Brief p. 2.) The two exemptions are substantively independent of each other. The Legislature's drafting of section 425.17 in this manner was not careless; it was deliberate.

Moreover, if the phrase "the statement or conduct" were treated as a shorthand incorporation of the "consists of representations of fact about" element into the "course of delivery" exemption, another *surplusage* problem would be created. The first paragraph of subdivision (c) states that the anti-SLAPP statute (Code Civ. Proc., § 425.16) does not apply to certain causes of action "arising from *any* statement or conduct" by a person if certain conditions exist. (Code Civ. Proc., § 425.17, subd. (c), italics added.) Subdivision (c)(1)'s "content and purpose" exemption restricts the phrase "any statement or conduct" in subdivision (c)'s first paragraph to a "statement or conduct [that] consists of representations of fact about that person's or a business competitor's business operations, goods, or services." (Code Civ. Proc., subd. (c)(1).) If subdivision (c)(1)'s "course of delivery" exemption is properly construed as *not including* that same restriction, then the word "any" in subdivision (c)'s first paragraph has meaning: The "content and purpose" exemption applies only to "representations of fact about that person's or a business competitor's business operations, goods, or services," and the "course of delivery" exemption applies to *any* statement or conduct that "was made in the course of delivering the person's goods or services." (Code Civ. Proc., § 425.17, subd. (c)(1).) But if subdivision (c)(1)'s "course of delivery" exemption were construed as *including* the "consists of representations of fact about" element, then the word "any" in subdivision (c)'s first paragraph would become surplusage, because neither exemption would *ever* apply without qualification to "any" statement or conduct, given the restriction of both of them to "representations of fact about that person's or a business competitor's business operations, goods, or services."

Had the latter construction been intended, there would have been no need for the word "any" in subdivision (c)'s first paragraph, and the phrase used there could have been simply "*a* statement or conduct" instead of "*any* statement or conduct." (Or, more efficiently, the statute's drafters could have placed the "consists of representations of fact about" element into subdivision (c)'s first paragraph – doing so once – rather than stating it twice in subdivision (c)(1), first in its entirety and then in a so-called shorthand form.) Thus, Gore's "short-hand" theory also fails by making surplusage of the word "any" in subdivision (c)'s first paragraph.

Gore posits a surplusage argument of his own – that if the "course of delivery" exemption does not include the "consists of representations of fact about" element, then that

entire element within subdivision (c)(1) becomes surplusage because, as Gore puts it, "[i]f advertisements are part of" the "course of delivery" exemption, "then no reason would ever exist for a plaintiff to invoke" the "content and purpose" exemption. (Gore Suppl. Brief p. 9.) The flaw in this argument is in the premise that advertisements must *always* be *a part of* the delivery of goods or services. Advertisements normally (but do not always) *precede* such delivery, as an attempt to secure a hoped-for sale that may or may not occur. Where advertisements are not a part of the delivery, they cannot be within the scope of the "course of delivery" exemption, and thus only the "content and purpose" exemption can apply – which means its elements will not be surplusage. Here, in contrast, Gore has consistently asserted in the trial court (see Appellant's Appendix p. 124), in the Court of Appeal (see Respondent's Brief p. 53), and in this court (see Answer Brief on the Merits p. 12) that his advertisement was *a necessary part of* (i.e., incidental to) his delivery of his services as a plaintiff's class action lawyer, whereby he uses advertisements to assemble a group of litigants. (See Opening Brief on the Merits pp. 41-42 (hereafter "OBOM").) That means both exemptions can apply *here*, under the circumstances of this case. It does not mean advertising must *always* be a part of the delivery of goods or services. In other situations, where advertisements are not a part of the delivery, restricting the "consists of representations of fact about" element to the "content and purpose" exemption does not make surplusage of that exemption.

Gore argues that a lawyer's delivery of services should not be within the "course of delivery" exemption because, as a result, "lawyers would lose the protection of the anti-SLAPP statute for virtually all of their statements and conduct in connection with litigation." (Gore Suppl. Brief pp. 7-8.) But the statutory litigation privilege (Civ. Code., § 47, subd. (b)) already provides ample protection for such statements and conduct. That protection is *greater* than anti-SLAPP protection, which merely shifts the burden to the plaintiff to show a probability of prevailing on the merits, and which surely was not intended to eclipse the litigation privilege. The protection afforded by the litigation privilege is absolute. Lawyers need not fear the unavailability of some lesser protection.

Ultimately, Gore's "short-hand" argument is, in effect, that the phrase "the statement or conduct" as it appears twice in subdivision (c)(1) is, in both instances, a *defined term* – the definition being "representations of fact about that person's or a business competitor's business operations, goods, or services." But nowhere does section 425.17 treat the phrase "the statement or conduct" as a defined term with a special legal or technical meaning. The statute provides no definitions at all, for that phrase or any other. Absent any special definition, the phrase "the statement or conduct" means nothing more than the plain meaning

of its component words "statement" and "conduct." (See, e.g., *Hammond v. Agran* (1999) 76 Cal.App.4th 1181, 1189.) The plain meaning of those words does not contemplate the "consists of representations of fact about" element. The statute uses that element to narrow the scope of the "content and purpose" exemption, but not to narrow the scope of the "course of delivery" exemption.

With regard to the drafting of federal legislation, it has been said that Congress does not "hide elephants in mouseholes." (*Whitman v. American Trucking Associations* (2001) 531 U.S. 457, 468.) Surely the same can be said of the California Legislature. Gore's "short-hand" argument is a search for an elephant in a mousehole. The mousehole is the phrase "the statement or conduct" where it appears for the second time in subdivision (c)(1), at the outset of the "course of delivery" exemption. The elephant is the language "consists of representations of fact about that person's or a business competitor's business operations, goods, or services," which appears only at the outset of the "content and purpose" exemption. The Legislature could have, but chose not to, incorporate that language into the second iteration of "the statement or conduct." There is no elephant in that mousehole.

2. Subdivision (c)(1)'s "course of delivery" exemption necessarily includes a commercial content component.

Gore's supplemental brief contends that Simpson proposes to deprive the "course of delivery" exemption of any commercial content component. (See Gore Suppl. Brief pp. 4, 9, 15.) That is not true, as is demonstrated in Simpson's letter brief filed March 10, 2010, at pages 5-6, where Simpson observes that a statement or conduct made "in the course of" delivering goods or services is a part of a commercial transaction and thus is necessarily commercial in character.

The key point here is set forth in Simpson's Opening Brief on the Merits, at pages 37-44, where Simpson addresses the holding in *Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, that "statements . . . made and conduct engaged in *as part of* . . . the type of business transaction engaged in by defendants" triggered the "course of delivery" exemption." (*Id.* at p. 341, italics added.) The Opening Brief on the Merits points out numerous analogous cases that have treated the phrase "in the course of" as meaning "as part of." (See OBOM pp. 38-41.) Within the context of subdivision (c)(1)'s "course of delivery" exemption, being "a part of" the delivery of goods or services means being "a part of" activity that is necessarily and unambiguously *commercial in character* – which, according to *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939 (*Kasky*), is the essence of commercial content.

(See *id.* at p. 961 ["the factual content of the message should be commercial in character"].) Thus, the "course of delivery" exemption necessarily includes a commercial content component, without any need for the "consists of representations of fact about" element, because statements and conduct "in the course of" delivering goods and services must be a part of a commercial transaction.

This key point – that the "course of delivery" exemption necessarily includes a commercial content component – should allay Gore's fears that the "course of delivery" exemption might apply where "a person delivering a refrigerator to a home decided to talk local politics with the resident," or where "a hot dog vendor disclosed the public exploits of a well-known actor that she personally observed to a local reporter," or where "a landscaper handed out a flier to a customer urging a vote against a planned development due to environmental concerns." (Gore Suppl. Brief pp. 6-7.) In each of these hypotheticals, the statements and conduct are *not a part of* the delivery of goods or services. Talking local politics is not "a part of" the refrigerator's delivery; disclosing the actor's exploits is not "a part of" the hot dog's sale; handing out fliers is not "a part of" the landscaping work. The very notion of "course of delivery" – which means "a part of" the delivery – prevents the "course of delivery" exemption from reaching statements and conduct that are not commercial in character.

The Legislature chose to structure subdivision (c)'s first paragraph generally to apply to "any statement or conduct," and then added conditions in subdivisions (c)(1) and (c)(2) to ensure that subdivision (c)'s exemptions are applied only to speech that is commercial in character. Subdivision (c)(1)'s "content and purpose" exemption does this by focusing on the substance of the speech, while subdivision (c)(1)'s "course of delivery" exemption does this by requiring that the statement be a part of a commercial transaction. Subdivision (c)(2) further ensures the exemptions' application to speech that is commercial in character by requiring, in pertinent part, that "[t]he intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer . . . ." (Code Civ. Proc., § 425.17, subd. (c)(2).) In this manner, subdivision (c)'s structure restricts the "course of delivery" exemption to speech that is commercial in character, wholly independent of the "consists of representations of fact about" element of the "content and purpose" exemption.

3. Gore relies on authorities and rules that do not support his argument.

Gore's supplemental brief includes several references to authorities and rules that do not support his arguments.

First, Gore contends the court in *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664 (*Stewart*) rejected the plaintiffs' theory that statements in a magazine were within the "course of delivery" exemption, for want of "'representations of fact about the business operations, goods or services' of Rolling Stone or one of its competitors." (Gore Suppl. Brief pp. 9-10.) But *Stewart* said nothing of the sort. Nowhere does the opinion state that the plaintiffs asserted the "course of delivery" exemption or that the court rejected such an assertion for want of the "consists of representations of fact about" element. The opinion neither addresses nor decides the point. (See generally *Stewart, supra,* at pp. 675-677.) "[C]ases are not dispositive authority for points not directly considered." (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57, fn. 8.) The court in *Stewart* might have concluded that the statements in that case were not made in the "course of delivery" at all, because they were made in the product itself (the magazine), not as a part of the delivery of that product.

Interestingly, *Stewart* cited *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 490 (see *Stewart, supra,* 181 Cal.App.4th at p. 676), which supports Simpson's position here. The court in *Taheri* said the conditions for exemption appeared to be met in that case because "Evans's alleged conduct 'consists of representations of fact about . . . a business competitor's [Taheri's] . . . services, made for the purpose of obtaining . . . sales . . . of . . . [Evans's] . . . services' – or, *alternatively*, the statement or conduct was 'made in the course of delivering [Evans's] services.'" (*Taheri Law Group v. Evans, supra,* 160 Cal.App.4th at p. 490, original ellipses and brackets, italics added, quoting Code Civ. Proc., § 425.17, subd. (c)(1).) The *Taheri* court's use of the word "alternatively" indicates that the court understood the "course of delivery" exemption *not* to include the "consists of representations of fact about" element.

Second, Gore states the Legislature adopted the "course of delivery" exemption "to address cases such as those involving the Northridge earthquake," citing two pages from section 425.17's voluminous legislative history. (Gore Suppl. Brief p. 12.) The cited pages, however, say nothing at all about why the Legislature adopted the "course of delivery" exemption. Gore further states that, in adopting the "course of delivery" exemption, "[t]he Legislature wanted to ensure that a business's lies about its goods or services, or those of a

competitor, were not outside of the Section 425.17(c) exemption simply because they arguably occurred while the business serviced current clients." (Gore Suppl. Brief p. 12.) For the latter statement, Gore provides no supporting citation at all. That is because nothing in section 425.17's legislative history says *anything* about why the Legislature adopted the "course of delivery" exemption. Here, Gore is searching for an elephant where there is not even a mousehole.

Third, Gore cites a legislative committee report's description of the commercial speech exemptions, as what Gore calls "perhaps the best evidence of the Legislature's intent that the 'course of delivery' exemption also have a 'representations of fact' content requirement." (Gore Suppl. Brief pp. 13-14.) If this description is the "best evidence" of the Legislature's intent, one must wonder why it appears only at the end of Gore's 16-page supplemental brief. In fact, this description is ambiguous. It explains 425.17's commercial speech exemptions, in pertinent part, as follows:

> Prohibits the anti-SLAPP motion from being used . . . against businesses sued for statements or conduct consisting of representations of fact about their goods, services or business operations, or those of a competitor, when those statements or conduct were for the purpose of obtaining approval for, promoting, or securing sales or leases of the person's goods or services, *or* in the course of delivering the person's goods or services . . . .

(Assem. Com. on Judiciary, Rep. on Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended June 27, 2003, p. 2, italics added; see Gore's Motion For Judicial Notice filed in the Court of Appeal, exhibit A, p. MJN0102.) The seventh "or" in this largely unintelligible description, italicized in the quotation above, creates an ambiguity: It is unclear whether that "or" makes the phrase "in the course of delivering the person's goods or services" an alternative to the phrase "consisting of representations of fact about their goods, services or business operations, or those of a competitor" (which is Simpson's reading of the statute), or an alternative to the phrase "for the purpose of obtaining approval for, promoting, or securing sales or leases of the person's goods or services" (which is Gore's reading of the statute). In our view, it is more likely that the author of this committee report intended the former meaning – that is, to say simply that with regard to the "course of delivery" exemption the statute "[p]rohibits the anti-SLAPP motion from being used . . . against businesses sued for statements or conduct . . . in the course of delivering the person's goods or services." Given the ambiguity, however, this language in the committee report (which the Legislature did not even use in the statute) is useless as an indicator of legislative intent.

Finally, Gore cites legislative history for his proposition that the Legislature intended to "exempt from the anti-SLAPP statute's protection *only* commercial speech as defined by *Kasky*." (Gore Suppl. Brief p. 14, italics added.) The legislative history does not support that proposition, but merely states that section 425.17 "closely tracks" the guidelines set forth in *Kasky*. (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 515, *supra*, p. 7.) *Kasky* used those guidelines to exemplify "typical" kinds commercial speech, not the *only* kinds of commercial speech. (See *Kasky, supra,* 27 Cal.4th at p. 961.) In addition to "closely tracking" the *Kasky* description of typical kinds of commercial speech, the Legislature *added* two more to those guidelines when crafting subdivision (c)(1): speech about "a business competitor's business operations, goods, or services" (within the "content and purpose" exemption), and speech "made in the course of delivering the person's goods or services." (Code Civ. Proc., § 425.17, subd. (c)(1).) Plainly the Legislature meant to expand subdivision (c)(1)'s reach beyond the examples of commercial speech set forth in *Kasky*.

4. A new Court of Appeal decision is pertinent to the first issue presented for review – which party bears the burden of persuasion regarding the commercial speech exemptions.

We also wish to apprise this court of a new Court of Appeal decision which is pertinent to the first issue presented for review – which party bears the burden of persuasion with respect to the applicability of subdivision (c)'s commercial speech exemptions. In *D.C. v. R.R.* (March 15, 2010) ___ Cal.App.4th ___, ___ [2010 WL 892204 at *14-15], the Court of Appeal for the Second Appellate District observed that the burden of showing that a complaint is based on protected activity has been variously described as "prima facie" or "threshold." As so described, Gore's burden of showing the nonexistence of facts that invoke the commercial speech exemptions (see OBOM pp. 20-23) is modest. For example, with regard to the "course of delivery" exemption, Gore need only have shown that he did not publish his advertisement as a part of his delivery of his services as a plaintiffs' class action lawyer. Of course, Gore's assertions that he uses such advertisements to assemble groups of class action litigants (see *ante*, p. 3) show precisely the opposite – that he *did* publish the advertisement as a part of his delivery of such services.

Respectfully submitted,

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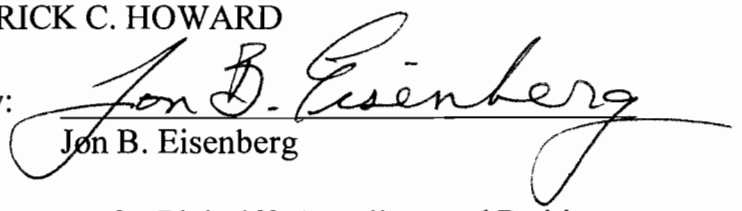
By: 
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cc: See attached proof of service

PROOF OF SERVICE
[C.C.P. § 1013a]

RE: **Simpson Strong-Tie Company v. Gore**
Case No. S164174

I, Jessica Dean, declare as follows: I am a citizen of the United States and employed in the County of San Francisco, State of California. I am over eighteen (18) years of age and not a party to the above-entitled action. My business address is 180 Montgomery Street, Suite 2200, San Francisco, CA, 94104. On the date set forth below, I served the following documents in the manner indicated on the below named parties and/or counsel of record:

- **LETTER TO HONORABLE RONALD M. GEORGE, CHIEF JUSTICE**

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I am readily familiar with Eisenberg and Hancock, LLP's practice for the collection and processing of correspondence for mailing with the United States Postal Service, and said correspondence would be deposited with the United States Postal Service at San Francisco, California that same day in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 18, 2009 at San Francisco, California.

JESSICA DEAN