No. S164174

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

**SIMPSON STRONG-TIE CO., INC.,**

Plaintiff, Appellant and Petitioner,

vs.

**PIERCE GORE and THE GORE LAW FIRM,**

Defendants and Respondents.

6th Civ. No. **H030444**

Santa Clara County Superior Court
No. **CV057666**



**Review after Decision of the Court of Appeal,
Sixth Appellate District
(Justice Conrad L. Rushing, Presiding Justice)**

# ANSWER TO PETITION FOR REVIEW

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LAW FIRM

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# ANSWER TO PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Defendants and Respondents Pierce Gore and the Gore Law Firm (collectively "Gore") respectfully submit this Answer to the Petition for Review filed by Simpson Strong-Tie Co., Inc. ("Simpson"). For the reasons set forth below, Gore respectfully requests that the Court deny Simpson's Petition for Review, and leave intact the well-reasoned decision issued in this matter by the California Court of Appeal, Sixth Appellate District (the "Court of Appeal").



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## 1. INTRODUCTION

This Petition is what should be the final act in this classic strategic lawsuit against public participation ("SLAPP") brought by the world's largest manufacturer of construction fasteners against a solo practitioner. The only conceivable purpose of Simpson Strong-Tie Co.'s lawsuit against attorney Pierce Gore, a seasoned plaintiff's class action attorney, was to discourage Gore from pursuing a lawsuit he was contemplating against Simpson and other manufacturers. After a year of investigation into a potential class action lawsuit, Gore was making plans to bring a lawsuit against Simpson and other major fastener manufacturers, based on problems created by corrosion that occurs when fasteners are installed in treated lumber used in outdoor decks.

After Gore ran a notice in the *San Jose Mercury News* seeking qualified class action plaintiffs for the contemplated lawsuit (the "Notice"), Simpson launched its aggressive pursuit of Gore as well as his now deceased brother's Tennessee law firm. Appellant's Appendix ("App.") 0869-0870. Simpson promptly demanded that Gore stop further publication of his Notice, App. 0297-0301, and began to create "evidence" to purportedly show that Gore's Notice had defamed the company. Barely a month after the Notice first ran in the *Mercury News*, Simpson had selected and retained a professional surveyor who had already developed an opinion survey and commenced its survey interviews. App. 0124; 0376. Simpson filed this lawsuit barely six weeks after the Notice first was published, less than two weeks after the



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surveyor commenced its survey interviews, and only two days after the survey interviews were completed. App. 0001, 0376.

Tellingly, Simpson never has offered any proof of actual harm from Gore's Notice. It relies instead on a survey of people who had not seen the Notice – because they were not in the *Mercury News*'s distribution area – and therefore who did not and could not represent customers dissuaded from buying Simpson's products due to the Notice. As demonstrated by Simpson's over-the-top response to Gore's benign Notice, the absence of evidence of actual damage to Simpson from the Notice, and the fundamental and insurmountable flaws in Simpson's claims, there can be no question that this lawsuit was initiated to stop Gore from pursuing the class action lawsuit he was developing – and to punish him for even *considering* suing Simpson. As the Court of Appeal recognized:

> Here, a seemingly large commercial enterprise has attempted to use the new exemptions to perpetuate a lawsuit that may fairly be described as a paradigmatic SLAPP in that it plainly arises from conduct protected by the anti-SLAPP statute and, as will appear momentarily, lacks substantial merit. To permit this effort to succeed would be a perversion of legislative purpose at least as striking as the one that motivated the Legislature to enact the exemptions Simpson invokes.

Court of Appeal Opinion ( "Opinion" or "Op.") at 20.

Now that the Court of Appeal has soundly rejected Simpson's claims, Simpson asks this Court to bless its aggressive litigation tactics, and perpetuate its punishment of Gore, by accepting review of this case. But Simpson's claims of conflicts between this case and others are misleading. For example, the Court of



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Appeal's allocation of burdens under Code of Civil Procedure Section 425.17[1] – imposing on Simpson the burden of establishing that an exemption from application of the SLAPP statute applies here – is completely consistent with this Court's decision in *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal. 4th 260. There, the Court held that the burden of establishing the applicability of an exemption from the SLAPP statute – in that case, the exemption provided by Section 425.18(h) – lies with the party who invokes the exemption. Simpson's heavy reliance on *Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal. App. 4th 324 – decided a year before *Soukup* – therefore is wholly misplaced. Section 2.A.1, *infra*.

So too, the Court of Appeal's stated disagreement with *Brill Media*'s interpretation of Section 425.17(c)(1) also does not warrant review. In *Brill Media*, the services at issue there actually were being delivered to a client – a factual situation vastly different from this case. Although *Brill Media* may have chosen inartful language in explaining its decision, that language is dicta, unnecessary to the decision, and does not give rise to a true conflict. Even if the decisions did directly conflict, it is *Brill Media* that was wrongly decided – not this case – and Simpson's SLAPP against Gore should not be perpetuated simply to have this Court correct *Brill Media*. Section 2.A.2, *infra*.

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[1] All further references are to the Code of Civil Procedure unless otherwise indicated.



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Nor does Simpson provide any other legitimate reason for this Court to accept review of this case. Ultimately, Simpson's arguments rest on its claim that the Court should broadly construe Section 425.17, and exempt a wide range of speech from the protections of the SLAPP statute. Such a result is contrary to the plain language of the exemption and the Legislature's express intent that the SLAPP statute remain as a vital statutory bulwark "to encourage continued participation in matters of public significance." C.C.P. § 425.17(a). Exceptions from the protection provided by the SLAPP statute must be *narrowly* construed so that the SLAPP statute itself can continue to be broadly construed, as the Legislature directed in Section 425.16(a). Indeed, this case would *conflict* with the Court's decision in *Soukup* – which held that the analogous Section 425.18(h) exemption must be narrowly construed – if Simpson's broad construction of Section 425.17(c) was adopted. Section 2.B, *infra*.

Nor does the Court of Appeal's rejection of Simpson's survey evidence justify review by this Court. Simpson does not tell the Court that the survey evidence was rejected primarily because it is the constitutional role of the courts – not strangers in parking lots – to determine whether a statement is capable of a defamatory meaning. The Court of Appeal here correctly concluded that Gore's Notice did not defame Simpson as a matter of law. It went on to reject the survey evidence, not for technical flaws, but rather because it could determine this legal question and the evidence did not support the proposition for which it was offered, *i.e.*, that Gore's Notice implied that Simpson's screws are defective. Indeed, instead of directly asking this question – "Does this notice lead you to believe that the screws are



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defective?" – the surveyor asked a convoluted question (along with five other irrelevant questions) that simply did not support this key point. The survey evidence is not relevant and it properly was excluded. Section 2.C, *infra*.

Finally, Simpson ignores part of the Court of Appeal's Opinion in arguing that some conflict exists between the Opinion and the law governing fraud. The Court of Appeal held that *as a general matter* a prediction of future events cannot give rise to liability, and it then explored and rejected one exception to that general rule, when a statement implies knowledge of false facts. This is completely consistent with California law, and certainly not a basis for review. Section 2.D, *infra*.

## 2. THIS COURT SHOULD NOT ACCEPT REVIEW, AND PERPETUATE THIS CLASSIC SLAPP, SIMPLY TO AFFIRM THE COURT OF APPEAL'S DECISION.

### A. No Conflict Worthy of Review Exists Between This Decision and *Brill Media.*

Simpson has largely abandoned its arguments made below as to the interpretation of Section 425.17(c). In its briefs to the Court of Appeal, Simpson offered a detailed – albeit, flawed – analysis of Section 425.17(c), arguing that Gore's Notice is exempt from the protections of the SLAPP statute on numerous grounds. Abandoning that analysis, Simpson now invokes this Court's review primarily because the Court of Appeal in this case twice stated its disagreement with the Second District Court of Appeal's opinion in *Brill Media*. As discussed below, however, neither of these disagreements merits review.



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### 1. This Court Already Has Concluded that the Party Invoking an Exemption from the SLAPP Statute Bears the Burden.

Simpson urges this Court to accept review and determine which party bears the burden of establishing that an exemption from the SLAPP statute applies. Pet. at 15-18. This Court resolved that issue two years ago, in *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal. 4th 260. Section 425.18(h), analyzed in *Soukup*, provides an exemption from the SLAPP statute, much like Section 425.17(c), at issue here, and therefore the holding and reasoning of *Soukup* should fully apply here.[2]

In *Soukup*, the Court held that "[t]he burden of establishing that the underlying action was illegal as a matter of law [and therefore exempt from the SLAPP statute] should be shouldered by the plaintiff in such cases." *Id.* at 286. The Court explained that "[t]his is because the Legislature's decision not to create a categorical exemption for SLAPPbacks demonstrates a legislative preference that the anti-SLAPP statute operate in the ordinary fashion in most SLAPPback cases, subject, of course, to the special procedural rules applicable to all motions to strike a SLAPPback." *Id.*

The same is true as to Section 425.17(c). The Legislature created a limited and specifically-defined exemption to the SLAPP statute, demonstrating its preference that the SLAPP statute operate in its usual fashion except when the specific criteria of Section 425.17(c) are met. And just as the Legislature's decision

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[2] Section 425.18(h) reads in its entirety: "A special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law."



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to enact a carefully circumscribed exemption in Section 425.18(h) led this Court to conclude that plaintiff bears the burden of establishing the applicability of that exemption, the Legislature's decision to enact the limited exemption embodied in Section 425.17(c) should lead to the same result.

Moreover, as the Court recognized in *Soukup*, the Court already had resolved that the defendant's sole burden to invoke the protection of the SLAPP statute is to demonstrate "that the challenged cause of action is one arising from protected activity." *Id.* (citations, internal quotes omitted). In *Soukup*, the Court explained that "[t]here is no further requirement that the defendant initially demonstrate his or her exercise of constitutional rights of speech or petition was valid as a matter of law." *Id.* For this reason, the Court held in *Soukup* that defendant should *not* bear the additional burden of demonstrating that an exemption from the SLAPP statute does not apply, and instead plaintiff must bear the burden of establishing that the exemption does apply. *Id.* Here, as in *Soukup*, Gore met his burden when he established that Simpson's claims arose from protected activity. Gore had no further burden of demonstrating that his speech *also* fell outside of the specific criteria of Section 425.17(c).

Thus, Simpson's reliance on *stare decisis* is sorely misplaced. Pet. at 15-17. As demonstrated in *Soukup*, this Court's cases actually support Gore, and the Court of Appeal's holding that plaintiff bears the burden of establishing the applicability of any exemption to the SLAPP statute. *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53 and *Navellier v. Sletten* (2002) 29 Cal. 4th 82 establish that a



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defendant's *only* burden is to establish that the conduct at issue triggers the protection of the SLAPP statute, and that defendant cannot be saddled with the additional burden of proving that no exemption to the SLAPP statute applies.[3] If plaintiff contends that the SLAPP statute is inapplicable for some reason, then plaintiff bears the burden of establishing that exemption. Although *Brill Media* held to the contrary, it was decided a year before this Court's decision in *Soukup*. Through *Soukup*, this Court already has made clear that *Brill Media* erred in placing the burden on defendant to establish that no exemption from the SLAPP statute applies. The Court need not take review of this case to resolve that question.

### 2. The Unusual Facts in *Brill Media* Dictated the Result in That Case, and the Differences Between This Case and *Brill Media* Render any Conflict Illusory.

In urging this Court to review this matter, Simpson relies on what it asserts is a second conflict between this case and *Brill Media*. But no such conflict actually exists. As the Court of Appeal recognized in this case, *Brill Media* involved complex facts, but "it appears essentially to have been an action by a borrower who alleged that the defendant lenders had wrongfully interfered with his attempts to sell assets, thereby rendering him insolvent and forcing him into default for their own advantage." Op. at 15. The Second District in *Brill Media* held that the conduct

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[3] Simpson's argument also makes no sense. *Equilon* and *Navellier* were decided in 2002 and Section 425.17 was enacted a year later, in 2003. This Court certainly did not resolve issues related to the proper interpretation of Section 425.17 a year before that statute was enacted. As the Court of Appeal properly held in this matter, "decisions are authority only for matters actually decided in them." Op. at 7 (citations omitted).



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occurred in the course of "delivering" a "service" sold by defendants because "[s]ecuring control of the Brill Media entities was the type of business transaction engaged in by defendants." Op. at 15-16 (citing *Brill Media*, 132 Cal. App. 4th at 341).

The Court of Appeal in this case disagreed with the language of *Brill Media*, asserting that "[p]lacing borrowers in bankruptcy may have been the kind of thing the *Brill* defendants profited by doing, but it does not appear to have been a 'service' they delivered (or sold or leased) to anyone." Op. at 16. Thus, the Court of Appeal suggested that some conflict exists between this case and *Brill Media*. Yet, a significant difference exists between this case – where it is undisputed that when Gore published the Notice, he did not yet have a client for his contemplated litigation against Simpson – and *Brill Media* – where defendant TCW Group, Inc., and its subsidiaries unquestionably did have clients that, according to Brill Media, benefited from Brill Media being placed into bankruptcy. Thus, *Brill Media* is distinguishable on the facts, and no conflict exists.

Moreover, if *Brill Media*'s language is to be followed literally, then that case was wrongly decided. As the Court of Appeal correctly explained below, "[t]he Legislature has not chosen to exempt conduct incidental to the 'type of business transaction engaged in by [the] defendant[].' ... It has instead prescribed a much narrower exemption, predicated by its plain terms on conduct in the course of *delivering* the *goods or services* the defendant is in the business of *selling or*



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*leasing*." Op. at 16.[4] Simpson ignores the *language* of Section 425.17(c) and – taking *Brill Media* even one step further than the Second District did – urges this Court to adopt a construction far broader than what the Legislature ever intended. *See* Section B, *infra*. But by its plain language the "delivery exemption" of Section 425.17(c) does not apply; Gore was not, by publishing his Notice, delivering his legal services to *anyone* at all – indeed, he did not have a client ready to sue Simpson when the Notice ran.

Simpson's argument that judicial estoppel prevents Gore from attempting to "evade application of the commercial speech exemptions" demonstrates the absurdities that would result if Section 425.17(c) were interpreted as broadly as Simpson urges. Pet. at 21. Everything that a commercial enterprise does is, in one sense or another, "incidental" to that enterprise's "typical business transactions." If

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[4] Section 425.17(c) provides in part:

> (c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services ..., arising from any statement or conduct by that person if both of the following conditions exist:
>
> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of ... promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services [the "**content exemption**," as defined by the Court of Appeal below], ***or*** the statement or conduct was made in the course of delivering the person's goods or services [the "**delivery exemption**"].
>
> (2) The 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 ....



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the "delivery" exemption could be applied to advertisements – such as the Notice at issue here – the first part of Section 425.17(c)(1) would become surplusage. Simpson's construction would render meaningless the mandate that only "representations of fact" made while attempting to procure a sale of goods or services trigger application of Section 425.17(c). A plaintiff failing to meet that stringent test would simply rely on the "delivery exemption" and claim that Section 425.17(c) is satisfied because plaintiff was "delivering" a good or service incidental to its typical business transactions, as Simpson argues here. Such an interpretation must be avoided. *Elsner v. Uveges* (2004) 34 Cal. 4th 915, 931.[5]

As the Court of Appeal recognized below, the broad language chosen by *Brill Media* – if it were the law – would reach advertising, purchasing supplies, and every other day-to-day activity of a typical business. Op. at 16 & n.11. Yet it is clear that the Legislature did not intend for Section 425.17(c) to be interpreted so broadly; if that had been its intent, it could have simply created a categorical exemption for all

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[5] Simpson's judicial estoppel argument also would require an absolute confluence between Civil Code Section 47(c) and the applicable part of Section 425.17(c). But these statutes use different language to serve different purposes. It is not incongruous at all for Gore to argue that the Notice had "'some relation' to an *anticipated* lawsuit" – necessary to invoke the litigation privilege of Civil Code Section 47(c), *see Rubin v. Green* (1993) 4 Cal. 4th 1187, 1194 – yet it was not published in the course of delivering Gore's services – which Simpson would have to disprove in order to trigger this exemption from the SLAPP statute's reach, *see* C.C.P. § 425.17(c)(1). These positions certainly are not "totally inconsistent," as is required in order to invoke judicial estoppel. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 183. In any event, the Court of Appeal did not need to reach Gore's assertion of the litigation privilege – as Simpson concedes, Pet. at 21 – and judicial estoppel is inapplicable for this independent reason. *Id.* at 183.



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commercial transactions. *Cf. Soukup*, 39 Cal. 4th at 286 ("the Legislature's decision not to create a categorical exemption for SLAPPbacks demonstrates a legislative preference that the anti-SLAPP statute operate in the ordinary fashion in most SLAPPback cases ..."). Simpson's maneuvering to squeeze itself into this limited exemption only demonstrates that the Court of Appeal in this case was correct in adopting the "narrower exemption" reflected in the language actually chosen by the Legislature, and not the extremely broad language invoked by the Second District in *Brill Media*. Op. at 16. This Court should not accept review of this matter – and perpetuate this SLAPP against a sole practitioner attorney, who already has been forced to spend far too much money to protect his rights of speech and petition – simply to correct *Brill Media*.

### B. This Court Should Continue to Construe the SLAPP Statute Broadly by Narrowly Construing this Exemption to the Applicability of the SLAPP Statute.

Simpson's Petition for Review, at its essence, urges this Court to accept review so that the Court can direct the Courts of Appeal to broadly construe the exemptions from the SLAPP statute (and, thereby, narrow the reach of the SLAPP statute). Simpson's arguments, however, are contrary to the general rule that "exceptions to a statute are construed narrowly to cover only situations that are 'within the words and reason of the exception.'" *Major v. Silna* (2005) 134 Cal. App. 4th 1485, 1494 (citation omitted).

In an attempt to avoid this general principle, Simpson argues that the preamble to Section 425.17(c) supports its interpretation. But the preamble – which,



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as Simpson concedes, "should trump any contrary indications in a legislative committee analysis," Pet. at 20 – makes clear the legislative intent to *further* the broad protection afforded by the SLAPP statute by exempting from the protection of the SLAPP statute only the narrow classes of cases specifically identified in Section 425.17. Thus, Section 425.17(a) provides, in its entirety:

> The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. *The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance*, and that this participation should not be chilled through abuse of the judicial process of Section 425.16.

*Id.* (emphasis added).

The Legislature did not intend to weaken the fundamental protection of the SLAPP statute when Section 425.17 was created. Rather, its purpose was to *strengthen* the SLAPP statute, by ensuring that the SLAPP statute is not abused by entities that it never was intended to protect. Thus, the SLAPP statute itself still provides that "this section shall be construed broadly," to ensure its ongoing protection of the rights of speech and petition. C.C.P. § 425.16(a). Section 425.17, in contrast, contains no such direction to the courts. Construing Section 425.17(c) broadly to reach a wider range of speech than intended by the Legislature, as evidenced in the plain language of the exemption, would conflict with the mandate for broad construction in Section 425.16(a) and amplified in Section 425.17(a), because it would remove more speech from the SLAPP statute's protection



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(narrowing the protection of the SLAPP statute) and foreclose the automatic appeal available under Section 904.1. C.C.P. § 425.17(e). Broadly construing Section 425.17(c) to embrace a wider array of speech also would simultaneously create tremendous uncertainty in the scope of Section 425.17(c). It would reduce the effectiveness of the SLAPP statute by permitting the courts – instead of the Legislature – to decide which cases should be exempt from the SLAPP statute's reach. Even more of a problem, the courts would make this decision applying a nebulous and undefined test cabined only by Simpson's directive that Section 425.17(c) be broadly construed. The Legislature wisely chose to adopt a specific, narrow test for Section 425.17(c) to ensure the vitality of the SLAPP statute, and this Court should not second-guess that decision.

In inviting this Court to regulate lawyer advertising through this exemption to the SLAPP statute, Simpson reaches much too far and argues that the Court of Appeal's decision "created yet another conflict with existing decisional authority – *Taheri Law Group v. Evans* (2008) 160 Cal. App. 4th 482." Pet. at 20-21. *Taheri* is completely consistent with the Court of Appeal's decision here, because it recognizes that Section 425.17(c) *generally* should not be interpreted to reach an attorney's conduct. Although *Taheri* offered in dicta that it "can envision circumstances – such as a 'massive advertising campaign' divorced from individualized legal advice – under which the commercial speech exemption to the anti-SLAPP statute conceivably might apply to a lawyer's conduct," *id.* at 492, this dicta does not conflict at all with the Court of Appeal's decision below. If Gore had made express



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representations of fact in his Notice, and those statements gave rise to a claim – if as part of his Notice he falsely stated that he has never lost a case – Section 425.17(c) might exempt his Notice from the protection of the SLAPP statute. Of course, that is not the case here.

It is telling that in enacting Section 425.17(c), the Legislature expressly chose *not* to simply exempt *all* commercial speech. In discussing the language ultimately adopted as Subsection (c)(1), the analysis of the Senate Judiciary Committee points out that this language is designed to "look at the content and context of the statement or conduct ..., rather than enacting a wholesale exclusion of a class of defendants which had been proposed" in previously failed legislation. Motion for Judicial Notice, filed in Court of Appeal, April 11, 2007 ("MJN") Exh. A at MJN0039. That analysis explains that SB 515 – which became Section 425.17(c) – "is a more measured approach" than prior legislation, which would have enacted "a wholesale exclusion of defendants who were product sellers from the anti-SLAPP law." *Id.* at MJN0041.[6] The construction advocated by Simpson would effectively re-write Section 425.17(c) to adopt broad language that the Legislature considered but rejected.

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[6] The legislation proposed a year earlier would have exempted from the protection of the SLAPP statute "[a]ny cause of action against any manufacturer, wholesaler, retailer, or other entity involved in the stream of commerce, arising from any statement, representation, conduct, label, advertising, or other communication, made in regard to the product, services, or business operations of that person or entity or any competitor." MJN Exh. A at MJN0283.



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A broad construction of the exemption in Section 425.17(c) also would create another conflict with the exemption from the SLAPP statute found in Section 425.18(h). This Court already has determined that the Section 425.18(h) exemption must be construed narrowly. *Soukup*, 39 Cal. 4th at 286; *accord Britts v. Superior Court* (2006) 145 Cal. App. 4th 1112, 1127-1128 (interpreting ambiguous language in SLAPP statute to provide greater protections to SLAPP defendants). Yet, there is no meaningful distinction between Section 425.17(c) and Section 425.18(h). Both are expressly limited exemptions from the SLAPP statute, adopted to protect the fundamental freedoms of speech and petition by ensuring that narrow categories of speech do not receive protection by the SLAPP statute. The Court's reasons for mandating that Section 425.18(h) be interpreted narrowly equally apply to Section 425.17(c). *See also Taheri*, 160 Cal. App. 4th at 490 (refusing to apply Section 425.17(c) exemption to attorney speech, although it "could arguably be viewed as falling within its scope," because "[a]ny other conclusion would be inconsistent with the intent of the Legislature when it passed section 425.17, and would conflict with the client's fundamental right of access to the courts, which necessarily includes the right to be represented by the attorney of his or her choice").

Finally, the Court also should reject Simpson's argument that the "content" exemption should be broadly construed to permit application of the Section 425.17(c) exemption, even if plaintiff's cause of action is based on certain language within a publication, but entirely different language gives rise to the exemption. Pet. at 22-24. Here, too, Simpson's arguments depend on its assertion that the Section



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425.17(c) exemption should be broadly construed. Indeed, Simpson concedes that "[t]o be sure, the confluence of these words in section 425.17 means that the 'statement or conduct' giving rise to Simpson's causes of action must 'consist of' factual representations about Gore's business operations or services." Pet. at 23. Simpson urges the Court to look at the entire Notice, which purportedly "*does* consist of factual representations about Gore's business operations or services," rather than analyzing the specific words on which Simpson's claims are based. *Id.*

But there are two problems with Simpson's argument. First, it is inconsistent with the language of Section 425.17(c). That section applies only to a "cause of action ... *arising from* any statement or conduct by that person if ... [t]he statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of" selling goods or services. *Id.* Where the alleged representations of fact that would trigger the exemption are not the subject of the dispute, Section 425.17 does not apply. Thus, for the statements or conduct to be exempt from the SLAPP statute, the claim must be based on statements or conduct as defined in Section 425.17(c)(1).[7]

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[7] As explained below by the Amicus Curiae Brief submitted by California State Senator Sheila Kuehl – who authored the bill that became Section 425.17 – and the California First Amendment Coalition, under Simpson's interpretation of Section 425.17(c), statements are exempt from the protection of the SLAPP statute so long as any part of the publication at issue contains a representation of fact about a person's or a competitor's goods or services, even if those representations of fact are not the basis of the claim. Thus, a press release containing a business's condemnation of a political candidate – core political speech – would be exempt from the protection of the SLAPP statute if the press release also mentioned the products sold by the



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As the Court of Appeal correctly held, "[t]he exemption does not extend to every cause of action arising from a statement *accompanied by* factual representations about the speaker's services." Pet. at 12. The cause of action must arise from statements "*consist[ing] of* representations of fact about [the speaker's] or a business competitor's business operations, goods, or services." *Id.* (citing C.C.P. § 425.17(c)(1)).[8]

Second, Gore's Notice contains no "representations of fact" triggering Section 425.17(c). A "representation of fact" is a specific statement about the speaker's goods or services, that is readily subject to being proven true or false. *Kasky v. Nike* (2002) 27 Cal. 4th 939, 962. A price is easy to prove. The educational history of a professional is easy to prove. A purported implication that an individual has investigated a product and *found it to be defective* is not easy to prove. This statement is not a "representation of fact" about Gore or a business competitor, and the trial court and the Court of Appeal were correct when they unanimously determined that Gore's Notice is not exempt from the SLAPP statute's protection on this ground.

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business. The Legislature certainly never intended this result in enacting Section 425.17(c).

[8] Simpson's reliance on *MacLeod v. Tribune Publ'g Co.* (1959) 52 Cal. 2d 536 is puzzling. Pet. at 23. *MacLeod* addresses the standard to be applied in deciding whether speech is capable of a defamatory meaning. It has no relevance at all to the question of statutory interpretation presented here.



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### C. The Survey Appropriately Was Rejected Because It Is the Responsibility of the Courts – Not Strangers in Parking Lots – to Decide as a Matter of Law if a Statement Is Susceptible to a Defamatory Interpretation.

Simpson attempts to manufacture a conflict between the Court of Appeal's decision and the decisions of other courts in arguing that the Court of Appeal rejected Simpson's survey evidence because it found the survey evidence to be technically flawed. Pet. at 25-26. Yet, this is not what the Court of Appeal decided. The Court of Appeal held, correctly, that "[t]he requirement of a provably false assertion of defamatory fact is grounded in the constitutional entitlement to speak truthfully. That entitlement is not subject to defeasance by plebiscite, let alone by private opinion survey." Op. at 29. Thus, the Court of Appeal held, "[i]t is for the courts, as guardians of our constitutional liberties, to say whether a statement is the type that will permit a judgment for libel. That function cannot be delegated to anonymous citizens questioned by anonymous interrogators in public parking lots." *Id.*

This certainly is nothing new. As this Court held decades ago, whether a statement is susceptible to a defamatory interpretation is a question of law to be determined by the court. *MacLeod v. Tribune Publ'g Co.* (1959) 52 Cal. 2d 536, 546 (citations omitted); *accord Arno v. Stewart* (1966) 245 Cal. App. 2d 955, 959. And as this Court has explained:

> In determining the defamatory nature of written material, the fact that some person might, with extra sensitive perception, understand such a meaning cannot compel this court to establish liability at so low a threshold. Rather, the test as noted above is whether by reasonable implication a defamatory meaning may be found in the communication.



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*Forsher v. Bugliosi* (1980) 26 Cal. 3d 792, 803, 805-806. The Court of Appeal applied exactly this standard in rejecting the defamatory implication urged by Simpson. Pet. at 28-29. Notably, Simpson does *not* challenge this finding on appeal. Deciding this question as a matter of law, the Court of Appeal correctly followed this Court's decisions in holding that the survey is not admissible to determine whether the Notice is capable of a defamatory meaning.

In any event, the Court of Appeal did not, as Simpson claims in its Petition, reject the survey "because the court perceived *technical flaws* in the survey." Pet. at 26. Rather, the court held that "the survey fails to show what Simpson claims for it, *i.e.*, that 'consumers understood Gore's advertisement to mean Simpson's galvanized screws *are defective* ....'" Op. at 29 (citing Simpson argument; emphasis in original).[9] Indeed, the court's holding is consistent with *Prudential Ins. Co. v. Gibraltar Financial Corp.* (9th Cir. 1982) 694 F.2d 1150, 1156 – on which Simpson

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[9] The Court of Appeal focused on one question in the survey because only this one question (of six) directly related to Simpson's claim that Gore's Notice implied that Simpson's screws were defective. Op. at 29. The other questions – which Simpson does not mention in its Petition – were: (1) "How would you rate the quality of the galvanized screws manufactured by Simpson Strong-Tie?" (App. 0424); (2) "How would you rate the quality of the other products manufactured by Simpson Strong-Tie?" (App. 0425); (3) "How likely would it be that other products manufactured by Simpson Strong-Tie would be defective?" (App. 0427); (4) "Assuming you are in the market for screws, how likely are you to purchase galvanized screws manufactured by Simpson Strong Tie?" (App. 0428); and, (5) "How likely would you be to purchase other products manufactured by Simpson Strong-Tie in the future?" (App. 0429).



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primarily relies (Pet. at 26) – which found that a survey's exclusion was harmless because the survey did not support the proposition for which it was offered. *Id.*

This is not a question of "technical flaws" but instead of relevance. And as the legal authorities relied on by Simpson establish, surveys properly are excluded if they are not relevant. *E.g.*, *Wendt v. Host Int'l, Inc.* (9th Cir. 1997) 125 F.3d 806, 814 ("surveys are to be admitted as long as they are conducted according to accepted principles and are relevant"). Thus, in *C.A. May Marine Supply Co. v. Brunswick Corp.* (5th Cir. 1981) 649 F.2d 1049 – another case on which Simpson relies – the Fifth Circuit Court of Appeals affirmed the exclusion of a survey because it was not proof of the point for which it was offered. Here, too, Simpson's survey does not support the point for which it is offered. Because of the language chosen by the surveyor – which the Court of Appeal carefully analyzed, in satisfying that court's constitutional obligation to decide as a matter of law whether the language is capable of a defamatory meaning – the survey does not support Simpson's claim that Gore's Notice implied that Simpson's screws are defective.

The Court of Appeal's rejection of the survey as evidence of defamatory meaning must be understood in the context of the applicable law, which is cabined by the First Amendment, and commits this issue to the court for decision. Each of Simpson's cases address a survey admitted to support a fact committed to the fact-finder for resolution. Thus, in each, it was appropriate to admit the survey if it could be of some assistance to the fact-finder. Here, in contrast, it is the court that must make the initial determination of whether the language is susceptible to a defamatory



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interpretation. If it is, the issue goes to the jury, and at that point, the survey may be admissible if it will assist the jury. Consequently, it is completely appropriate for the court to analyze the evidence offered to support this point and determine in the first instance if the evidence affects the court's decision as to whether the language is susceptible to a defamatory meaning. Again, there is nothing remarkable or incorrect about this holding.

Ultimately, Simpson's argument on this point is a red herring because Simpson does *not* challenge the Court of Appeal's conclusion that the Notice is not capable of a defamatory meaning (beyond its flawed argument, discussed in the next Section, that the Opinion created a conflict between defamation law and fraud law). Thus, even if Simpson prevailed on its argument related to the survey, it would be meaningless because it has not asked this Court to review the Court of Appeal's decision that the Notice is not susceptible to a defamatory meaning. Here, too, Simpson has given this Court no reason to review this matter.

### D. Simpson Misstates the Court of Appeal Opinion in Arguing that a Conflict Exists Between the Opinion and the Law Governing Fraud.

Simpson's final argument is that this Court should accept review because the Court of Appeal's holding that "a prediction of future events is intrinsically incapable of conveying a provable (or disprovable) assertion of fact" purportedly conflicts with California decisional law on fraud. Pet. at 29-30. But Simpson again mischaracterizes the Court's decision. The Court of Appeal held that "[*i*]*n general* ... a prediction of future events is intrinsically incapable of conveying a provable (or



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disprovable) assertion of fact." Op. at 26 (emphasis added). Simpson's Petition omits the very important qualifier "in general" in arguing that some conflict exists between the laws governing defamation and fraud. The Court of Appeal's statement of the law is correct – as discussed below – and it is, coincidentally, completely consistent with the law governing fraud. *E.g.*, *Borba v. Thomas* (1977) 70 Cal. App. 3d 144, 152 ("[g]enerally, an actionable misrepresentation must be made as to past or existing facts. '[P]redictions as to future events, or statements as to future action by some third party, are deemed opinions, and are not actionable fraud'").[10]

Following its statement of the general rule – that a prediction of future events does not give rise to a claim – the Court of Appeal addressed an exception to that rule, discussing and rejecting Simpson's claims about the falsities purportedly implied by Gore's Notice. Thus, the Court explained – much like the law governing fraud – that "[a] statement of opinion may sustain liability where it implies that the speaker knows additional, undisclosed defamatory facts." Op. at 28. The Court found, however, that no such implication is possible here because "Gore did the opposite: By conditioning any 'potential claim' on further investigation, Gore directly implied that he *did not know*—and *could not* know without further

[10] It is little surprise that Simpson offers no case to suggest that the law on defamation should or must coincide with the law on fraud. A defamation claim requires proof of completely different elements than a fraud claim and – more importantly – it is subject to the constraints of the First Amendment. Simpson's argument about a purported conflict between defamation law and fraud law is frivolous on its face.



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investigation—whether Simpson or anyone else was liable." *Id.* The court concluded that "[a] reader might suppose that Gore possessed additional facts relevant to the question, but no reasonable reader could suppose they [sic] facts established Simpson's liability, or indeed the actual existence of any 'defect,' because Gore himself impliedly pronounced them insufficient to do so." *Id.*

No conflict exists between the Court of Appeal's decision and any other law. Rather, the decision in this matter is completely consistent with the law governing defamation claims and – although it is not relevant – also the law governing fraud claims. In an attempt to manufacture a non-existent conflict, Simpson simply ignores the portions of the Court of Appeal's Opinion that undermine its argument. Here, too, no grounds exist for this Court's review of this matter.

## 3. CONCLUSION

Simpson's SLAPP lawsuit has gone on long enough. Gore will recover his attorneys' fees and costs incurred from Simpson under the SLAPP statute; however the burden of this frivolous litigation on him and his family has been high. As set forth above, most of the purported conflicts identified by Simpson simply are non-existent. As to many of those purported conflicts, Simpson's characterization of the Court of Appeal's decision is misleading, and in truth the decision is completely consistent with the applicable law. As to the one true conflict – the Court of Appeal's disagreement with the Second Appellate District's decision in *Brill Media* regarding who bears the burden relative to exemptions from the SLAPP statute – this



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Court resolved that issue two years ago, with its decision in *Soukup* addressing an analogous exemption under Section 425.18(h).

No review is necessary or appropriate in this case. Gore therefore respectfully requests that the Court deny Simpson's Petition for Review and permit this SLAPP to finally come to an end.

Dated: June 26, 2008

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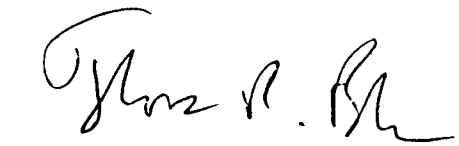
By: 

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Pursuant to California Rule of Court 8.504(d)(1), the text of this brief, including footnotes and excluding the caption, table of contents, tables of authorities and this Certificate, consists of 6,908 words in 13-point Times New Roman type as counted by the Microsoft Word 2002 word-processing program used to generate the text.

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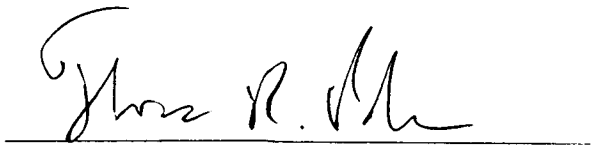
By: 

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