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S164174

IN THE SUPREME COURT OF CALIFORNIA

SIMPSON STRONG-TIE CO., INC.,

Plaintiff and Appellant,

vs.

PIERCE GORE, ET AL.,

Defendants and Respondents.

Appeal From an Order of the Santa Clara County Superior Court
Honorable John Herlihy, Judge

Review After Judgment of the Court of Appeal,
Sixth Appellate District
Justice Conrad L. Rushing, Presiding Justice

DEFENDANTS/RESPONDENTS' ANSWER BRIEF

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

Defendants/Respondents Pierce Gore and the Gore Law Firm ("Gore") respectfully submit this Answer Brief, in response to the Opening Brief on the Merits ("O.B.") submitted by Plaintiff/Appellant Simpson Strong-Tie Co., Inc. ("Simpson" or "Plaintiff"). As set forth below, Gore respectfully requests that this Court affirm the orders of the trial court and court of appeal, granting and then affirming the grant of Gore's Special Motion to Strike ("anti-SLAPP Motion") under California Code of Civil Procedure Section 425.16 (the "anti-SLAPP statute").

1. INTRODUCTION

The underlying premise of Simpson's argument to this Court – that Section 425.17(c), an exemption to the anti-SLAPP statute, must be broadly construed – ignores the express language of the statute, its legislative history, and a wealth of California law to the contrary. It is simply wrong. When this premise falls, Simpson's arguments fall with it.

The Legislature intended Section 425.17(c) to be a limited exemption to the anti-SLAPP statute, to withdraw that statute's protection from business disputes involving factual representations – false claims about products or services. This type of speech lies beyond the First Amendment, which does not protect false or misleading commercial speech. *Kasky v.*

Nike, Inc. (2002) 27 Cal.4th 939, 953-954 ("*Kasky*"). The Legislature considered adopting an earlier version of the statute that would have withdrawn the anti-SLAPP statute's protection from all businesses, but rejected that broad exemption and chose in its place a narrow, carefully-defined exemption. Section 425.17(c) never was intended to reach speech that is entitled to First Amendment protection, regardless of the speaker. Yet, Simpson would rewrite the statute to adopt the broad, open exemption rejected by the Legislature, and to thereby withdraw the anti-SLAPP statute's protection from speech that the trial court and court of appeal unanimously found to be fully protected by the First Amendment.

Make no mistake; Simpson's lawsuit against Gore is the paradigmatic SLAPP. Simpson, a large, wealthy corporation sued Gore, a solo plaintiffs' class action attorney, to stop him from speaking about a latent consumer safety issue or pursuing the class action lawsuit he was exploring. As the trial court and court of appeal found, Gore's speech was not defamatory and it gave rise to no claim. Although Simpson's arguments in this Court invoke the "commercial speech" exemption from the anti-SLAPP statute, it is telling that Simpson did not argue below or before this Court that Gore's Notice was commercial speech, entitled to reduced First Amendment protection. (*E.g.*, Appellant's Opening Brief, Sixth District Case No. H030444, filed July 25, 2006, at 32-33.)

The description of Section 425.17(c) as a "commercial speech" exemption is overinclusive, but decidedly *not* underinclusive. In *Kasky*, this Court defined commercial speech for the specific purpose of "laws aimed at preventing false advertising or other forms of commercial deception." *Kasky*, 27 Cal.4th at 960. It is this definition – more narrow than the general definition of commercial speech – that the Legislature adopted in Section 425.17(c). Thus, while Gore's Notice contains elements of commercial speech, it is lacking the "representations of fact" that this Court held in *Kasky* must be present to justify a law enacted to prevent a certain kind of commercial speech. 27 Cal.4th at 961-962.

Neither of Simpson's arguments to this Court should change the result below. Simpson's attempt to shift to Gore the burden of persuasion on the Section 425.17(c) exemption that Simpson invoked, and which has been its primary defense to avoid having to satisfy the anti-SLAPP statute, is contrary to a number of principles that place the burden directly on Simpson. Simpson asks this Court to conclude that in 1965, when the Legislature enacted Evidence Code Section 500, the Legislature *sub silentio* rejected the well-established principle that a party invoking an exemption to a statute bears the burden of proving the application of the exemption, and that the courts have been wrongly applying this principle consistently for the four decades since then. Simpson can cite no case directly supporting this argument because this general principle is in fine health, and was not

affected at all by Section 500. Moreover, placing this burden on Simpson is consistent with this Court's ruling in *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260 ("*Soukup*") – which placed the burden of a different exemption from the anti-SLAPP statute on the party invoking the exemption – and makes sense. As this Court recognized in *Soukup*, it would be contrary to *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53 ("*Equilon*") – not consistent with it, as Simpson argues (O.B. at 16-18) – to impose on Defendant the burden of disproving every possible exemption to the anti-SLAPP statute in order to invoke the protection of the anti-SLAPP statute. Section 3, *infra*.

But even if the burden did properly lie with Gore to disprove the applicability of the Section 425.17(c) exemption, Gore easily met that burden below by demonstrating that his Notice fell outside the scope of the exemption. The language of Section 425.17 makes clear that its purpose is to protect the availability of the anti-SLAPP statute by providing narrow exemptions to that statute. Simpson relies on a single sentence from Section 425.17(a)'s preamble and ignores the remainder and the gist of the preamble, which explicitly reaffirm the vitality of the anti-SLAPP statute to safeguard First Amendment-protected speech and petition activities. Section 4.B.1, *infra*.

Beyond the language of this particular statute, a number of general principles of law support a narrow interpretation of Section 425.17(c). First,

it is well-established that exemptions from a statute are narrowly and strictly construed. Section 4.B.2, *infra*. This is particularly true where the general statute includes a legislative mandate for broad construction, as the anti-SLAPP statute does (and as noted above, Section 425.17's preamble expressly contemplates the continued vitality of Section 425.16). Indeed, a broad construction of *both* the anti-SLAPP statute (which the Legislature has dictated and this Court has consistently recognized) and the Section 425.17(c) exemption (notwithstanding the absence of any legislative mandate for a broad construction) would create incongruity and conflict and must be avoided. Section 4.B.3, *infra*.

By its plain language Section 425.17(c) has no application to Gore's Notice. Initially, the court of appeal correctly held that the requirements of Section 425.17(c) must coincide in a single statement for the exemption to apply. The statute says so in express terms. Any other interpretation of Section 425.17(c) would give rise to skewed results, as speech that is fully-protected by the First Amendment would be deprived of the anti-SLAPP statute's valuable protections simply because it accompanied speech that might be twisted to fit into the Section 425.17(c) exemption. Because the alleged defamation is about Simpson – not Gore or one of Gore's business competitors – Section 425.17(c) does not apply. Section 4.C.1.a, *infra*.

In any event, Gore's Notice did not make any representation of fact as contemplated by this Court in *Kasky* (which the Legislature incorporated

into Section 425.17(c)). Representations of fact that trigger application of this exemption would include claims about Gore's professional history, or his success rate in handling litigation matters. Gore's Notice contained no such claims. Nor can Section 425.17(c) be applied to a purported promise by Gore about future events, which is not a representation of fact, capable of being proven false. Section 4.C.1.b, *infra*.

The delivery exemption found in the final part of Section 425.17(c)(1) also does not apply here because Gore was not delivering his legal services to anyone by publishing his Notice. Simpson's argument that Gore's Notice constituted legal services would wildly expand Section 425.17(c) beyond the two narrow circumstances contemplated by the Legislature – the advertising and delivery of products or services – to encompass essentially every action taken by a business. Simpson thus would rewrite the exemption to create the broad application that the Legislature expressly rejected when it chose instead the narrow, precisely-defined exemptions embodied in Section 425.17(c). Section 4.C.2, *infra*.

Moreover, the legislative history strongly supports Gore's arguments. Among other things, that history is unequivocal that in enacting Section 425.17(c), the Legislature intended to protect individuals from *corporate* abuse of the anti-SLAPP statute. As the court of appeal aptly noted, Simpson's demand that Gore be denied the protection of the anti-SLAPP statute in this paradigmatic SLAPP would "be a perversion of legislative

purpose at least as striking as the one that motivated the Legislature to enact the exemptions Simpson invokes." Op. at 20. Section 4.C.3, *infra*.

2. SUMMARY OF FACTS AND PROCEDURE

A. Gore Learns of Problems with Galvanized Fasteners, Carefully Evaluates Potential Liability, and Publishes a Notice Seeking Possible Plaintiffs.

Gore first learned about potential consumer dangers associated with galvanized deck fasteners and connectors in October of 2004, when he saw a news report by Michael Finney on KGO-7 (the "Finney Report"). Petitioner's Appendix ("App.") 0119 ¶¶ 3, 4, 0129-0134; see also Respondent's Appendix ("R.A.") 001. Gore learned that effective January 1, 2004, wood pressure-treated with copper chromated arsenic ("CCA") was replaced with wood pressure-treated with alkaline copper quaternary and copper azole (the "new pressure-treated wood"). *Id.* However, these new substances on the wood were capable of corroding steel at an accelerated rate. *Id.*

The Finney Report featured Ted Todd ("Todd"), a Senior Inspector for the Contra Costa County District Attorney's Office, who was leading an investigation concerning the failure of galvanized fasteners and connectors used with the new pressure-treated wood and the resulting public safety hazard for consumers. *Id.* Todd reported that the corrosion suffered by galvanized steel fasteners and connectors used with the new pressure-treated wood would "most certainly" cause decks to fall down. *Id.* ¶ 4. The Finney

Report also revealed that "[i]t's all but impossible" for consumers and even some professional contractors to know which wood fasteners and steel connectors are affected, and that decks must be inspected to determine whether there is a corrosion problem. *Id.*

Later, NBC-11 aired a report by reporter Ethan Harp (the "Harp Report"), which corroborated the Finney Report, observing that "[t]he new pressure-treated wood is so corrosive that the very things that hold it together [fasteners and connectors] are corroding, almost immediately, and are subject to structural failure, leading to eventual collapse." App. 0120 ¶ 5, 0131-0132; R.A. 001. A later KGO-7 news broadcast included a statement by Mark Crawford, Vice-President of Engineering at Simpson, that there was not adequate testing for corrosion before the new pressure-treated wood standards were set up. App. 0120 ¶ 6, 0133; R.A. 001. The news report opined that without proper testing, it could be years before it is known whether a thicker coating of zinc will protect galvanized deck screws from corrosion. *Id.*

Crawford's comments prompted Gore to specifically research Simpson. Gore located Simpson's amended Quarterly Report filed with the Securities and Exchange Commission in 2004, in which the company admitted: "[W]ood pressure-treating chemicals ... can contribute to failure of fasteners and connectors. On occasion, some of the fasteners that the

Company sells have failed, although the Company has not incurred any material liability resulting from those failures." App. 0120 ¶ 7, 0138.

During the Fall of 2005, Gore also had eight or nine conversations with Todd. App. 0121-0122 ¶ 8. Among other information, Todd told Gore that he had visited numerous retail stores in the Bay Area, but that consumer notices regarding incompatibility were in small print, inconspicuously posted, or completely absent. App. 0121. Todd further advised Gore that although Simpson had introduced a "ZMAX" line of connectors and fasteners – which Simpson asserts can be safely used with the new pressure-treated wood, *e.g.*, App. 0171, 0754 – Todd found a builder in Oregon who built a deck using ZMAX connectors and fasteners yet had experienced measurable corrosion in less than thirty days. App. 0121.

Curtis Patterson, a Simpson engineer, called Todd and told him that the corrosion issue is "an industry problem, not just a Simpson problem." *Id.* Patterson also informed Todd that the corrosion problem affects anything put in the wood, including hangers, nails and screws. *Id.* When Todd asked if Simpson proposed a solution, Patterson responded that there was not an easy answer and that Simpson "does not have enough information to know what's going to happen in the long term." App. 0121-0122. Todd also told Gore about action that the U.S. Consumer Product Safety Commission was taking to address the safety issues created by the

use of the new pressure-treated wood with galvanized fasteners and connectors. App. 0122.

In 2004, due to its "concern that many consumers and building contractors may not be aware of the issue," the Contra Costa County District Attorney's Office issued a Consumer Alert warning of the danger of using anything other than stainless steel fasteners and connectors with the new pressure-treated wood. App. 0122 ¶ 8, 0140. That Consumer Alert explained that an "investigation has disclosed that these advisories [posted in retail stores] tend to be in very small print or somewhat inconspicuously posted. Therefore, there is concern that many consumers and building contractors may not be aware of the issue ...." App. 0140.

In the Fall of 2005, before publishing his Notice, Gore also reviewed the following information on Simpson's website, which appeared in bold type:

> Many of the new Pressure Treated Woods use chemicals that are corrosive to steel. By selecting connectors that offer greater corrosion resistance (Stainless Steel, Post Hot-Dip Galvanized, or ZMAX™) you can extend the service life of your connectors. However, corrosion will still occur. You should perform periodic inspection of your connectors and fasteners to insure their strength is not being adversely affected by corrosion. In some cases, it may be necessary to have a local professional perform the inspections. Because of the many variables involved, Simpson Strong-Tie cannot provide estimates on service life of connectors, anchors or fasteners.

App. 0122 ¶ 9.

Gore also reviewed a class action complaint filed against one of Simpson's competitors in the United States District Court for the District of Massachusetts ("Phillips Complaint"), which sought relief on numerous theories on behalf of a national class of consumers allegedly damaged by defective galvanized fasteners and connectors used with the new pressure-treated wood. App. 0123 ¶ 12, 0274-0291. In addition, Gore learned that his former plaintiffs' class action law firm was investigating this same issue. App. 0123 ¶ 10.

Based on his investigation, Gore believed that manufacturers of galvanized steel fasteners, including Simpson, might be selling products that could be unsafe or unsuitable for building outdoor decks with the new pressure-treated wood. *Id.* ¶ 11. Gore concluded that numerous contractors and particularly consumers doing their own home construction or repairs could be unaware of this threat to public safety, especially since Simpson itself publicly proclaimed that it could not "provide estimates on service life of connectors, anchors or fasteners." App. 0122 ¶ 9.

In December 2005, Gore placed a Notice in the *San Jose Mercury News* seeking potential plaintiffs for an anticipated class action based on these problems. App. 0124-0125 ¶¶ 13-14. The Notice, which appeared five times in the *San Jose Mercury News*, and once in the *Los Gatos Times*, read:

ATTENTION:

WOOD DECK OWNERS

If your deck was built after January 1, 2004 with galvanized screws manufactured by Phillips Fastener Products, Simpson Strong Tie or Grip-Rite, you may have certain legal rights and be entitled to monetary compensation, and repair or replacement of your deck.

Please call if you would like an attorney to investigate whether you have a potential claim:

Pierce Gore
GORE LAW FIRM
600 East Hamilton Ave.
Suite 100 Campbell, CA 95008
408-879-7444

App. 0004, 0124-0125 (the "Notice").

Gore modeled the wording of the Notice on similar notices that he and his co-counsel had used in recent years to locate potential plaintiffs in contemplated class action litigation, and which satisfied the requirements of the various Codes of Professional Conduct in the states in which they appeared. App. 0124 ¶ 13, 0293, 0295. None of Gore's previous notices resulted in legal demands, let alone litigation. App. 0124 ¶ 13.

B. Within Days of Gore's Notice, Simpson Launches Its Attack on Gore's Speech and Petition Rights.

Simpson *immediately* hired experienced counsel to pursue litigation against Gore. App. 0297-0299. Simpson also retained a surveyor to *immediately* prepare a statistical survey, specifically for use in this action.

App. 0374-0375 ¶ 7. The experiment began on January 28, 2006 – barely a month after Gore's Notice first ran – and concluded on February 5, 2006. App. 0376 ¶ 12. Yet, the survey did not purport to measure actual sales lost due to the Notice; rather, it purported to measure consumer views regarding Simpson's products. App. 0377-0379.

Simpson sued Gore two days after Simpson's consultant completed his survey. App. 0001. Simpson immediately sought to take Gore's deposition and requested access to his pre-litigation investigation file. Simpson also sued Gore's brother's law firm in Tennessee for defamation based on the wording of a notice published to support a class action lawsuit then pending in Massachusetts. App. 0869-0870. Gore filed his anti-SLAPP Motion on April 10, 2006, App. 0050-0072, and the trial court heard the matter on May 23, 2006. Its order was succinct:

> Defendants' Special Motion to Strike is granted. The court finds that CCP §425.17(c) does not apply because the statement was not made about a business competitor's products or services. Defendants have made a threshold showing that the statement was made in furtherance of their right of petition or free speech regarding an issue of public interest. (CCP §425.16(e)(4).) The burden shifts to Plaintiff to demonstrate a probability of prevailing on the merits. Plaintiff's evidence is insufficient to establish that Defendants' advertisement is false.

App. 0960. Following Gore's motion for fees under Section 425.16(c), Gore was awarded $74,124.50 in fees and costs incurred in connection with the anti-SLAPP motion. Motion for Judicial Notice Filed in Court of

Appeal ("MJN") at MJN0431. Gore's recovery of that award has been stayed and it remains unpaid pending this appeal.

3. SIMPSON BEARS THE BURDEN OF PERSUASION ON THE ANTI-SLAPP STATUTE EXEMPTION IT INVOKED.

This Court accepted review of this matter to resolve a dispute between this case and *Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324 ("*Brill Media*"), which held that a party invoking the anti-SLAPP statute bears the burden of disproving exemptions to that statute. *Brill Media* relied for this conclusion on "common sense," reasoning that because case law established a two-part test to evaluate whether the anti-SLAPP statute applies to an action, and defendants bear the initial burden under that test, defendants bear the burden on *every* issue that might be addressed in determining applicability of the anti-SLAPP statute. As demonstrated below, however, this reasoning is flawed. A plaintiff who invokes the Section 425.17(c) exemption must bear the burden of proving that exemption applies.

A. It Long Has Been the Law That a Litigant Bears the Burden of Proving an Exemption It Invokes; Evidence Code Section 500 Did Not Purport to Change This Law.

Simpson claims that in 1965, when the Legislature replaced Code of Civil Procedure Section 1981 with Evidence Code Section 500, it *sub silentio* rejected the well-established rule that a litigant who invokes a statutory exemption bears the burden of proving the applicability of that

exemption. O.B. at 21-22. As demonstrated below, however, this remains a "general principle" of law in California, which applies in all cases *except* where the Legislature has chosen to make the exemption part of the statutory criteria (*i.e.,* the statute defines its scope by reference to the exemption). That certainly is not the case here. Ultimately, Simpson's contention that this general principle was rejected by the Legislature in 1965 finds absolutely *no support* in statutes or case law, and would return Evidence Code Section 500 to the meaningless and easily-manipulated standard that the Legislature intentionally scrapped.

1. It Long Has Been the Rule That Litigants Have the Initial Burden of Proving the Exemptions They Invoke.

"One claiming an exemption from a general statute has the burden of proving that he comes within the exemption." *Norwood v. Judd* (1949) 93 Cal.App.2d 276, 282.[1] Simpson argues that today this rule is an anachronism, only applied in a few cases and not properly applied for the last forty years, because the Legislature purportedly rejected it when it replaced Code of Civil Procedure Section 1981 with Evidence Code Section 500. O.B. at 21 & fn.4. Simpson is wrong. *Norwood*, which Simpson

[1] Similarly, "[t]he general rule has long been that 'He who takes the benefit must bear the burden.'" *Adams v. Murakami* (1991) 54 Cal.3d 105, 121 (citing Cal. Civ. Code §3521). Simpson – not Gore – would take the benefit of Section 425.17(c). Without that section, there would be no question that the anti-SLAPP statute protects Gore's speech.

argues is no longer good law, does not even mention Section 1981. Indeed, Gore has found *no* California case suggesting that this general and frequently-applied principle was revised with the enactment of Evidence Code Section 500. Instead, those courts of appeal that have connected this principle with Evidence Code Section 500 have concluded that Section 500 supports imposing the burden of proving an exception on the party invoking the exception. *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345; *Smith v. Santa Rosa Police Dept.* (2002) 97 Cal.App.4th 546, 568-569. *See also* Section 5, *infra*.

In contrast to the absence of *any* authority supporting Simpson, numerous cases demonstrate that the burden of proving an exemption from a statute remains on the party who invokes that exemption. In *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 747, the court imposed on the prosecution the burden of proving that an exception applies to the statutory bar from proceeding with a third prosecution. Similarly, in *Royal Thrift & Loan Co. v. County Escrow, Inc.* (2004) 123 Cal.App.4th 24, the court held that appellants bore the burden of establishing that an exception to the automatic stay rule of Code of Civil Procedure Section 917.4 applied, and permitted them to proceed with a foreclosure sale pending appeal. *Id.* at 36. And in *Smith*, 97 Cal.App.4th at 568-569, the court held that a vehicle owner claiming mitigating circumstances following removal and storage of the vehicle has the burden of proving those mitigating circumstances. *See*

also City of Lafayette v. East Bay Mun. Utility Dist. (1993) 16 Cal.App.4th 1005, 1017; *Barnes v. Chamberlain* (1983) 147 Cal.App.3d 762, 767.

2. Simpson Bears the Burden Because the Anti-SLAPP Statute Exemptions Are Not Elements of the Anti-SLAPP Statute Itself.

Ultimately, the question is whether the Legislature intended the exemptions to be elements of the underlying statute (or claim), in which case the party invoking the statute (or claim) would bear the burden. *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 856 (the requirement that the complaint negative the exception "only applies to statutes which define the right or liability and also contain the exception in the enabling clause itself. Where the exception is found in a subsequent section of the act, it need not be negative in the initial pleading"); *see also G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 273. Thus, if the exemptions "are limited exceptions to proscribed conduct, rather than exceptions that define the offense," the burden rests on the party that invokes the exemptions. *City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 726.

Of course, Section 425.17(c) is a different statute than the anti-SLAPP statute, Section 425.16. Nothing in the legislative history suggests that the Legislature intended to inject the requirements of Section 425.17(c) (or the other SLAPP exemptions) into the definition of protected conduct in the anti-SLAPP statute, and impose on the defendant invoking the anti-

SLAPP statute the obligation of disproving those exemptions. None of the exemptions – the "public benefit" exemption of Section 425.17(b), the exemption at issue here, or the SLAPPback exemption found in Section 425.18(h) – could be said to define the speech that is protected by the SLAPP statute, as set forth in Section 425.16(b) or (e).

3. Even When Multiple Layers of Exemptions Are at Issue, the Party Invoking Each Exemption Bears the Burden as to That Exemption.

This Court also has established that the burden of proving an exception to an exception – similar to the issue presented here – normally lies with the party invoking the exception to the exception. Thus, in *Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, the Court held that an insured bears the burden of establishing an exception to an exclusion from insurance coverage, "because 'its effect is to reinstate coverage that the exclusionary language otherwise bars.'" *Id.* at 1188. The Court adopted the reasoning of a number of other courts in concluding that "'[b]ecause the *insured* bears the burden of establishing coverage under an insurance policy, it makes sense that the insured must also prove that the exception affords coverage after an exclusion is triggered.'" *Id.* at 1192 (citations omitted). It relied on Evidence Code Section 500 to reach this result. *Id.* at 1193; *cf.* Section 5, *infra*.

The discovery rule, an exception to the statute of limitations, is a perfect example of the typical allocation of the burden of proof when

evaluating statutes and their exceptions. While defendant must plead and prove the affirmative defense established by the statute of limitations, if plaintiff relies on the discovery rule, plaintiff bears the burden of proving when the claim was discovered. This Court adopted this principle years ago. *Sun 'N Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 701-702. The courts of appeal have abided by this Court's direction. *See, e.g.*, *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 788 (statutory tolling); *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1030 (common law tolling (citing *Samuels v. Mix* (1999) 22 Cal.4th 1, 10; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832)).[2]

In each of these cases, it could have been argued – as Simpson argues here – that the party invoking the statute must also establish that no exception applies because that party is seeking to benefit from the statute it has invoked.[3] Under the same reasoning, a plaintiff could be required to

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[2] Here, too, a different rule applies when the statute contains the element of discovery as an aspect of the limitations period. *Samuels v. Mix* (1999) 22 Cal.4th 1, 7; *Colonial Ins. Co. v. Industrial Accident Comm'n* (1945) 27 Cal.2d 437, 441.

[3] The Second District addressed this issue in *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, distinguishing between "new matter" and a "traverse." *Id.* at 1669-1670. If the issues are "opposite sides of the same coin" the purportedly "new matter" is instead merely a traverse, and the burden remains with the plaintiff. Here, the question of whether Gore's Notice satisfies the requirements of Section 425.17(c) is substantively different from the threshold issue of whether Simpson's claims are subject to the anti-SLAPP statute.

disprove defendant's affirmative defenses, because plaintiff is seeking relief in the litigation and could be held to show that no "exception" to that relief applies. But this is not the law. The law focuses on the specific relief sought and at issue – the affirmative defense or exemption invoked. When the Court properly focuses on the relief at issue in this action – does Section 425.17(c) apply to Gore's speech? – it is clear that Simpson bears the burden because Simpson invoked this exemption to the anti-SLAPP statute and seeks relief under it to avoid having to satisfy the rigors imposed by Section 425.16.

4. *Brill Media*'s Reasoning Was Flawed and Contrary to Decisions of This Court.

Simpson relies heavily on the odd and fact-driven decision in *Brill Media*, 132 Cal.App.4th 324. O.B. at 17-18. In reaching its conclusion, *Brill Media* reasoned that the words "does not apply" in Section 425.17(c) "closely parallel[] the 'within the class of suits subject'" to the anti-SLAPP statute language that has been employed by some courts in describing the first prong of the anti-SLAPP statute. 132 Cal.App.4th at 331. But this makes no sense. The phrases are very different, with not a single word in common. Any parallel relates only to the meaning of the words. Yet, it makes sense that the two phrases would have a similar meaning because they have a similar purpose – determining whether or not the anti-SLAPP statute applies. That does not mean that the Legislature, by choosing the

words "does not apply" intended to incorporate the Section 425.17(c) exemption into the anti-SLAPP statute itself.

In fact, the closest parallel is to the decisions of this Court and others recognizing that the words "does not apply" or "shall not apply" create an exemption, the burden of which is on the party invoking it. For example, in *People v. Mower* (2002) 28 Cal.4th 457, this Court held that "section 11362(d) constitutes an exception to sections 11357 and 11358, which make it a crime to possess and cultivate marijuana, because section 11362(d) provides that sections 11357 and 11358 '*shall not apply*'" to certain individuals. *Id.* at 477. The Court explained that "[s]ection 11362.5(d) plainly allows a defense for which the rule of convenience and necessity supports allocating to the defendant the burden of proof as to the underlying facts." *Id.* at 478.

Similarly, in *People v. Neidinger* (2006) 40 Cal.4th 67, the Court held that the party invoking Penal Code Section 278.7(a) as a defense to Penal Code Section 278.5 bears the burden because in using the words "***does not apply***" in Section 278.7(a), the Legislature created an exemption to Section 278.5. *Id.* at 75. The Court explained that "[i]t is well established that where a statute first defines an offense in unconditional terms and then specifies an exception to its operation, the exception is an affirmative defense to be raised and proved by the defendant." *Id.* (citations, internal quotes omitted). The Court concluded that "section 278.7(a) is an exception

to section 278.5, which supports the conclusion that it is an affirmative defense that the defendant must raise." *Id.; accord City of Brentwood*, 123 Cal.App.4th at 722.

When Simpson's arguments and cases are carefully considered, it is plain that no case supports the allocation of the burden of proof that Simpson asks the Court to hold here. Simpson invoked Section 425.17(c), Simpson will benefit from the application of this exemption, and it makes sense that Simpson be required to establish that this exemption to the anti-SLAPP statute does, in fact, apply.

5. Evidence Code Section 500 Did Not Change This Well-Established Law.

Simpson's reliance on Evidence Code Section 500 is puzzling; this statute supports Gore, not Simpson. Section 500 reads in its entirety:

> Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

Id.

Simpson's interpretation would return Evidence Code Section 500 to the meaningless language of Code of Civil Procedure Section 1981 that the Legislature rejected in enacting Section 500. As the Law Revision Commission Comments explain, "[t]he 'affirmative of the issue' [language from Section 1981] lacks any substantial objective meaning ...." Cal. Evid. Code §500, Law Rev. Comm'n Comts. "That the burden is on the party

having the affirmative [or] that a party is not required to prove a negative ... is no more than a play on words, since practically any proposition may be stated in either affirmative or negative form." *Id.* (citation omitted). "The basic rule, which covers most situations, is that whatever facts a party must affirmatively plead he also has the burden of proving." *Id.* (citation omitted). If a party must plead or allege the fact in order to prevail, that party must prove that allegation.[4] This is furthered by Evidence Code section 520, which makes clear that "[t]he party claiming that a person is guilty of ... wrongdoing has the burden of proof on that issue."

Simpson's argument that Gore must prove each fact the "nonexistence" of which is essential to Gore's reliance on the anti-SLAPP statute misconstrues Section 500. O.B. at 20-21. The "negative" averments contemplated by Section 500 include, for example, the burden of proving impossibility, or that a person did not exercise a requisite degree of care, or that goods were destroyed without that party's negligence or fault. 31 Cal. Jur. 3d Evidence §93 (2008) (citations omitted). As to each, the "negative"

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[4] Thus, Simpson's concession that "[u]nder old section 1981, Simpson might have been said to have had the 'affirmative of the issue' whether the commercial speech exemptions apply" is telling. O.B. at 22. As the Law Revision Commission Comments indicate, the Legislature did not intend to *change* the traditional allocation of the burden of proof, but instead to *restate* it in a more meaningful way.

fact is an element of the claim or defense invoked. But as discussed above, that is not the case here.

Other than *Brill Media*, Simpson cites no case to support imposing on Gore the burden of persuasion as to the defense that Simpson invoked. Gore is aware of no other legal authority.[5] The question is quite simple – if Simpson had never invoked Section 425.17(c), would Gore nonetheless have been obligated to disprove it in its anti-SLAPP motion? Of course not. "[I]f you want the court to *do* something, you have to present evidence sufficient to overcome the state of affairs that would exist if the court did nothing." *Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1388; *see also Buss v. Superior Court* (1997) 16 Cal.4th 35, 53. The *status quo* here – the state that would exist without invocation of Section 425.17(c) – is that the anti-SLAPP statute applies to this action. It is Simpson that asks

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[5] Under rare circumstances, the burden of proof will be shifted to one party or another because public policy demands it. *National Council Against Health Fraud, Inc. v. King Bio Pharm.* (2003) 107 Cal.App.4th 1336, 1346-1347. "The shift in the burden of proof ... rests on a policy judgment that there is a substantial probability the defendant has engaged in wrongdoing and the defendant's wrongdoing makes it practically impossible for the plaintiff to prove the wrongdoing." *Id.* (citation omitted). "[T]he exceptions are few, and narrow." *Sargent Fletcher*, 110 Cal.App.4th at 1670. Simpson makes a half-hearted argument that the burden should be shifted to Gore. O.B. at 21-22. From a public policy perspective, placing this burden on Simpson (and future plaintiffs) is entirely consistent with the Legislature's express sentiment 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 or Section 425.16." Cal. Code Civ. Pro. §425.17(a).

this Court to change that *status quo* by applying Section 425.17(c) and eliminating for Gore, the protection of the anti-SLAPP statute.

The absurdity of Simpson's burden of proof argument becomes apparent when one considers what results will flow from imposing the Section 425.17(c) burden on Gore. If Gore bears this burden, is he then also obligated to prove that no other exemption applies?[6] Was he required to raise the issue in his anti-SLAPP motion, or risk having waived it? This is the application being invoked in the trial courts, where litigants are claiming that under *Brill Media*, a defendant who files an anti-SLAPP motion without anticipating in its motion plaintiff's invocation of Section 425.17(c) waives the right to challenge the applicability of that section. S.Ct. MJN at SRJN00041. This is the type of gamesmanship this Court elsewhere has condemned, particularly when the "*public* interest is at stake." *Adams*, 54 Cal.3d at 120.

B. As This Court Recognized in *Soukup*, a Litigant Invoking an Exemption to the Anti-SLAPP Statute Necessarily Bears the Burden of Persuasion as to That Exemption.

Two years ago, this Court found that a litigant invoking the Code of Civil Procedure Section 425.18(h) exemption to the anti-SLAPP statute

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[6] As discussed further below, this would be inconsistent with this Court's decision in *Soukup*, which held that plaintiff bears the burden of proving the anti-SLAPP statute exemption embodied in Section 425.18(h). Section 3.B, *infra*.

bears the burden of proving that exemption. *Soukup*, 39 Cal.4th at 286.[7] The Court explained, "[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, specifically-defined exemption to the anti-SLAPP statute, demonstrating its preference that the anti-SLAPP statute operate in its usual fashion – protecting free speech and petitioning activities – except when the specific criteria of Section 425.17(c) are met. The burden of proof under Section 425.17(c) should be the same.

Moreover, as the Court recognized in *Soukup*, this Court already has resolved that defendant's *sole* burden to invoke the protection of the anti-SLAPP statute is to demonstrate "that the challenged cause of action is one arising from protected activity." *Id.* (citations, internal quotes omitted). *Equilon*, 29 Cal.4th 53 and *Navellier v. Sletten* (2002) 29 Cal.4th 82 ("*Navellier*") establish that defendant cannot be saddled with the additional

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[7] Under Section 425.18(h), "[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."

burden of proving that no exemption to the anti-SLAPP statute applies.[8] "There 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.* It is plaintiff's burden to establish that an exemption applies. *Id.*[9]

Here, as in *Soukup*, Gore met his burden by establishing that Simpson's claims arose from his First Amendment-protected activities. Gore had no further burden of demonstrating that his Notice also fell outside the specific criteria of Section 425.17(c). As in *Soukup*, this frequently could entail an evaluation of the merits of the claim if, for example, plaintiff claims that defendant's speech is commercial speech, entitled to limited First Amendment protection. Because there is some confluence between Section 425.17(c) and the test for commercial speech as defined by this Court in *Kasky*, Simpson effectively asks this Court to do what the Court

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[8] Thus, Simpson's reliance on *stare decisis* is sorely misplaced. O.B. at 18-19. *Soukup* establishes that if *Equilon* and *Navellier* are *stare decisis* on the question of who bears the burden of establishing an exemption from the anti-SLAPP statute, they support Gore, not Simpson. 31 Cal.4th at 734. In any event, *Equilon* and *Navellier* were decided in 2002; 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).

[9] Although *Brill Media* held to the contrary, it was decided a year before this Court's decision in *Soukup*. *Brill Media*'s fundamental holding on this issue already has been undermined.

condemned in *Soukup* – impose on defendant the burden of proving that its speech is entitled to the full protection of the First Amendment, as part of the first prong of the anti-SLAPP statute.

Simpson attempts to distinguish *Soukup* by pointing out that the Section 425.18(h) exemption requires proof of different facts than the Section 425.17(c) exemption. O.B. at 23-25.[10] Gore's argument is not that *Soukup* held that all exemptions from the anti-SLAPP statute bear the same burden allocations. The other exemptions were not before the Court. Instead, Gore's argument is that the Court's reasoning in imposing on plaintiff the burden of persuasion for the Section 425.18(h) exemption applies fully to the Section 425.17(c) exemption.

4. UNDER THE STATUTE'S PLAIN LANGUAGE, THE SECTION 425.17(c) EXEMPTION DOES NOT APPLY TO GORE'S NOTICE.

Simpson conceded below that by its terms, the anti-SLAPP statute applies to Simpson's claims; it could not dispute that its Complaint sought to punish Gore for speech in connection with an issue of public interest. App. 0351-0352. The trial court and the court of appeal agreed. App. 0960; Op. at 6-7. Instead, Simpson focused on Section 425.17(c), invoking this

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[10] Simpson claims that "the SLAPPback plaintiff has the burden of establishing that the original SLAPP was illegal as a matter of law, not because the SLAPPback statute is an exemption from anti-SLAPP protection, but because it would be wrong to impose a greater burden on a SLAPPback defendant than that imposed on an ordinary SLAPP defendant. ..." Id. at 24.

exemption to avoid having to satisfy the anti-SLAPP statute. As addressed above, Simpson is simply wrong in its initial argument that Gore bore the burden of persuading that this exemption does *not* apply. Yet, although the burden of persuasion for Section 425.17(c) is a necessary predicate for resolving this dispute, ultimately it is not dispositive. Even if Gore bears the burden of *disproving* the applicability of Section 425.17(c), he easily met that burden as the trial court and court of appeal unanimously determined.

A. Section 425.17(c) Exempts Some "Commercial Speech" from the Protection of the Anti-SLAPP Statute.

Simpson's interpretation of Section 425.17(c) is flawed in fundamental respects. Under Section 425.17(c), certain actions based on speech are exempt from the protections of the anti-SLAPP statute, but only if that speech meets two statutory criteria. The statute 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, or the statement or conduct was made in the course of delivering the person's goods or services.
>
> (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 ....

Cal. Code Civ. Proc. §425.17(c). Gore does not dispute that he primarily is engaged in the business of selling legal services, nor that the intended audience was potential buyers of his services. His Notice has some of the elements of commercial speech. The question is whether the Subsection (c)(1) prong has been satisfied. But in arguing that this prong is satisfied, Simpson misconstrues its language to reach a result never intended by the Legislature.

B. Section 425.17(c) Must Be Strictly and Narrowly Construed.

1. In Relying on Section 425.17(c)'s Preamble to Support Its Call for Broad Interpretation, Simpson Ignores Most of the Preamble, Which Supports Gore.

Simpson's arguments in this Court ultimately are premised on its flawed claim that Section 425.17(c) must be broadly construed to further the statute's goals of curbing abuse of the anti-SLAPP statute. *E.g.*, O.B. at 4, 27-28. Simpson relies on the statute's preamble, which declares that Section 425.17 was enacted to curb a "disturbing abuse of Section 425.16, the California Anti-SLAPP Law. ..." Cal. Code Civ. Proc. §425.17(a). But Simpson errs in narrowly focusing on one part of the preamble, and ignoring the remainder. The entire preamble reads:

> 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 or Section 425.16.***

Id. (emphasis added). Any interpretation of Section 425.17(c) must adhere to the overarching goal of ensuring that the anti-SLAPP statute continues to strongly protect the rights of speech and petition in California.

Simpson correctly argues that "[a] declaration of findings and purpose in a statute's preamble is 'the most significant source' for ascertaining legislative intent." O.B. at 20 (citation omitted). Although, as Simpson declares, "it should trump any contrary indications in a legislative committee analysis" (*id.*), that trump card need not be played here. The legislative purpose as gleaned from the *complete* preamble coincides completely with the legislative history that Simpson asks this Court to ignore. *Id.*, citing Op. at 16, 19-20 (discussing Senate Committee Analysis). Simpson's interpretation, and its call for a broad construction of Section 425.17(c), would undermine the anti-SLAPP statute in ways neither anticipated nor intended by the Legislature.

2. Exemptions to a Statute Are Strictly and Narrowly Construed Unless the Statute Dictates Otherwise.

The express language of Section 425.17(c) limits its application to two narrow categories of activity. Simpson cites no case law to support its call for a broad construction of this exemption. O.B. at 26-28. California law uniformly holds that "exceptions to a general provision of a statute are

strictly construed and will not be understood as a limitation on general powers except to the extent the limitation fully appears." *Estate of Banerjee* (1978) 21 Cal.3d 527, 540. Thus, in *City of Nat'l City v. Fritz* (1949) 33 Cal.2d 635, this Court found that the urged interpretation of a statutory exception would result in an exceedingly broad reach and that "'[t]hese factors, coupled with the rule that exceptions in a statute are to be strictly construed" required the interpretation of that statutory language as narrowly as possible. *Id.* at 636-637.

The courts of appeal agree. Relying on this rule, the Second District narrowly read Section 425.17(b)'s "public interest" exemption, in combination with the qualification on the exemption contained in subdivision (d)(2), to conclude that Section 425.17(b) did not encompass the speech at issue, and consequently that the anti-SLAPP statute applied. *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1494. The court concluded that this narrow construction was particularly important in the SLAPP context "given the Legislature's goal of reaffirming the anti-SLAPP law as a protector of free speech rights through the enactment of section 425.17." *Id.* at 1496; *see* Section B, *supra*.[11] Other than its myopic focus on one phrase

[11] No shortage exists of cases reaffirming this basic principle of statutory construction. *E.g.*, *WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal.App.4th 525, 541; *City & County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 400; *Estate of Thomas* (2004) 124

in Section 425.17(c)'s preamble – ignoring the parts that demonstrate the fallacy of its claims – Simpson offers nothing to suggest that this generally-applied principle should be altered here.

3. A Broad Construction of Section 425.17(c) Would Conflict with the Legislature's Mandate that the Anti-SLAPP Statute Be Broadly Construed.

Beyond the express language of the statute – although this language conclusively resolves this issue – a narrow construction of the Section 425.17(c) exemption is necessary because the anti-SLAPP statute must be broadly construed. Cal. Code Civ. Proc. §425.16(a) (emphasis added). This Court has adhered to the Legislature's express mandate, explaining that "[w]here, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory language as conclusive." *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-1120.

And where, as here, a statute by its own terms must be broadly construed, it necessarily follows that its exemptions must be narrowly construed. Thus, in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, the court concluded that because of "the voters' intent that the constitutional provision [at issue] be construed liberally," it was "compelled to resort to the principle that exceptions to a general rule of an enactment must be strictly construed," and it gave the

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Cal.App.4th 711, 720; *Breedlove v. Municipal Court* (1994) 27 Cal.App.4th 60, 64; *Barnes*, 147 Cal.App.3d at 767.

language at issue "its narrower, more common meaning." *Id.* at 1358 (citations omitted). Similarly, in *Roosevelt v. Roosevelt* (1981) 117 Cal.App.3d 397, 402, the court explained that "[e]xemption statutes are liberally construed in favor of the judgment debtor, so exceptions must be narrowly construed."

This make sense. If a statute must be liberally or broadly construed, necessarily its exemptions must be narrowly construed, lest the statute and the exemptions conflict. Because the anti-SLAPP statute must be broadly construed, it follows that Section 425.17(c) must be narrowly construed.

C. Simpson's Construction of Section 425.17(c) Is Not Within the "Words and Reason" of This Exemption.

Simpson cannot prevail based on the plain language of Section 425.17(c). Applied in a literal and common-sense fashion, Gore's Notice falls outside of Section 425.17(c). Thus, Simpson necessarily urges a broad construction of the statute. O.B. at 26-28. But even the broad construction urged by Simpson entails a rewriting of the statute, which this Court should not undertake. The statute's language is clear: the statement *that gives rise to the claim* must be either "representations of fact about that person's or a business competitor's business operations, goods or services" (made for a specified purpose, a requirement not at issue here) or "made in the course of delivering" Gore's services. Cal. Code Civ. Proc. §425.17(c), (c)(1). As set forth below, Simpson cannot satisfy either requirement.

1. The "Content" Exemption Does Not Apply Here Because Gore's Benign Notice Contained No Representations of Fact, Much Less Representations of Fact About Gore or a Business Competitor.

a. The Purported Implication Giving Rise to Simpson's Claim Is Not a Representation of Fact About Gore or a Competitor.

Under the Section 425.17(c) "content" exemption, the anti-SLAPP statute does not apply "to any cause of action brought against a person [selling good or services], ***arising from*** any statement or conduct by that person if [among other things] ***[t]he*** statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services" made for a specific purpose. *Id.* (emphasis added). Simpson cannot claim that the allegedly defamatory implication on which its claims are based – that Simpson's metal fasteners are defective – falls within the plain language of this exemption. This alleged implication is not about Gore or one of his competitors.

Simpson concedes, "[t]o be sure, the confluence of these words in the statute 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." O.B. at 33. Simpson argues, however, that this content exemption should be broadly construed to permit application of the Section 425.17(c) exemption because other statements in the Notice – statements that are *not* the source of Simpson's claims – allegedly satisfy the

content exemption. O.B. at 31-33. (As discussed below, Gore disputes this claim.) 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 the court of appeal correctly held that the three requirements for application of the content exemption must coincide in a single statement.

Simpson's interpretation is inconsistent with Section 425.17(c)'s plain language. The "statement or conduct" giving rise to the claim – not the publication of which it is a part – must meet the statutory "representations of fact" requirement. "The exemption does not extend to every cause of action arising from a statement *accompanied by* factual representations about the speaker's services." Op. at 12 (emphasis added). Simpson rewrites this exemption in arguing that the Court should look at the Notice more broadly and apply the statute if any part of the publication meets the Section 425.17(c) criteria. O.B. at 35.[12] (This is particularly true if the "representations of fact" requirement is jettisoned and substituted with

[12] Simpson's argument that the Notice must be read as a whole "for the advertisement to achieve its purpose" is meaningless. O.B. at 35. The same could be said about any publication. Nor does it matter that Gore's Notice was short and contained only a few statements. No bright line could be drawn based on the size of the work at issue. If the Section 425.17(c) elements need not coincide in a single statement, this will be the rule regardless of the size of the publication.

the nebulous, meaningless standard advocated by Simpson. *See* Section b, *infra.*) The Legislature considered and rejected an earlier version of Section 425.17(c) that would have endorsed the broad exemption that Simpson argues, in favor of the limited exemption that is the law. Section 3, *infra.*

Simpson's interpretation of Section 425.17(c) would lead to absurd results. Statements would be exempt from the anti-SLAPP statute's protection 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 lose the protection of the anti-SLAPP statute if the press release also mentioned the products sold by the business. Similarly, any speech that might affect another business – even if the parties are not competitors – would be wrapped into Section 425.17(c)'s reach. *E.g., New.Net, Inc. v. Lavasoft* (C.D. Cal. 2004) 356 F.Supp.2d 1090, 1104. The statute provides no support for this absurd result.

b. Gore Made No Representations of Fact in the Notice.

Even if the Notice could be viewed as broadly as Simpson urges, it still does not satisfy Section 425.17(c), which (as relevant here) applies only to "representations of fact" about Gore's legal services. Cal. Code Civ. Proc. §425.17(c)(1). The Notice contained none. In enacting Section

425.17(c), the Legislature adopted the test enunciated by this Court in *Kasky*, 27 Cal.4th 939. *E.g.*, MJN at MJN0040 ("SB515 indeed borrows from the *Kasky v. Nike* formulation of commercial speech"); *id.* at MJN0105, MJN0107 (bill "closely tracks" the standards on commercial speech established in *Kasky*).

In *Kasky*, the Court evaluated what must be shown to justify "laws aimed at preventing false advertising or other forms of commercial deception." 27 Cal.4th at 960. The Court held that in such circumstances, the commercial speech must include "representations of fact," such as "statements about the price, qualities or availability of individual items offered for sale," as well as, "statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product." *Id.* at 961. Similarly, "statements about the education, experience, and qualifications of the persons providing or endorsing the services" would be included. *Id.* Under the doctrine of *ejusdum generis*, the Court cannot interpret "representations of fact" as Simpson urges here.[13] Simpson's purported "representations of fact" bear

[13] "*Ejusdem generis* applies whenever specific words follow general words in a statute or vice versa. In either event, the general term or category is 'restricted to those things that are similar to those which are enumerated

no similarity to the specific representations of fact contemplated by this Court in *Kasky*.

Ultimately, the touchstone for whether a statement is a "representation of fact" is whether it easily can be verified by its disseminator. 27 Cal.4th at 962;[14] *see also Bernardo v. Planned Parenthood Fed'n of America* (2004) 115 Cal.App.4th 322, 348 (statements of opinion on disputed issue not "representations of fact" as contemplated in *Kasky*). 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 and easily falls outside of *Kasky*.

Indeed, Simpson's argument could be made about any statement about a third party's goods or services. In *New.Net*, 356 F.Supp.2d at 1104,

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specifically.'" *Kraus v. Trinity Mgmt. Srvcs.* (2000) 23 Cal.4th 116, 141 (citation omitted).

[14] The ill fit between the statements at issue here and the "representations of fact" considered in *Kasky* becomes apparent when one considers the primary rationale underlying the commercial speech doctrine. As this Court explained in *Kasky*, one key distinction between commercial and non-commercial speech, which justifies the U.S. Supreme Court's decision to withhold full First Amendment protection from commercial speech, is the fact that it is readily verifiable. *Id.* at 955; *accord id.* at 962; *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 566 (commercial speech is entitled to First Amendment protection if it is not misleading). Here, even assuming a defamatory implication is conveyed by Gore's Notice, this remarkably subjective "representation" is not subject to ready verification. It is, at most, an opinion about the potential problems of using galvanized fasteners with certain treated wood products.

for example, the court did not evaluate whether defendant's statements about plaintiff were encompassed by Section 425.17(c) because they implied that defendant had investigated and discovered certain facts about plaintiff's products. Rather, the court examined whether representations of fact were made about defendant or one of defendant's business competitors. *Id.; accord Troy Group, Inc. v. Tilson* (C.D. Cal. 2005) 364 F.Supp.2d 1149, 1155. Plaintiffs should not be permitted to avoid the restrictive language of the statute by adding another layer, and claiming that the statements imply that defendant has investigated and discovered the unstated facts.

Stretching to make this argument, Simpson claims that the Court *must* draw from the Notice the inference Simpson urges. O.B. at 34-35. Both the trial court and the court of appeal disagreed, rejecting the alleged inference and concluding that no defamatory implications were made in the Notice. App. 0960; Op. at 28-29. This issue is not before this Court. In any event, neither the anti-SLAPP statute nor Section 425.17(c) requires an inference favoring plaintiffs in deciding whether the anti-SLAPP statute applies (the first prong of the anti-SLAPP test). Simpson's cases address the standard to be applied when the Court is evaluating the merits, to determine if plaintiff has stated a claim (the second prong). O.B. at 34. Similarly, Gore's concession below addressed Simpson's defamation claim on its merits. *Id.* (citing RB 25). So too, *MacLeod v. Tribune Publ'g Co.* (1959) 52 Cal.2d 536 addresses the standard to be applied in determining if a

publication is defamatory. O.B. at 34-35. No reason exists to import this body of law into Section 425.17(c). Indeed, the opposite is true. The Legislature *chose* to adopt the Court's test from *Kasky*. That is the only standard to be applied in deciding if Section 425.17(c) applies. Simpson's argument highlights the ill fit between Section 425.17(c) and Gore's Notice.

Simpson also claims that the "representations of fact" requirement is met because Gore purportedly promised he would provide legal services to anyone responding to his Notice. O.B. at 33. Even assuming this implication could be drawn – and Gore had no obligation to represent individuals who responded to his Notice – this is not a "representation of fact." It is not a statement about Gore's qualifications to provide such legal services, his success rate in similar actions, or anything to this effect. It is a promise about future activity. Promises are not "representation[s] of fact." *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 840-841; *accord Baba v. Board of Supervisors* (2004) 124 Cal.App.4th 504, 517 (eviction threats are not factual representations under *Kasky*). The first part of Section 425.17(c)(1) has no relevance here.

2. The "Delivery" Exemption Does not Apply Because Gore Was Not Delivering His Services to Anyone.

Simpson argues, alternatively, that the Section 425.17(c)(1) delivery exemption applies. This section applies to statements or conduct made "in the course of delivering the person's goods or services." Yet, it has always

been undisputed – indeed, it was a key predicate for Simpson's arguments below – that Gore did not have a client when he ran the Notice. *E.g.*, O.B. at 10. Under the statute's plain language, Gore's statements could not have been made "in the course of delivering" his services, because his legal services were not being delivered to anyone.

To avoid this seemingly inevitable result, Simpson again argues incorrectly that Section 425.17(c) must be interpreted broadly. O.B. at 37-38. It is impossible to construe the delivery exemption so broadly without completely rewriting the statute. If the "representations of fact" requirement does not apply to the delivery exemption,[15] then interpreting the statute as Simpson advocates would render the first part of Subsection (c)(1) surplusage – an interpretation that must be avoided. *Elsner v. Uveges* (2004) 34 Cal.4th 915, 931. If Gore's attempts to deliver his services were encompassed by the second part of Subsection (c)(1), the first part of

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[15] In the court of appeal, Gore assumed that the delivery exemption applies even when no "representations of fact" are at issue – *i.e.*, that it applies to claims based on any statement or conduct "in the course of delivering the person's goods or services." However, it is an open question whether or not this exemption – like the content exemption – applies only to claims based on "representations of fact" made in the course of delivery. Certainly, parts of the legislative history support the view that it does. *E.g.*, MJN Exh. A at MJN0102. This is not an issue that need be resolved here. As discussed in this Section, the statements for which Simpson has sued Gore were not made in the course of delivering Gore's services and consequently the delivery exemption does not apply to Gore, regardless of how this exemption is interpreted.

Section 425.17(c)(1) would be unnecessary. Any entity that advertises its goods or services can be said to be attempting to "deliver" those goods and services in the same way that Simpson alleges here. This 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). Parties would simply invoke the second part of Subsection (c)(1), claim that they were "attempting to" deliver their goods or services, and thereby obtain the protection of Section 425.17(c) for any statements or conduct, and not merely statements or conduct that "consist of representations of fact." If the "representations of fact" requirement is not included within the delivery exemption (*see* footnote 15, *supra*), then this could not have been the Legislature's intent.[16]

Simpson's arguments revolve around the Second District's opinion in *Brill Media*. As the court of appeal recognized below, *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

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[16] Simpson's attempt to avoid this result makes no sense. O.B. at 44. If Simpson's interpretation is broad enough to include advertisements in the delivery exemption, it is broad enough to reach virtually anything a business does. If a manufacturer's disparagement of a competitor's products has any connection to the manufacturer's business, it would fall within Simpson's definition of the delivery exemption.

him into default for their own advantage." Op. at 15. The Second District in *Brill Media* held that the conduct 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 below disagreed, 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. "The 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 leasing." Op. at 16.

Pushing *Brill Media* even further than the Second District, Simpson urges this Court to adopt a construction that as a practical matter would make everything a business does exempt from the anti-SLAPP statute. Simpson's broad interpretation would reach advertising, purchasing supplies, and every other day-to-day activity of a typical business. Op. at 16 & n.11. Yet it is evident that the Legislature never intended Section 425.17(c) to be interpreted so broadly; if that had been its intent, it could simply have created a categorical exemption for all 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 ..."). It purposely chose not to do that, and instead to exempt only *some* of the speech engaged in by businesses. *See* Section 3, *infra*. Simpson's argument would nullify that deliberate choice by the Legislature.[17]

Simpson tries to avoid this result by pointing to a few cases that have interpreted the phrase "in the course of" broadly. O.B. at 38-41. These cases do not purport to hold that "in the course of" should always be interpreted broadly. Rather, they analyze that neutral statement based on the facts of the case. In *Ryan v. Garcia* (1994) 27 Cal.App.4th 1006, for example, "in the course of" was read broadly because public policy strongly

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[17] Simpson claims that judicial estoppel prevents Gore from attempting to "evade application of the commercial speech exemptions." O.B. at 43-44. This would require an absolute confluence between Civil Code Section 47(c) and the applicable part of Section 425.17(c), although these statutes use different language to serve different purposes. It is not incongruous for Gore to argue that the Notice had "'some relation' to an anticipated lawsuit" – necessary to invoke the litigation privilege, *see Rubin v. Green* (1993) 4 Cal.4th 1187, 1194 – yet was not published in the course of delivering Gore's legal services – which Simpson would have to disprove to trigger the Section 425.17(c) exemption. These positions are not "totally inconsistent," as is required 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, and judicial estoppel is inapplicable for this independent reason. *Id.* at 183.

favored the mediation confidentiality at issue there. *Id.* at 1010-1011. The Legislature amended Evidence Code Section 1119 in 1997 in light of this and another case to mandate a broader construction. *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 580-581.

Simpson's other cases are dictated by the language of the statute being interpreted. In *People v. Jenkins* (2006) 140 Cal.App.4th 805, 811, the Utah statute at issue defined the offense broadly. Similarly, Labor Code Section 3600, interpreted by this Court in *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 18, addresses injury "*arising out of* and in the course of the *employment*" – a far broader category than simply "in the course of" delivery. The statute interpreted in *Bigsby v. Johnson* (1941) 18 Cal.2d 860, 862-863 applied to sales "made in the course of *business operations*." This is far more broad than speech or conduct made "in the course of *delivering* the person's goods or services." These cases demonstrate that the Legislature knows how to write a broad "in the course of" exemption when it chooses. It intentionally did not do that here.

Simpson also argues, incorrectly, that the court of appeal's decision would take "an arbitrary snapshot at the moment of actual delivery" and apply Section 425.17(c) only to events during that moment. O.B. at 41. But the delivery exemption would apply to a wide range of speech or conduct, as

few services, or even goods, are delivered at a moment in time.[18] The absolute minimum requirement, however, must be that defendant's services are actually being "delivered" lest the delivery exemption be rendered meaningless. An advertisement is not, except in unusual circumstances not present here, a "delivery" of goods or services to anyone.[19]

3. Section 425.17's Legislative History Strongly Supports a Narrow Interpretation of This Exemption.

As addressed above, the language of Section 425.17(c) is not ambiguous, and therefore no reason exists to resort to the statute's legislative history. However, that history certainly supports the conclusions of the trial court and the court of appeal that Section 425.17(c) has no application here. Initially, the Legislature's clear intent was to eliminate abuse of the anti-SLAPP statute ***in order to protect the anti-SLAPP statute itself***, and its underlying goal of protecting the rights of speech and petition. This is reflected in a report of the Assembly Committee on Judiciary, which

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[18] For example, the Bill's sponsor CAOC urged that cases arising from alleged misconduct by insurance companies in adjusting earthquake claims should be exempt from the anti-SLAPP statute. Section 4.C.3, *infra*. Those claims arose in the course of the insurance companies' delivery of their services to their insureds, although potentially extending over days, weeks or months.

[19] Nor does it matter that Section 425.17(c) applies where the intended audience is "potential" customers. O.B. at 44. Advertisements are directed to "potential" customers; the content exemption would be unduly limited if Section 425.17(c) applied only to actual customers. Op. at 17.

emphasizes that SB 515 "seeks to ensure that the anti-SLAPP motion is employed appropriately to accomplish the purposes for which it was designed" – "suits or counter-claims brought against individuals [like Gore] ... who are targeted by powerful business interests" [like Simpson] in order "to discourage the exercise of free speech and petition rights" [as Simpson attempted to do with this lawsuit]. MJN at MJN0101. Simpson's reliance on one isolated sentence from the preamble, while ignoring the remainder and the gist, would defeat the Legislature's intent. Section B.1, *supra*.

Similarly, the legislative history supports the court of appeal's conclusion that Section 425.17(c) only applies to claims where the statement at issue meets the statutory criteria. The Report of the Assembly Committee on Judiciary explains that the bill:

> Prohibits the anti-SLAPP motion from being used in specified causes of action 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 ....

MJN at MJN0102, MJN0200 (emphasis added). Other legislative reports used similar language. *E.g.*, *id.* at MJN0205 (Senate Judiciary Committee). The bill's author, Senator Sheila Kuehl, used the same language in urging the Governor's signature. *Id.* at MJN0222. Simpson's interpretation is contrary to the plain language of Section 425.17(c) and its legislative history.

The legislative history reveals that this lawsuit by Simpson is a perfect example of the wrong the Legislature sought to remedy by enacting Section 425.17(c). The legislation was sponsored by the Consumer Attorneys of California "to stop ***corporate*** abuse of the [SLAPP] statute and to return Section 425.16 to its original purpose of protecting a citizen's rights of petition and free speech from the chilling effect of expensive retaliatory lawsuits brought against them for speaking out." MJN at MJN0036 (Analysis of Senate Bill 515 prepared for the Senate Committee on the Judiciary (emphasis added)).[20] The Second District certainly reached this conclusion when it analyzed this legislative history (as did the court of appeal below). *Major*, 134 Cal.App.4th at 1496. Simpson's claim that only

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[20] *Accord id* at MJN0201, MJN0213 (arguments in support of the bill focus on corporate abuse); *id.* at MJN0221 (in urging former Governor Davis to sign SB 515, Senator Kuehl explained that "corporate defendants" were abusing the SLAPP motion); *id.* at MJN0234 (Enrolled Bill Report explained that "a growing number of large corporations have inappropriately invoked the anti-SLAPP statute to delay and discourage consumer and other litigation against them by filing meritless anti-SLAPP motions. This bill is intended to stop corporate abuse of the anti-SLAPP statute and return to its original purpose of protecting citizens' rights of petition and free speech"); *id.* at MJN0247 (explaining that "the growing use by corporations of anti-SLAPP motions subverts the purpose of the anti-SLAPP law" in part because large corporate defendants with massive resources are not chilled by litigation to the same degree as most private citizens and nonprofit groups); *id.* at MJN0257 (Governor's signing statement explains that "[i]n recent years, a growing number of large corporations have used the anti-SLAPP statute to discourage consumer litigation against them. This bill is intended to stop corporate abuse of the anti-SLAPP statute and return to its original purpose of protecting citizens' rights of petition and free speech").

early versions of the bill addressed corporate abuse is demonstrably wrong. O.B. at 28.[21]

Indeed, the court of appeal correctly discerned the irony of Simpson invoking Section 425.17(c) as a sword against Gore. Op. at 20. Gore's actions here – and the Notice he published to further a possible consumer class action against Simpson – are exactly the type of speech and petition activity the Legislature intended to *protect* by enacting Section 425.17. The Legislature explained that Section 425.17 was necessary because "the same types of businesses who used the SLAPP action are now inappropriately using the anti-SLAPP motion against their public interest adversaries." MJN at MJN0102; *accord id.* at MJN0103. In urging the Governor to sign

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[21] Nor was the bill made more broad through its amendments, as Simpson claims. O.B. at 29. To the contrary, the Legislature chose to adopt a more measured approach, that looks 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 SB 1651." MJN at MJN0039; *accord id.* at MJN0055, MJN0283. SB 1651, which the Legislature rejected in favor of the more moderate approach of SB 515, would have broadly exempted from the protection of the anti-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." Motion for Judicial Notice (filed with this Court) ("S.Ct. MJN") at SRJN0005.

the bill, the bill's author explained that "SB 515 prevents the anti-SLAPP law from being used as a sword instead of a shield." *Id.* at MJN0223.[22]

Thus, a primary goal of Section 425.17 was to protect the pro bono public interest case, which should be completed in six months with minimal cost, from a SLAPP motion. *Id.* at MJN0036. Indeed, its purpose ultimately was to protect the quintessential SLAPP suit as described by the Second District in one of the first cases to address what was then a new statute:

> The favored causes of action in SLAPP suits are defamation [and] various business torts such as interference with prospective economic advantage, ... Plaintiffs in these actions typically ask for damages which would be ruinous to the defendants. [Citations.] ***SLAPP suits ... are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.***

Id., citing *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815-816 (emphasis added); *see also* MJN at MJN0037.[23]

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[22] Simpson sued Gore for the obvious purpose of shutting down the class action lawsuit that Gore was pursuing. Simpson has offered no evidence of harm from Gore's benign Notice. And it has been successful – Simpson certainly convinced Gore that it was not worth the high personal price that he has been forced to bear. Simpson turns Section 425.17 on its head by using it as a sword against Gore.

[23] Simpson argues that Gore is not entitled to the protection of the anti-SLAPP statute because some lawyers practice in large firms, and they can obtain insurance to protect themselves. O.B. at 30-31. This makes no sense at all. This Court is resolving *this case*, and Gore is not a member of a large firm, nor is there any evidence before the Court that he is insured for this claim (and he is not). Moreover, as discussed above, the legislative history makes clear that Section 425.17(c) was designed to control

As the Report of the Senate Judiciary Committee explained, the Legislature viewed SB 515 as "a measure that seeks to trim off a few bad branches as argued and identified by the CAOC."[24] *Id.* at MJN0038; *see also id.* at MJN0058 (CAOC describes SB 515 as "a very measured response to a critical problem" by which the Legislature "carefully tailor[ed] the exceptions" to return the anti-SLAPP statute "to its original purpose: to protect free speech from expensive or daunting retaliatory lawsuits"). Thus, the Enrolled Bill Memorandum to the Governor summarized the arguments in support of the bill as follows: "This bill will restore the use of California's anti-SLAPP statute to its intended purpose, limiting frivolous lawsuits against persons exercising their first amendment rights." MJN at MJN0218.

The intended beneficiaries of Section 425.17(c) were cases brought by consumers subject to unfair business practices, such as *DuPont Merck Pharm. Co. v. Superior Court* (2000) 78 Cal.App.4th 562, which held that "allegations relating to the defendant's FDA activities were lobbying activities and fell squarely within the 'petitioning' prong of the statute." MJN at MJN0038-MJN0039. Other cases that CAOC believed had been

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corporate abuse of the SLAPP statute. The only corporate abuse in this lawsuit comes from Simpson.

[24] Consumer Attorneys of California ("CAOC") sponsored SB 515; the legislative history evidences the Legislature's intent to remedy the problem as identified by CAOC. *E.g.*, *id.*; MJN at MJN0038.

wrongly decided included fraud and related claims based on allegedly improper insurance claims resolution in connection with the Northridge earthquake, failure-to-warn claims against the manufacturer of an herbal dietary supplement, and false advertising claims. MJN at MJN0052-MJN0054; *see also id.* at MJN0079 (Legislature's enunciation of appropriate and inappropriate uses of the anti-SLAPP statute). As described by CAOC, the bill was designed to prevent a corporation that "lies about a product" from relying on the anti-SLAPP statute to escape or stall litigation. MJN at MJN0057. "That is why SB 515 distinguishes between commercial activity, which includes statements about their products, from constitutionally protected speech." *Id.* at MJN0058.

Critically, the Legislature made clear its intent to adopt the "factual content" requirement enunciated in *Kasky* to establish the Section 425.17(c) exemption:

> Finally, the factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services.

Id. at MJN0107. SB 515 was designed to apply to "speech intended to persuade an audience to buy one product instead of another" because that speech is "clearly more in furtherance of business considerations and may

be characterized as commercial speech which does not enjoy full constitutional first amendment protection." MJN at MJN0039-MJN0040. If the Legislature wanted to wrap all "advertisements" within the reach of Section 425.17(c), it could have done so. It intentionally did not.

As the legislative history makes clear, only certain "commercial speech" is subject to Section 425.17(c) – commercial speech in the context of "laws aimed at preventing false advertising or other forms of commercial deception" as defined by this Court in *Kasky*, 27 Cal.4th at 960. Thus, while a finding that the Notice is "commercial speech" is a necessary condition, it is not sufficient. Indeed, a narrow interpretation of Section 425.17(c) is vital to protect the non-commercial speech that the anti-SLAPP statute was designed to protect. *Id.* at MJN0107. As the Report by the Assembly Committee on the Judiciary explained, "even if the bill excludes some commercial speech from the anti-SLAPP motion, there is a countervailing governmental interest in protecting the non-commercial speech of individual citizen and small community that is targeted by SLAPP suits." *Id.*; *accord id.* at MJN0206 (same comments from Senate Committee on the Judiciary).

This Court should not interpret Section 425.17(c) in a way that would subject all advertisements, regardless of their content or context, to its terms. To do so would render the anti-SLAPP statute unavailable to defendants engaging in First Amendment-protected activities, contrary to the very purpose of the anti-SLAPP statute. *E.g.*, *Equilon*, 29 Cal.4th at 61-62.

Rather, it should examine the statements carefully to determine if they meet the express and narrow statutory criteria. As addressed above, these statements do not. No "representations of fact" were made in Gore's Notice. Nor were the statements made by Gore in the "course of delivering" his services. Section 425.17 does not apply.[25]

5. CONCLUSION

Neither of the procedural issues presented to this Court should stand in the way of the final resolution of this matter in Gore's favor. As the trial court and the court of appeal unanimously held, Gore's Notice is entitled to the full protection of the First Amendment. Those rulings are not

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[25] The second issue accepted for this Court by review could be interpreted in two ways: (1) whether on the facts of this case, which involves an attorney, the Section 425.17(c) exemption applies; or (2) whether lawyers, due to the nature of the services they provide, are entitled to a narrower interpretation of Section 425.17(c). Gore understands that the former is the issue as accepted by this Court and consequently Gore does not directly address the latter possibility in this Brief. However, Gore notes that an argument certainly could be made that *some* actions by lawyers are by their nature outside of the Section 425.17(c) exemption. *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 490-491. While lawyer advertising unrelated to any specific matter may be subject to the same test as other service providers – a bare statement about a lawyer's professional qualifications, for example, may not have a sufficiently direct connection to petition rights to justify particular deference – Gore's Notice was directly connected to the rights of petition protected by the anti-SLAPP statute. Gore was seeking potential plaintiffs in a specific class action lawsuit intended to protect consumer rights. Thus, on the facts of this case – where the Notice at issue was intended to further the petition rights of the very group, consumers, that Section 425.17(c) was enacted to protect – an argument could be made that Section 425.17(c) should not be used to deprive the Notice of the anti-SLAPP statute's protection.

challenged here. Simpson's strained statutory interpretation arguments quite literally turn Section 425.17(c) on its head and threaten the continued viability of the anti-SLAPP statute in business contexts. For all these reasons, Gore respectfully asks this Court to conclude that Section 425.17(c) has no application to this litigation and, consequently, to affirm the trial court's order granting Gore's SLAPP Motion.

Dated: November 25, 2008

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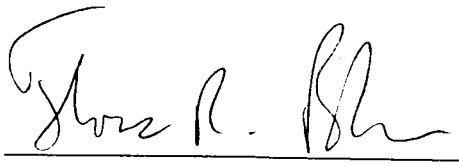
By: 

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), the text of this brief, including footnotes and excluding the caption, table of contents, tables of authorities and this Certificate, consists of 13,829 words in 13-point Times New Roman type as counted by the Microsoft Word 2003 word-processing program used to generate the text.

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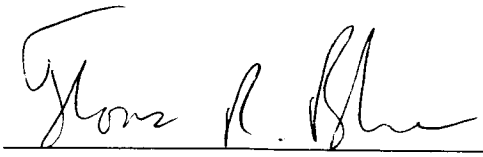
By: 

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