June 24, 2008

Honorable Chief Justice Ronald M. George,
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

RE: ***Simpson Strong-Tie Company, Inc. v. Gore***
(Petition for review filed June 6, 2008)
Supreme Court, Case No. S164174
Sixth Appellate District, Case No. H030444
Santa Clara County Superior Court, Case No. CV57666

Dear Chief Justice George and Associate Justices:

Amici curiae National Association of Manufacturers (the NAM) and California Manufacturers and Technology Association (CMTA) write pursuant to Rule 8.500(g)(1) to support Simpson Strong-Tie Company's (Simpson's) petition for review.

QUESTIONS PRESENTED FOR REVIEW

1. Consistent with the rule that a defendant has the burden of showing that a claim arises from protected activity under the anti-SLAPP statute, does a defendant likewise have the burden of showing that activity is protected because it falls outside the new statutory exemptions from the anti-SLAPP statute?
2. Does the new statutory exemption of commercial speech from anti-SLAPP protection include advertising by a lawyer soliciting clients for a contemplated lawsuit?
3. Do purported technical flaws in a public opinion survey that proves a claim make the survey inadmissible, or do they merely go to the weight of the evidence?
4. Can a statement couched as a prediction of future events be defamatory?

INTEREST OF *AMICI CURIAE*

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The NAM has long been a strong advocate of vigorous debate on matters of public concern. Our livelihood depends on our ability to provide the perspective of manufacturers to legislative, executive and judicial branch officials and the general public

on economic and political issues. By the same token, we support the rights of manufacturers and others to engage in commercial speech that allows them to promote the sale of goods and services. We have filed amicus briefs in a wide range of cases around the country supporting free speech and cautioning against government restrictions on it. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (cert. dismissed as improvidently granted)(arguing that manufacturers should have the same First Amendment right to defend their products as others have to attack them); *Bernstein v. U.S. Department of Justice*, 176 F.3d 1132 (9th Cir. 1999)(challenging government restrictions on encrypted software); *McConnell v. FEC*, 540 U.S. 93 (2003) (challenging government restrictions on issue advertising); *Ex parte Campbell*, Cause No. 56,045-01 (Tex. Crim. App. 2003) (opposing grand jury questions relating to issue advocacy).

CMTA is a mutual benefit, 501(c) (6) non-profit trade association representing large and small manufacturers doing business in the state of California. California has the largest and most diverse manufacturing base in the United States, including aerospace, consumer products, computer technology, biotechnology, chemical, automotive, oil, cement, steel and many more companies. Since 1913 CMTA has advocated for fair and reasonable laws, regulations and court decisions to support a healthy and growing manufacturing economy. This case presents an opportunity for the court to rule on very important points of law and interpretation with regard to the anti-SLAPP statute application to attorney statements made in advertisements to potential clients. CMTA urges the court to grant the petition for review.

WHY THIS COURT SHOULD GRANT THE SUBJECT PETITION

Amici are organizations that represent companies doing business in California. Accordingly, *amici* have a substantial interest in ensuring that the legal rules applied to attorney solicitations relating to products or services sold in California are consistent with established constitutional, statutory and common law, as well as with good public policy. *Amici* believe the California Court of Appeal's decision involves an important issue relating to the limits of free speech in the context of attorney advertising that calls into question the qualities and attributes of the goods or services of manufacturers or other companies. It is essential that the statute at issue be properly interpreted to prevent unintended injury to the reputation, sales or viability of companies doing business in California. Free speech on matters of public interest is a critical part of our society, and those who rely on it have an obligation to act responsibly, particularly when the speech proposes a commercial relationship that is designed to be in conflict with other existing commercial relationships.

The NAM and CMTA are primarily interested in the attorney advertising issue in this case, and will focus this letter only on question 2 of the Petition for Review. We support review on the other issues raised on appeal as well.

I. The Legal Services Advertising Environment is Increasingly Active

For many years, attorney advertising was prohibited, and it was not until the 1970s that the Supreme Court began to recognize that commercial speech was entitled to certain First Amendment protections. In 1976, it first ruled that advertising by pharmacists of prescription drug prices could not be restricted by the state. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The Court quickly moved on to address attorney advertising, holding that it too deserved some First Amendment protection. *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). Since then, the Court has issued many other rulings, generally freeing lawyers to aggressively market their availability and expertise.

However, the majority in *Bates* made clear that false, deceptive or misleading attorney ads do not enjoy the same constitutional protection. States may restrict such advertising, and, indeed, California has allowed lawsuits against improper speech in the anti-SLAPP statute at the heart of this case. The anti-SLAPP statute provides that suits challenging legitimate speech may be summarily dismissed. At issue here is whether there is a "probability that [Simpson] will prevail on the claim." The answer depends on the extent to which the Gore Law Firm (Gore) has acted outside the bounds of protected commercial speech or whether Gore falls within exemptions from the statute that apply to the advertising or delivery of goods or services. If Gore acted outside the bounds of protected speech, or if the firm falls within the exemptions, Simpson's suit will not be dismissed under the anti-SLAPP statute.

Determining whether attorney advertising is protected commercial speech is becoming an ever-increasing challenge. Lawyers need no longer rely only on newspapers or the Yellow Pages. Firms can hire sophisticated media organizations to develop marketing plans that include radio and television advertising, direct-mail solicitations, billboards, or other targeted multi-media campaigns. The explosive growth of the Internet has opened a variety of new outlets for attorneys, not only on their own web sites, but in chat rooms, blogs, activists' sites, support group sites, or other forums. It is an easy matter for a law firm to create a web site that focuses on a particular product or manufacturer and to have it quickly become one of the most frequently visited sites on that product or manufacturer. Sites are easily developed or taken down, and regulatory control over false, deceptive, misleading or manipulative information is becoming more and more problematic. Tracing the source of deceptive information about a product can be impossible.

In January, the Center for Medicine in the Public Interest released a report outlining the real-world consequences of on-line medical information that "appeared legitimate but that had no medical authority whatsoever. In many cases, [they] found

lawyers posing as medical experts." Robert Goldberg, Ph.D., Peter Pitts & Caroline Patton, MA, Center for Medicine in the Public Interest, *Insta-Americans*: The Empowered (and Imperiled) Health Care Consumer in the Age of Internet Medicine 3 (2008) (http://www.cmpi.org/PDFs/Reports/insta-americans.pdf). Routine searches for information about vaccines, Crestor, and Avandia produced results that were "dominated by Web sites paid for and sponsored by either class action law firms or legal marketing sites searching for plaintiff referrals." Id. at 3 & 5.

Such sites can do more than just encourage litigation. For example, misleading information about selective serotonin reuptake inhibitors (SSRSs) resulted in a decrease in their use as a teen antidepressant, and that same year, there was an 18% increase in youth suicides. Benjamin Shain, *Suicide and Suicide Attempts in Adolescents*, Pediatrics. Vol. 120 No. 3 Sept. 2007 (669-676).

This new world of self-promotion over the Internet carries an aura of informality, or even lawlessness, as a new generation of trial lawyers enters the field. Advertising or product-related information on specialized web sites, as opposed to newspaper or television ads, are susceptible to surreptitious behavior, including anonymous postings and outright falsehoods. The rules that California adopts and that this Court interprets are critical to a fair and just commercial environment that allows open discussion of public issues without improperly damaging the reputations or livelihoods of legitimate product manufacturers.

II. Lawyer Advertising Contains Representations of Fact

A lawsuit like Simpson's against law-firm advertising is expressly exempted from the anti-SLAPP law if the lawsuit arose from any statement by Gore that "consists of representations of fact about that person's . . . services, that is made for the purpose of . . . securing sales [of the person's services] . . . ." It is uncontested that the advertisement in question was published for the purpose of obtaining clients, and thus "securing sales" of the law firm's services. See Appellant's Appendix 11(AA). The only issues for debate with respect to this provision are (1) whether Simpson's lawsuit arose from Gore's advertising, and (2) whether the ad made representations of fact about Gore's services.

The Court of Appeal ruled that Simpson's suit arose not from Gore's offer to investigate, but from the "supposed implication that Simpson's products are defective." AA 12. Thus, the court ruled that Simpson's complaint that Gore disparaged Simpson's product did not arise from the advertisement, since the ad was designed to get clients, not to harm a product. The court also circuitously ruled that "to the extent that Simpson's action 'arise[s] from' a representation by Gore, the representation was not 'about' Gore's or a competitor's services or business operations." Id.

This ruling muddles the law. We urge this Court to review the decision because it is equally if not more plausible that Simpson's claim arose from the advertisement and that the advertisement consisted of representations about Gore's services. This kind of advertisement serves two purposes – to inform potential clients that they may have certain legal rights, and to suggest that the law firm can help assert them.

The statements were intended to convey and did in fact convey to the public the "fact" that the law firm could and would "investigate" whether wood deck owners have a potential claim against Simpson and two other manufacturers. The alleged disparagement arose from the advertisement, and the advertisement contained factual representations about the law firm's services. The court of appeal's narrow interpretation means that an advertisement containing two sentences is not considered a single "statement" under the anti-SLAPP law. This cramped reading is misleading and it could encourage a substantial number of damaging advertisements in the future.

III. Lawyer Advertising Begins the Delivery of the Lawyer's Service

The Court of Appeal also ruled that Simpson's cause of action does not fall within the second exemption of Section 425.17(c)(1) because the advertisement was not a statement made "in the course of delivering" Gore's services. AA 13. It rejected Simpson's argument that the advertisement was an attempt to deliver services that is part and parcel to the services themselves. Id. at 14-15. It also rejected arguments that the ad was part of the business transaction, that the ad constituted delivery of the services to the general public, and that delivery includes statements addressed to potential customers. Id. at 15-17.

The exemption applies to any statement made "in the course of delivering" the goods or services. Whether advertising constitutes a part of the course of delivering goods or services is a significant question of law that deserves a clear interpretation in California.

There are many instances where commercial transactions begin with some form of delivery, with the final terms of the transaction to be resolved by subsequent agreement or by operation of law. For example, a traditional traveling salesman carried his wares from place to place, offered them to potential customers, and completed the transaction with the exchange of money for the goods. When the customer chose the product and took possession of it, delivery occurred, but the transaction was not complete until the money was paid.

Estate planning seminars provide a similar example. Various law firms conduct seminars in their communities to explain what can happen when people fail to take steps to minimize estate taxes or finalize wills and other personal directives. These seminars

can contain considerable detail about the laws and how to develop an estate plan. Customers who ultimately retain a firm have a substantial head start already provided by the firm. The firm has already "delivered" a significant portion of the legal services for which they are retained.

In the case at bar, Gore delivered the initial portion of its services by explaining to customers the nature of the services to be rendered and its knowledge about a particular type of product, galvanized screws. When a customer verifies that he or she in fact used the product, the law firm can engage in a further information exchange to continue to build a record for any claims that may result. This back-and-forth process is an essential part of the delivery of legal services, and begins when a law firm aims its investigation at a certain product and the customers who use it.

It is important that this Court recognize that "delivery" under the anti-SLAPP statute is vague and deserves clarity. The Court of Appeal's narrow reading of the exemption provides a substantial loophole that will allow aggressive law firms to harm specific manufacturers without restraint.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the subject Petition and reverse the decision of the Court of Appeal.

Respectfully submitted,

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PROOF OF SERVICE

DISTRICT OF COLUMBIA

I certify that on June 24, 2008, I sent an original and eight copies of the foregoing by overnight delivery to:

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I also served a copy of the foregoing on each of the interested parties in this action by placing true and correct copy in sealed envelopes sent by U.S. Mail, first-class postage-prepaid, addressed to the following:

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