

CA No. 07-15895
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SCHERING CORPORATION,

Plaintiff/Appellee,

v.

FIRST DATABANK, INC.,

Defendant/Appellant.

**On Appeal From an Order Denying an Anti-SLAPP Motion
United States District Court for the Northern District of California
(No. CV-07-01142-WHA, Honorable William H. Alsop)**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF,
URGING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company.

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INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States, including many in California. WLF regularly appears before federal and state courts to promote economic liberty and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to promoting reforms designed to streamline the judicial process in order to reduce the tremendous tax being imposed on the economy by the high costs of litigation. WLF has supported efforts to make it easier for defendants to win dismissal of insubstantial claims. *See, e.g., Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). WLF also litigates in support of procedures designed to reduce litigation costs by ensuring that substantial claims can be decided expeditiously. *See, e.g., PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003).

WLF is concerned that the California anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, is prone to abuse by defendants seeking to obstruct the normal litigation process. As the California legislature has recognized, some defendants have invoked the anti-SLAPP statute in a manner not intended by the legislature, with the result that litigation not intended to be subject to the statute is blocked or delayed. Such delays inevitably increase the overall costs of litigation and

benefit few but the lawyers involved. WLF believes that in controversies, such as this one, that were never intended to be covered by the anti-SLAPP statute, motions to dismiss and for summary judgment and Fed.R.Civ.P. 11 are the appropriate vehicles for protecting the interests of defendants in avoiding frivolous litigation.

WLF takes no position on the merits of the underlying dispute between the parties. But WLF believes that Plaintiff-Appellee Schering Corporation has raised substantial issues that ought to be considered expeditiously yet thoroughly. WLF does not believe that the interests of justice are served when defendants in commercial disputes of this nature are permitted to disrupt the normal litigation process by filing an anti-SLAPP motion and then bringing the lawsuit to a halt while they appeal the denial of their motion.

WLF has no direct interest in the outcome of this case and thus brings to the case a perspective that is distinct from that of any of the parties. Accordingly, WLF believes that its brief may be of significant assistance to the Court in resolving the legal issues raised by this appeal. WLF is filing its brief with the consent of all parties.

STATEMENT OF THE CASE

This case involves claims by Schering that Defendant-Appellant First

DataBank, Inc. (FDB) persists in including false and misleading information about one of Schering's pharmaceutical products in its National Data Drug File Plus (NDDF). The NDDF is a commercial database that includes information about nearly every drug approved for marketing by the federal Food and Drug Administration (FDA). The parties have thoroughly described in their briefs the circumstances surrounding this dispute; WLF touches briefly on background facts of particular relevance to its view that the anti-SLAPP statute is not applicable to the dispute.

The product at issue is Proventil, an FDA-approved asthma rescue medication manufactured by Schering. It is dispensed via an albuterol sulfate metered-dose inhaler. The inhaler administers albuterol sulfate by suspending it in hydrofluroakaline (HFA), a propellant. FDA has approved two other albuterol sulfate inhalers, Ventolin and ProAir, that also use HFA as a propellant. The three products are not identical, however. For example, Proventil is the only one of the three drugs that uses oleic acid as an excipient. Schering contends that the differences among the drugs mean that some patients and their physicians prefer Proventil to the other drugs.

Proventil generally sells at a somewhat higher price than the other two drugs. Schering is concerned because, when doctors write prescriptions for

Proventil, pharmacists – after consulting information supplied by FDB via the NDDF – regularly fill the prescription not with Proventil as the doctor had prescribed but with one of the two lower-cost alternatives. Schering contends that FDB is falsely conveying to pharmacists that the three drugs are *therapeutic* equivalents, and thus candidates for substitution.¹ In fact, FDA presumes that the three drugs are *not* therapeutic equivalents because there is not sufficient scientific evidence to suggest that they will have the same clinical effects on patients. In most States, pharmacists are prohibited from substituting a drug that has not been determined by FDA to be therapeutically equivalent to the prescribed drug, without obtaining advance approval from the prescribing physician. Thus, Schering contends, pharmacists would not be routinely filling Proventil prescriptions with Ventolin or ProAir except for the inaccurate information about Proventil being peddled by FDB. FDB responds that nothing in the NDDF states that the three drugs are therapeutically equivalent and that it cannot be held responsible if pharmacists are inaccurately reading the NDDF as

¹ Drugs are “pharmaceutical equivalents” if (as here) they have the same active ingredients, dosage form, route of administration, and strength. Drugs that are pharmaceutical equivalents can also be deemed “therapeutic equivalents,” but only if they can be expected to have the same clinical effect and safety profile when administered to patients under the conditions specified in the labeling.

indicating such equivalence.

Schering filed suit in U.S. District Court in New Jersey, alleging that the information about Proventil that FDB was selling/licensing through the NDDF was false, and stating causes of action for product disparagement, negligence, and tortious interference with economic advantage. FDB succeeded in having the case transferred to California and then filed a “special motion to strike the complaint” under California’s anti-SLAPP statute.

California adopted its anti-SLAPP statute in 1992.² The California legislature adopted the law in response to what it perceived to be “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” Cal. Civ. Proc. Code § 425.16(a). Section 425.16 establishes a procedure that allows the trial court to evaluate the merits of such lawsuits at the early stages of the litigation and to strike those that lack merit, thereby “limit[ing] the costs of defending against such a lawsuit.” *Varian Medical*

² SLAPP is an acronym for “strategic lawsuits against public participation.” The term was coined in the 1980s by University of Denver law professors who viewed SLAPP suits as an illegitimate tool used by powerful business interests to silence individuals who publicly voiced criticism of those interests. See Pring & Canan, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBLEMS 506 (1988).

Systems, Inc. v. Delfino, 35 Cal. 4th 180, 192 (2005).

The California legislature later determined that § 425.16 had become subject to “disturbing abuse” by defendants who were invoking its protections even though the lawsuits filed against them were not the types of suits that the legislature had intended to protect against; indeed, the legislature determined that these inappropriately filed anti-SLAPP motions were themselves “undermin[ing]” the exercise of speech and petition rights (*i.e.*, the suits themselves constituted a legitimate exercise of those constitutional rights). Cal. Civ. Proc. Code § 425.17(a). Accordingly, the legislature in 2003 adopted an anti-anti-SLAPP statute to impose strict limits on the circumstances under which the protections of § 425.16 could be invoked. In general, the new legislation barred the filing of § 425.16 anti-SLAPP motions against suits seeking relief on behalf of the general public, § 425.17(b), or against suits that are largely commercial in nature. § 425.17(c).

By order dated April 20, 2007, the district court denied FDB’s anti-SLAPP motion. The court noted that addressing an anti-SLAPP motion entails a two-part inquiry. First, the moving party must establish that the suit “arises from an act in furtherance of [the defendant’s] rights of petition or free speech in connection with a public issue,” as set forth in §§ 425.16. Slip Op. at 14.

Second, the burden then shifts to the plaintiff “to demonstrate a probability of prevailing on the challenged claims.” *Id.* The district court determined that it did not need to address the first prong of the analysis because Schering met its burden under the second prong by “making a *prima facie* showing of facts to sustain a favorable judgment.” *Id.* at 14-15. The district court also held that the motion should be denied for an independent reason: the anti-SLAPP statute was inapplicable to this case because it was governed by New Jersey choice-of-law rules, which would reject application of the statute. *Id.* at 5-14. FDB has appealed the denial of its anti-SLAPP motion to this Court.

SUMMARY OF ARGUMENT

The briefs filed by FDB and its supporting *amici* focus largely on their assertions that Schering failed to establish a probability of prevailing on any of its three causes of action. The Court need not reach that issue in order to affirm the decision below. FDB has failed to meet its burden of establishing that this is the type of suit to which the California legislature intended to extend the privilege of the filing of a special motion to strike the pleadings.

That failure is most readily apparent if one examines the requirements of § 425.17(c). That provision states that the anti-SLAPP statute does not apply to suits against businesses based on “any statement or conduct” by the business,

when two conditions are met. First, the statement or conduct must *either* consist of representations about the defendant's or a competitor's business operations *or* must be made in the course of delivering the defendant's goods or services. Second, the intended audience of the statement or conduct must be *either* an actual or potential buyer or customer, *or* a person likely to repeat the statement to an actual or potential buyer or customer.

Section 425.17(c) quite clearly applies to the statements/conduct in which FDB is alleged to have engaged. First, FDB's statements regarding Proventil were made in the course of delivering FDB's goods or services; that is, the statements were made in the NDDF, which is a product that FDB delivers to its customers in the medical community. Second, the intended audience of FDB's statements regarding Proventil include pharmacists and pharmacy benefit managers who are FDB's "actual" customers. Because all the conditions of § 425.17(c) are met, FDB cannot meet its initial burden of demonstrating that its statements/conduct regarding Proventil are the type of speech that the California legislature intended to protect under the anti-SLAPP statute.

One searches FDB's brief in vain for any mention of § 425.17(c), a statutory provision that was fully briefed in the district court. To the extent that FDB may attempt in its reply brief to dispute the applicability of that statute,

WLF expects FDB to focus on § 425.17(c)(1), which sets forth the first of the two conditions that must be met for this portion of the anti-anti-SLAPP statute to apply.³ WLF contemplates that FDB will argue that the requirements of § 425.17(c)(1) can be met only by showing that the challenged statement or conduct consists of representations about the business operations of the defendant or one of its competitors.⁴ While there are conflicting *dicta* in various court decisions regarding how § 425.17(c)(1) should be construed, FDB’s anticipated interpretation is inconsistent with the unambiguous statutory language. The only plausible interpretation is the one espoused by Schering: that the legislature also intended the statute to apply when, as here, the defendant’s challenged statements were made in the course of delivering the defendant’s goods or services. The legislative history of § 425.17(c) confirms that Schering’s interpretation of that statute is the correct one.

WLF does not mean to disparage the importance of truthful speech about medical products. It repeatedly has gone to court to protect the First

³ For ease of understanding, WLF will refer herein to § 425.17(c) as the “commercial exception” to the anti-SLAPP statute.

⁴ The statements at issue in this case concern Schering, which is not, of course, either the defendant or a competitor of the defendant. Thus, if FDB’s interpretation of § 425.17(c)(1) were correct, that statute would have no application to this case.

Amendment right to engage in such speech. Moreover, WLF believes that delivery of health care is advanced by allowing for the widest possible dissemination of such speech. But the initial issue here is not whether FDB's speech is truthful, but whether the California legislature intended to provide special protections to FDB's speech, by allowing FDB to invoke the expedited procedures of the anti-SLAPP statute. The evidence indicates that the legislature had no such intent. Rather, the legislature intended that commercial disputes of the type at issue here should be resolved in accordance with the regularly applicable rules of civil procedure. If FDB can establish that Schering has put forward insufficient evidence to bring its claims before a trier of fact, then FDB will be entitled to an award of summary judgment.

But FDB is not entitled to a rush to judgment, particular when (as here) Schering has raised issues that on their face appear substantial. Schering alleges that, as a direct result of information received from FDB, pharmacists routinely are supplying patients with either Ventolin or ProAir even when the patient's doctor has prescribed Proventil – and they do so without seeking approval from the doctor. Such substitution of drugs not deemed therapeutic equivalents is prohibited in most States and may be reason for concern. Accordingly, Schering's allegation that false information from FDB is the cause of this

improper substitution deserves careful scrutiny. Because FDB is a well-financed commercial entity that is unlikely to be dissuaded from continuing to engage in its commercial endeavors by this lawsuit, there is no reason to conclude that the California legislature intended to short-circuit that careful scrutiny by applying the anti-SLAPP statute to this case.

ARGUMENT

FDB and its supporting *amici* focus largely on a single issue: they contend that Schering has failed to establish a probability of prevailing on any of its three causes of action. But in order to reach that issue, FDB must prevail on three preliminary questions: (1) is FDB entitled to take an interlocutory appeal from the order denying its anti-SLAPP motion?; (2) under New Jersey choice-of-law rules, is the California anti-SLAPP statute applicable to this case?; and (3) is this commercial dispute the type of lawsuit to which the anti-SLAPP statute was intended to apply? WLF's brief focuses on the third of those three issues.

I. SECTION 425.17 MAKES CLEAR THAT THIS IS NOT THE TYPE OF SUIT TO WHICH THE CALIFORNIA ANTI-SLAPP STATUTE APPLIES

California adopted its anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, in 1992 in response to what it perceived to be “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of

freedom of speech and petition for the redress of grievances.” Cal. Civ. Proc. Code § 425.16(a). Section 425.16 establishes a procedure that allows the trial court to evaluate the merits of such lawsuits at the early stages of the litigation and to strike those that lack merit, thereby “limit[ing] the costs of defending against such a lawsuit.” *Varian Medical Systems*, 35 Cal. 4th at 192.

A. Section 425.17 Was Adopted to Eliminate Abuses of the Anti-SLAPP Statute

The California legislature later determined that § 425.16 had become subject to “disturbing abuse” by defendants who were invoking its protections even though the lawsuits filed against them were not the types of suits that the legislature had intended to protect against; indeed, the legislature determined that these inappropriately filed anti-SLAPP motions were themselves “undermin[ing]” the exercise of speech and petition rights (*i.e.*, the suits themselves constituted a legitimate exercise of those constitutional rights). Cal. Civ. Proc. Code § 425.17(a). Accordingly, the legislature in 2003 adopted an anti-anti-SLAPP statute to impose strict limits on the circumstances under which the protections of § 425.16 could be invoked. In general, the new legislation barred the filing of § 425.16 anti-SLAPP motions against suits seeking relief on behalf of the general public, § 425.17(b), or against suits that are largely commercial in

nature. § 425.17(c).

Section 425.17(c) provides in pertinent part as follows:

(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 operations, goods, or services, that is made for the purpose of obtaining approval for, 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, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, . . .⁵

California courts have established a two-part inquiry when addressing anti-SLAPP motions:

First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected

⁵ Section 425.17 exempts several categories of lawsuits from the provisions of § 425.17(c), including actions against newsmen, or individuals engaged in disseminating ideas or expression in a book or academic journal, § 425.17(d)(1); actions against an individual based on the creation or exhibition of any dramatic, literary, musical, political, or artistic work, including articles published in a newspaper or magazine of general circulation, § 425.17(d)(2); and actions against nonprofit organizations that receive a majority of their revenue from government sources. § 425.17(d)(3).

activity. . . . If the court finds that such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.

Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 67 (2002). The burden is on FDB, as the defendant, to demonstrate that the causes of action asserted by Schering in this case are ones arising from protected activity. *Brill Media Co. v. TCW Group, Inc.*, 132 Cal. App. 4th 324, 331 (2005).

Schering's causes of action do not arise from activity protected by §§ 425.16 and 425.17. The commercial exception to the anti-SLAPP statute, § 425.17(c), quite clearly applies to FDB's statements in the NDDF regarding Proventil.⁶ The requirements set forth in the opening paragraph of § 425.17(c) are met because FDB is "primarily engaged in the business of selling or leasing goods or services" and Schering's lawsuit arises from a "statement or conduct" by FDB. The requirements of § 425.17(c)(1) are met because "the statement or conduct was made in the course of delivering the person's goods or services" – that is, FDB made statements regarding Proventil in the NDDF, which is a product that FDB delivers to its customers in the medical community. The

⁶ The district court did not address this threshold issue, in light of its finding that Schering had met its burden under the second prong of the two-part inquiry. Slip Op. 14-15. Nonetheless, the § 425.17(c) issue is properly before the Court – it was briefed by the parties in the district court and by Schering in this Court.

requirements of § 425.17(c)(2) are met because the “intended audience” of FDB’s statements regarding Proventil is its “actual . . . customer[s]” in the medical community. Because all the conditions of § 425.17(c) are met, FDB’s statements/conduct regarding Proventil are not the type of speech that the California legislature intended to protect under the anti-SLAPP statute.

B. Schering’s Interpretation of § 425.17(c)(1) Is the Most Plausible

One searches FDB’s brief in vain for any mention of § 425.17(c), a statutory provision that was fully briefed in the district court. To the extent that FDB may attempt in its reply brief to dispute the applicability of this statute, WLF expects FDB to focus on § 425.17(c)(1), which sets forth the first of the two principal conditions that must be met for the commercial exception to apply. WLF contemplates that FDB will argue that the requirements of § 425.17(c)(1) can be met only by showing that the challenged statement or conduct is covered by the language that appears in the first clause of § 425.17(c)(1); *i.e.*, that the challenged statement or conduct “consists of representations about [the defendant’s] or a business competitor’s business operations, goods, or services.”⁷ As FDB reads the statute, all the language that follows the first clause simply

⁷ The statements at issue in this case concern Schering, which is not, of course, either the defendant or a competitor of the defendant.

serves to modify that clause by imposing additional requirements. Thus, FDB apparently asserts, a statement or conduct falls within the requirement of § 425.17(c)(1) only if, *in addition to* meeting the requirements of the first clause, the statement is either: (1) made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the defendant's goods or services; or (2) made in the course of delivering the defendant's goods or services.

That construction is simply not a plausible interpretation of the language adopted by the California legislature. If the legislature had intended to convey the meaning that FDB apparently suggests, it would have used a parallel construction for the two clauses that FDB contends modify the opening clause of § 425.17(c)(1). In other words, it would have written the final clause as follows, “. . . or that is made in the course of delivering the [defendant's] goods or services,” in order to mirror the language in the prior clause (the clause that begins, “that is made for the purpose of obtaining approval . . .”).

Instead, the final clause of § 425.17(c)(1) uses language that closely parallels the language of the opening clause. Each clause sets forth requirements regarding the types of statements/conduct that fall within the commercial exception to the anti-SLAPP statute. The opening clause begins, “The statement

or conduct consists of representations of fact . . .,” while the final clause begins, “[T]he statement or conduct was made in the course of delivering . . .” The two clauses are connected by the word “or,” indicating that § 425.17(c)(1) is met if the statement/conduct at issue meets either of the two criteria. Because FDB’s statements quite clearly were “made in the course of delivering” the NDDF, the requirements of § 425.17(c)(1) have been met in this case.

The interpretation outlined in the preceding paragraph is also the most plausible from a commonsense standpoint. In adopting the commercial exception, the legislature was focusing on two types of speech that often are the subject of litigation involving commercial entities: (1) advertising; and (2) speech that accompanies a commercial product.⁸ The interpretation that Schering espouses (*i.e.*, that the opening and closing clauses of § 425.17(c)(1) are parallel clauses) neatly divides (c)(1) into those two categories; the first portion of (c)(1) addresses advertising-related litigation, while the second portion addresses litigation arising from speech that accompanies the

⁸ Examples of the latter type of suit are product liability claims filed against pharmaceutical companies. Such suits invariably challenge the adequacy of the drug label. Plaintiffs allege that they were injured because the manufacturer negligently failed to include on the product label a sufficient warning about possible side effects of the drug. *See, e.g., Motus v. Pfizer Inc.*, 358 F.3d 659 (9th Cir. 2004).

commercial product.⁹

The statutory exemptions from § 425.17(c) – set forth in § 425.17(d) – also support Schering’s interpretation. Section 425.17(d) provides that § 425.17(c) does not apply to causes of action involving either newsmen or individuals engaged in disseminating ideas or expression in a book or academic journal, § 425.17(d)(1); or individuals involved with creating or exhibiting any dramatic, literary, musical, political, or artistic work, including the publication of articles in a newspaper or magazine of general circulation, § 425.17(d)(2). There would have been very little point to creating those exemptions if the California legislature intended § 425.17(c)(1) to be interpreted in the manner FDB apparently espouses. The types of speech covered by the § 425.17(d) exemptions would virtually never be subject to § 425.17 in the first place; for example, except in the very rare instances in which a newspaper was writing a piece that was critical of the quality of a rival newspaper, newspaper articles would never be subject to the § 425.17(c) commercial exception. In contrast,

⁹ It is not at all clear, under FDB’s interpretation of the paragraph, that failure-to-warn product liability claims would be covered by § 425.17(c)(1), even though there can be little doubt that the legislature did *not* intend such claims to be subject to the anti-SLAPP statute. Under FDB’s interpretation, § 425.17(c)(1) would not cover such claims unless the *failure to include a warning* on a product label could somehow be deemed “representations of fact about [the defendant’s] goods.”

under Schering’s interpretation, § 425.17(d)’s newperson exemption is of considerable significance – in the absence of the exemption, all statements in a newspaper would be subject to the § 425.17(c) commercial exception because such statements are “made in the course of delivering the [defendant’s] goods or services.”¹⁰

C. *Brill Media* Confirms Schering’s Interpretation of § 425.17(c)(1)

WLF is unaware of any California appellate decisions that have engaged in an in-depth analysis of the meaning of § 425.17(c)(1). Decisions that have touched upon the meaning of that provision have included casual statements that are somewhat in conflict with one another. But the decisions favoring FDB appear not to have recognized that there was any potential ambiguity in the provision, and all of their statements regarding the meaning of § 425.17(c) can fairly be characterized as *dicta*.¹¹ In contrast, in *Brill Media*, the appeals court’s

¹⁰ Schering’s brief cogently explains why the exemptions contained in § 425.17(d) are inapplicable to FDB’s speech. *See* Schering Br. 43-44. Accordingly, WLF will not repeat those arguments here.

¹¹ The decision containing statements most strongly supportive of FDB’s interpretation is *Sunset Millennium Associates, LLC v. LHO Grafton Hotel, L.P.*, 146 Cal. App. 4th 300 (2006). However, the statements in *Sunset Millennium* were not outcome-determinative because the court found that the initial clause of § 425.17(c)(1) had been met: the challenged statements were about “a business competitor.” The court ultimately held that the requirements of § 425.17(c)(1) had not been met, but only because the defendant demonstrated that *neither* of

adoption of Schering’s interpretation of § 425.17(c)(1) *was* outcome-determinative. *Brill Media* involved claims that the defendants had engaged in speech/conduct designed to force the plaintiff companies into liquidation. The appeals court reversed the trial court’s grant of a motion to strike the complaint under the anti-SLAPP statute, holding that the defendants were ineligible for anti-SLAPP relief by virtue of the § 425.17(c) commercial exception. *Brill Media*, 132 Cal. App. 4th at 341-42. Notably, the *sole* basis for the court’s determination that the § 425.17(c)(1) requirement had been met was its finding that the challenged statements were made in the course of the defendants’ delivery of their services. *Id.* at 341. In describing § 425.17(c)(1), the court repeatedly stated that the provision required no more than that “[t]he [defendant’s] statement or conduct was made in the course of delivering the person’s goods or services.” *Id.* at 330, 341.

D. The Legislative History Supports Schering’s Interpretation of § 425.17(c)(1)

Schering’s interpretation of § 425.17(c)(1) is confirmed by the legislative

the other requirements of that provision had been met, because the challenged statements: (1) were not made for the purposes of obtaining sales; and (2) were not made in the course of delivering goods or services. Accordingly, the outcome of the case would have been the same regardless whether the court had adopted FDB’s or Schering’s interpretation of § 425.17(c)(1).

history surrounding adoption of the anti-anti-SLAPP statute in 2003.

Throughout the legislative history are statements from legislators indicating that the anti-SLAPP statute was primarily intended to protect individuals from abusive lawsuits filed by powerful interests, not to protect commercial interests. For example, in its report on the legislation that ultimately became § 425.17, the California Senate Judiciary Committee broadly described the bill as one designed to make the anti-SLAPP statute “inapplicable to . . . lawsuits brought against a business that arises from commercial statements or conduct of that business, as specified.” Sen. Judiciary Comm., 3d Reading Analysis of Sen. Bill No. 515 (2003-2004 Reg. Sess.), May 6, 2003 (hereinafter, “Senate Report”) at 1, *available at* www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0501-0550/sb_515_cfa_20030507_133358_sen_comm.html. The report quotes proponents of the legislation as explaining that while the anti-SLAPP statute ensures that the exercise of First Amendment rights by individuals is not chilled by abusive lawsuits, the business community does not need such protection because “this chilling effect does not apply when a large corporate defendant has massive resources that it may rely upon in litigation, unlike the private citizen.” *Id.* at 6. The report stated that the legislation was designed to overturn several “dangerous” precedents that had applied the anti-SLAPP statute in cases filed

against large commercial entities, and to make the statute “inapplicable” to cases filed against a business in which the “cause of action arises from the business’s commercial speech or activity.” *Id.* at 8.

The report of the Assembly Committee on Judiciary is to similar effect. The report explained that the legislation was necessary to eliminate “abuse” of the anti-SLAPP statute by large corporate defendants, whose speech is unlikely to be “chilled” by lawsuits because they have “massive resources that they may rely upon in litigation, unlike private citizens.” Assem. Comm. on Judiciary, Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended June 27, 2003, at 5, *available at* www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0501-0550/sb_515_cfa_20030630_121334_asm_comm.html. In light of the California legislature’s understanding that the business community had little need for the protections afforded by the anti-SLAPP statute and that the statute is generally inapplicable to “commercial activity,” there is no justification for adopting a narrow interpretation of § 425.17(c)(1) that could result in large numbers of anti-SLAPP motions continuing to be filed by corporate defendants in suits, as here, that challenge the defendants’ commercial activities.

II. CALIFORNIA'S NORMAL RULES OF CIVIL PROCEDURE ADEQUATELY PROTECT FDB'S FIRST AMENDMENT RIGHTS

Denying FDB the right to bring an anti-SLAPP motion does not undercut FDB's ability to protect its First Amendment rights. To the contrary, substantive New Jersey/California law imposes a heavy evidentiary burden on plaintiffs asserting causes of action based on a defendant's expressive activities. For example, in order to make out a cause of action for product disparagement, Schering will need to demonstrate both that FDB's statements were false and that FDB acted with the requisite degree of fault. *Mayflower Transit, LLC v. Prince*, 314 F. Supp. 2d 362, 372 (D.N.J. 2004). Unless Schering can introduce evidence sufficient to meet that evidentiary burden, FDB will be entitled to entry of summary judgment in its favor. *Auvil v. CBS "60 Minutes,"* 67 F.3d 816, 822 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996). Accordingly, even without the protection of the anti-SLAPP statute, FDB will have an opportunity to seek pre-trial disposition of the speech-related causes of action raised by Schering.

Moreover, WLF does not mean to disparage FDB's speech rights.¹²

¹² Indeed, WLF regularly supports protection of First Amendment rights in health care-related issues. For example, WLF has successfully challenged the constitutionality of FDA restrictions on truthful speech regarding off-label uses of FDA-approved products. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed*, 202 F.3d 331 (D.C. Cir. 2000). WLF is participating as an *amicus curiae* in an on-going challenge to New Hampshire's

FDB's speech is entitled to considerable First Amendment protection even if it is deemed commercial speech. While restrictions on the government's authority to regulate speech are somewhat relaxed when the speech at issue is commercial in nature, those restrictions are still quite stringent. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

But the degree of First Amendment protection to which FDB is due has little relevance to this appeal. The issue here is whether the California legislature intended FDB's First Amendment rights to be vindicated via the anti-SLAPP statute, or by means of the regular rules of civil procedure applicable in California and federal courts. As the preceding section of this brief indicates, the California legislature chose the latter course.

Section 425.17(c) makes clear that the California legislature intended the anti-SLAPP statute to be inapplicable to a wide variety of claims filed against commercial entities, even when the challenged speech is entitled to the highest level of First Amendment protection. For example, a commercial entity that testifies before a government regulatory body for the purpose of obtaining a change in the law to allow it to market a product is engaging in highly protected

efforts to restrict speech regarding doctors' drug-prescription practices. *IMS Health Inc. v. Ayotte*, 490 F. Supp. 2d 163 (D.N.H. 2007).

political speech that is subject to virtually no government restrictions. *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978). Yet, the legislature made clear in adopting § 425.17(c) that in most instances commercial entities are *not* permitted to vindicate those First Amendment rights by filing an anti-SLAPP motion to dismiss litigation challenging its testimony. Rather, they must resort to regularly available procedural devices – motions to dismiss, for summary judgment, and for sanctions under Fed.R.Civ.P. 11. *See, e.g.,* § 425.17(c)(1) (denying access to the anti-SLAPP statute for causes of actions based on statements “made for the purpose of obtaining approval for . . . commercial transactions in [the defendant’s] goods or services”).

Indeed, the legislative history makes absolutely clear that the legislature intended to include, within the scope of the § 425.17(c) commercial exception, statements made by a commercial entity before a government regulatory body. In *DuPont Merck Pharmaceutical Co. v. Superior Court*, 78 Cal. App. 4th 562 (2000), the California Court of Appeal had held that a pharmaceutical company met the first prong of the two-part inquiry for determining the applicability of the anti-SLAPP statute, when the company demonstrated that a suit filed against it under the California Unfair Practices Act, Cal. Bus. & Prof. Code § 17500,

challenged statements it made before the FDA.¹³ The legislative history states explicitly that one of the reasons the California legislature adopted § 425.17(c) was to overrule *DuPont Merck*. See Senate Report at 8 (“Proponents argue that the [*DuPont*] *Merck* decision is a very dangerous precedent for eroding the ability of citizens to bring private lawsuits to correct public or private wrongs. . . . This bill would effectively overturn the *DuPont* case.”).¹⁴ Given the legislature’s decision to make the anti-SLAPP statute inapplicable even to the fully protected political speech at issue in *DuPont Merck*, there is no reason to assume that the legislature would have intended the statute to apply to the commercial activity at issue here.

Moreover, the legislature’s rejection of *DuPont Merck* raises considerable

¹³ The plaintiffs (purporting to represent a class of consumers) alleged that the pharmaceutical company had testified before the FDA and elsewhere that generic forms of one of its drugs were not the bioequivalent of its drug. The plaintiffs alleged that those statements were false and were designed to delay marketing approval for the generics. The court of appeal held that, regardless whether those statements should be deemed commercial or noncommercial speech, they were uttered in furtherance of the defendant’s right of petition or free speech and thus were sufficient to permit the defendant to file an anti-SLAPP motion. *Id.* at 565-66.

¹⁴ WLF notes that FDB relies on the *DuPont Merck* decision in its brief, despite the fact that the court’s interpretation of the anti-SLAPP statute was overturned by the California legislature more than four years ago. FDB Br. at 20.

doubt regarding whether, even in the absence of § 425.17(c), FDB could properly invoke the anti-SLAPP statute. Section 425.16(b)(1) permits a defendant to bring an anti-SLAPP motion upon a showing that the cause of action “aris[es] from any act of [the defendant] in furtherance of [the defendant’s] right of petition or free speech under the United States or California Constitution in connection with a public issue.” Several California Court of Appeal decisions, decided before § 425.17 took effect, explicitly questioned *DuPont Merck* and held that commercial entities similarly situated to the defendant in *DuPont Merck* did not meet the standard established by § 425.16(b)(1). See, e.g., *Martinez v. Metabolife International, Inc.*, 113 Cal. App. 4th 181, 192 (2003); *Nagel v. Twin Laboratories, Inc.*, 109 Cal. App. 4th 29, 46-51 (2003). In light of the subsequent legislative overruling of *DuPont Merck*, it is fair to conclude that it was *Martinez* and *Nagel* that properly interpreted § 425.16(b)(1) and that that statute, quite apart from the later enactment of § 425.17, bars FDB from invoking the anti-SLAPP statute.

In sum, denying FDB access to the anti-SLAPP statute is not an affront to FDB’s First Amendment defenses. It is simply a recognition that the California legislature has designed alternative procedures for entities such as FDB to raise their defenses – procedures which, in light of FDB’s considerable resources, are

highly unlikely to lead to a chill in its assertion of First Amendment rights.

III. SCHERING HAS RAISED SUBSTANTIAL ISSUES THAT DESERVE CAREFUL CONSIDERATION

WLF takes no position on the merits of the dispute between Schering and FDB. Nonetheless, it was the substantial nature of the issues raised by Schering that initially interested WLF in participating in this case. Quite apart from the persuasiveness of the statutory-based arguments discussed above, WLF believes that the substantial issues raised by Schering deserve careful consideration, not the rushed judgment that (of necessity) is the hallmark of the grant of an anti-SLAPP motion.

Schering alleges that, as a direct result of information received from FDB, pharmacists routinely are supplying patients with either Ventolin or ProAir even when the patient's doctor has prescribed Proventil – and they do so without seeking approval from the doctor. Such substitution of drugs not deemed therapeutic equivalents is prohibited in most States and may be reason for health concern. Accordingly, Schering's allegation that false information from FDB is the cause of this improper substitution deserves careful scrutiny. That type of scrutiny is possible in connection with consideration of a motion for summary judgment; it is not possible in connection with consideration of an anti-SLAPP

motion.

Doctors have raised concerns that even drugs deemed by FDA to be the therapeutic equivalent of brand-name drugs may cause medical complications when substituted for the brand-name drug prescribed by the treating physician. For example, many doctors who treat epilepsy believe that generic drugs approved by FDA as therapeutically equivalent to well-proven drugs for treating epilepsy pose a health risk for their patients. *See* Michael J. Berg, M.D., *What's the Problem with Generic Antiepileptic Drugs? A Call to Action*, 68 *NEUROLOGY* 1245 (2007). Similar concerns have been expressed by cardiac care physicians regarding generic substitution for antiarrhythmic drugs. *See* Peter R. Kowey, M.D., *Issues in Bioequivalence and Generic Substitution for Antiarrhythmic Drugs*, AMERICAN HEART ASSOCIATION (2007), available at www.americanheart.org/print_presenter.jhtml?identifier=3015266. A recent study by the AARP concluded that while physicians support generic substitution in most circumstances as a cost-saving measure, many physicians report that “there are some drugs with narrow therapeutic indexes that should not be substituted even when required by a third party.” *See* AARP, *Physicians' Attitudes and Practices Regarding Generic Drugs* (March 2005), at 8.

Schering contends that the substitution that is taking place in this case

involves drugs that are not even recognized by FDA as therapeutically equivalent and is occurring without the knowledge of prescribing physicians who have prescribed Proventil for their patients. Schering contends that false speech by FDB is causing this substitution to occur. WLF lacks the medical expertise to know whether the information being supplied by FDB is false or whether the substitution that is taking place at pharmacies across the country is cause for public health concern. Nonetheless, WLF believes that the issues raised are sufficiently serious that, as a matter of health policy, it is preferable that those issues be addressed in connection with summary judgment motions after the parties have had an opportunity to engage in discovery.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation.

Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief of *amicus curiae* is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 6,781, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 2007, I deposited two copies of the brief of *amicus curiae* Washington Legal Foundation in the U.S. Mail, First Class postage prepaid, addressed to the following:

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