UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16809

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.

Plaintiff-Appellant,

v.

ROBERT L. DELSMAN,

Defendant-Appellee.

On Appeal from a Judgment of the
United States District Court for the
Northern District of California
No. 4:09-cv-01468-SBA

BRIEF FOR DEFENDANT-APPELLEE DELSMAN

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QUESTIONS PRESENTED

1. In granting defendant-appellee Delsman's special motion to strike under California's anti-SLAPP statute, California Code of Civil Procedure, § 425.16, did the district court err by not singling out for discussion whether references to plaintiff-appellant Sedgwick's "latest Ponzi scheme" on a web site and a postcard was actionable, when neither the text of Sedgwick's complaint nor Sedgwick's opposition to the special motion to strike either mentioned those words or cited the postcard on which they were displayed?

2. Did Sedgwick make a showing under California's anti-SLAPP statute that it had a probability of prevailing on the claim that Delsman defamed Sedgwick and committed "trade libel" by referring to Sedgwick's "latest Ponzi scheme"?

JURISDICTION

Appellant has properly asserted jurisdiction below and in this Court. However, as explained below, Delsman does not agree that Sedgwick has preserved several of the arguments that it presents on appeal.

STATEMENT

A. Facts

Defendant-appellee Robert Delsman is a former employee of General Electric Company ("GE") who filed a claim for long-term disability benefits under a disability insurance policy that GE provided for its employees. Appellant's Excerpt of Record

("ER") 54. Delsman came to believe that he was being unfairly denied disability benefits to which he was entitled and that much of the blame rested with plaintiff-appellant Sedgwick Claims Management Services, *id.*, a company that provides services to GE and many other companies managing claims under their workers compensation, disability and other policies. ER 53-54. Sedgwick's clients are required to set aside reserves to pay for claims under such policies, and, as a general matter, the more claims that are denied, the lower the reserves that have to be maintained. Upon investigation of Sedgwick, Delsman discovered that many other employees of many different companies objected to the way in which Sedgwick managed their claims. ER 41-42. Delsman started several web sites about Sedgwick at http://sedgwickcms.blogspot.com/, http://www.gesupplyrexeldiscrimination .blogspot.com/, http://sedgwickcmsclients.blogspot.com/, and http:// www.gesupply discrimination .com/. He also published a YouTube video. ER 54. He used these sites to publicize his dissatisfaction with Sedgwick, to encourage other disabled worker "victims" to speak out and publicize their grievances and lawsuits as well as his own, to urge employers to choose different claims management providers, and to spur federal and state authorities to crack down on what he considered to be Sedgwick's abuses. Delsman sent emails both to Sedgwick's own employees and to Sedgwick customers to publicize these web sites. After Sedgwick diverted Delsman's

emails to its communications officers, ER 57, thus preventing him from communicating with Sedgwick's staff, Delsman sent out a series of postcards about Sedgwick and his web sites instead. ER 57-58.

B. Proceedings Below

On April 3, 2009, Sedgwick filed a six-count complaint against Delsman, which, as amended on April 10, 2009, claimed that his web sites, emails, and postcards violated Sedgwick's rights. ER 52-76. Sedgwick alleged federal question jurisdiction on the ground that Delsman had marked up two copyrighted photographs of its senior officials to portray them as Nazi leaders. ER 53-54, 70. Sedgwick also alleged diversity jurisdiction over state-law claims for "trespass to chattels" (because his emails to Sedgwick staff were unwanted),[1] interference with prospective economic advantage, trade libel, defamation, and unfair competition under California Business and Professions Code section 17200. ER 53, 70-73. In paragraph 23 of its complaint, Sedgwick listed ten paragraphs of material quoted from Delsman's web sites that it contended were defamatory. ER 56-57. None of those paragraphs referred to a "Ponzi scheme" or even used the word "Ponzi." In paragraphs 29 through 35, Sedgwick reproduced text and graphical images from several web site pages and postcards that it claimed were tortious; the defamatory or otherwise tortious character

[1] *But see Intel Corp. v. Hamidi*, 30 Cal.4th 1342 (2003).

of the images portrayed was described in the text of the complaint. ER 58-68. Nowhere does the text of the complaint use the word "Ponzi" in specifying how Delsman's words and images supposedly violated Sedgwick's rights.

The images reproduced from one of Delsman's web sites in paragraph 32 included a "Wanted" poster featuring a photograph of a Sedgwick officer under a legend stating "WANTED FOR HUMAN RIGHTS VIOLATIONS," and over the words "Paul 'Ponzi' Posey"; to the side of the image were three legends, one of which was "Just Say No to Sedgwick's latest Ponzi scheme." ER 62. Paragraph 34 contains the same image, which is summarized in the complaint as follows:

> The postcard bears the copyrighted photo of Paul Posey, Sedgwick's Chief Operating Officer, stating Mr. Posey is "WANTED FOR HUMAN RIGHTS VIOLATIONS," goes on to ask whether the recipient has "[]been terrorized, threatened and lied to by Sedgwick Claims Management Services,' contains other defamatory statements and contains a link to Delsman's website blogs."
>
> ER 65.

Again, the text describing the allegedly tortious character of the postcard does not mention the word "Ponzi."

The trade libel and defamation counts allege generally that Delsman's "published statements were false," ER 72 ¶¶ 69, 75, and that Delsman's "statements were . . . motivated by his malice . . . in that he wanted to cause harm to Sedgwick,"

ER 72 ¶¶ 71, 77. However, neither of the counts alleges actual malice — publication of the statements with knowledge of falsity or reckless disregard of probable falsity.

Defending himself pro se, Delsman filed a motion to dismiss and for summary judgment that argued, among other things, that his use of Sedgwick's photographs of its senior staff was fair use, ER 42, and that Sedgwick's complaint was a SLAPP suit and should be dismissed as such. ER 41, 51. Sedgwick filed an opposition that was largely devoted to the copyright claims. With respect to defamation, Sedgwick's opposition to Delsman's SLAPP arguments argued briefly and generically that the Delsman statements over which it was suing were not protected by the anti-SLAPP statute because "rather than publish true statements about Sedgwick . . ., Delsman made defamatory and derogatory comments about Sedgwick on his blogs and in emails . . . and mailed defamatory postcards." Appellee's Supplemental Excerpt of Record ("SER") at 3. Sedgwick argued that because it claimed that Delsman was engaged in a vendetta against it, the anti-SLAPP statute could not be implicated. *Id.*

Turning to whether Sedgwick had shown a probability of prevailing, Sedgwick argued only that its "Complaint is legally sufficient, and each of Sedgwick's five state law claims is supported by a sufficient prima facie showing of facts to sustain favorable judgment." ER 5-6 (citing paragraphs of its complaint and paragraphs of an affidavit showing ownership of the photographs and alleging damage to

Sedgwick). Sedgwick did not argue that its complaint was verified, and did not cite any evidence purporting to show either that any of Delsman's statements was false or that any of them had been published with actual malice. Nor did Sedgwick make any specific arguments about the defamatory nature of any of Delsman's specific criticisms of Sedgwick. In particular, Sedgwick's opposition said nothing about Delsman's use of the word "Ponzi" to refer to Sedgwick or Posey.

Sedgwick's argument on probability of prevailing identified paragraphs 24, 29 and 32 of the complaint as setting forth the allegedly "false, defamatory and unprivileged statements posted on Delsman's website" on which its defamation claims were based. SER 5. Sedgwick's argument did not mention Delsman's postcard mailings, did not use the word "Ponzi," and did not identify any statements that showed how Delsman was allegedly engaged in "trade libel."

Along with its opposition, Sedgwick submitted an affidavit from its Communications Director, Frank Huffman, that attached the copyright assignments from the photographers who had taken the pictures of its officers, and a variety of documents that were said to show the impact that Delsman's statements had on Sedgwick. ER 20-39. These averments were all made on personal knowledge. Huffman did not claim personal knowledge about the allegations of the complaint, however. In the one paragraph devoted to the complaint, Huffman averred only, "I

am informed and believe and on that ground allege that the matters stated in the Complaint are true." Affidavit ¶ 2, ER 21.

In a careful opinion, District Judge Saundra Brown Armstrong granted Delsman's motion to dismiss the copyright claim on fair use grounds, and, recognizing as Sedgwick itself did in its opposition that Delsman's motion included a special motion to strike the state-law claims under the California Anti-SLAPP statute, Code of Civil Procedure § 425.16, granted that motion as well. Judge Armstrong reviewed the four fair use factors enumerated in 17 U.S.C. § 107 and found that they either favored Delsman (first and fourth factors) or were neutral (second and third factors). Turning to the anti-SLAPP motion, Judge Armstrong noted that "Sedgwick does not dispute that Defendant's statements were made in public forum, i.e. through his web blog and mailings." ER 12. She rejected the contention that Delsman was engaged only in a personal vendetta and private dispute because the complaint made clear that Delsman was reaching out to consumers and potential customers of Sedgwick, urging members of the public to communicate with Sedgwick and to report misconduct to law enforcement agencies. ER 13.

Turning to Sedgwick's probability of prevailing on the merits, Judge Armstrong ruled that, under California's anti-SLAPP statute, a plaintiff "cannot rely on allegations in the complaint, but must set forth evidence that would be admissible

at trial." ER 14. "[A] court looks to the evidence that would be presented at trial, similar to reviewing a motion for summary judgment; a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent admissible evidence." *Id.* Judge Armstrong rejected Sedgwick's showing because it "fails to adduce any evidence to meet its burden [but] simply recited the elements of each of its state law causes of action and cites to various allegations of the Amended Complaint. . . . The conclusory allegations in Sedgwick's unverified pleading, standing alone," did not carry its burden under the anti-SLAPP statute. ER 15.

SUMMARY OF ARGUMENT

Under California's anti-SLAPP statute, once a defendant shows that he has been sued over an exercise of his freedom of speech with respect to a public issue, or an issue of public interest, the plaintiff must show, through both legal argument and evidence that would be admissible at trial, that it has a valid legal claim against the defendant on which it has a reasonable probability of succeeding.

On appeal, Sedgwick has abandoned most of its arguments below. Sedgwick does not contest the dismissal of its copyright claim, and it makes no case for its state-law claims for trespass to chattels, interference with economic advantage, and unfair competition. Sedgwick argues that Delsman's postcard mailings were not statements made in the exercise of his free speech rights, but does not dispute that Delsman's

criticism on his web sites was protected by the anti-SLAPP statute. Nor does Sedgwick challenge the dismissal of its "trade libel" or defamation claims with respect to most of Delsman's statements about Sedgwick that were alleged in the complaint. It confines its appeal to one set of statements – the phrases "Paul 'Ponzi' Posey" and "Sedgwick's latest Ponzi scheme." Sedgwick faults the district court for not discussing these statements separately, and argues both that these statements are not protected by the SLAPP statute and that it met its burden of showing a probability of prevailing on claims that the statements were libelous because Huffman supposedly verified its complaint.

These arguments are faulty. Because Sedgwick itself never called the "Ponzi" references to the district court's attention in opposing the SLAPP motion, it can hardly fault the court for failing to discuss them separately. Moreover, Delsman's uses of the term "Ponzi," both on his web site and on one of his postcards, fall within the protection of the anti-SLAPP statute as exercises of free speech on an issue of public interest, because they were made in furtherance of his criticism of what he believed to be Sedgwick's pattern of deliberately denying valid claims to save its clients' money (and thus to reduce their need for claims reserves). Nor has Sedgwick shown any probability of success on its defamation claims for two reasons. First, Delsman used the term Ponzi as a hyperbolic expression of his strong opinion.

Second, even if the term were a statement of fact, Sedgwick did not introduce any admissible evidence either that Delsman's statements were false or that he made false statements with actual malice. Its complaint was unverified, and its only affidavit in opposition to summary judgment was from its director of communications who admitted that he did not have personal knowledge of the truth of the allegations in the complaint.

ARGUMENT

I. SEDGWICK'S APPEAL IS BASED ON A NARROW POINT THAT WAS NOT ARGUED BELOW AND HENCE WAS NOT PRESERVED FOR APPEAL.

Although Sedgwick's complaint alleged several different causes of action, based on a collection of statements made and images used by Delsman both on various parts of his anti-Sedgwick blogs and on a series of postcards that he mailed to call the blogs to the attention of Sedgwick's employees and clients, Sedgwick has dropped almost all of its claims on appeal and concentrated on two of its causes of action as applied to a single phrase — Delsman's use of the term "Ponzi" or "Ponzi scheme" on a postcard (and perhaps on a page of one of his blogs, which displayed an image of that postcard). Sedgwick has not pursued its claim of copyright infringement — which was its main argument below — or its claims for trespass to chattels, interference with economic advantage, and unfair competition. Nor does

Sedgwick pursue on appeal the claims against the allegedly defamatory statements described in paragraphs 23-24, 29-31, 33, and 35 of its complaint. The judgment striking or dismissing all of those claims should therefore be affirmed.

Instead, Sedgwick has confined its appeal to claims about which Sedgwick made no argument in opposition to Delsman's special motion to strike and which are, therefore, not preserved for appeal. This Court has consistently held that when a party does not present arguments to the district court, they are waived and cannot be raised on appeal. *See Llamas v Butte Community College Dist.*, 238 F.3d 1123, 1127-1128 (9th Cir. 2001); *Howard v. AOL*, 208 F.3d 741, 747 (9th Cir. 2000).

In its opposition to Delsman's special motion to strike, Sedgwick's entire submission in support of its probability of prevailing on its defamation and trade libel claims was as follows:

> The Complaint is legally sufficient, and each of Sedgwick's five state law claims[5] is supported by a sufficient prima facie showing of facts to sustain favorable judgment.[6] Sedgwick has provided examples in the First Amended Complaint to the Court, from which the Court can take judicial notice of:
>
> • the false, defamatory and unprivileged statements posted/published on Delsman's website (Complaint, ¶¶24, 29, 32)
>
> SER 5.

Footnote 6 set out a summary of the elements of Sedgwick's various causes of action,

including both defamation and trade libel.

Nowhere in the text of its brief did Sedgwick use the word "Ponzi," or explain that it claimed that the use of the word was defamatory, let alone the basis for such a claim. Paragraphs 24, 29 and 32 of the complaint cited various pages on Delsman's **web site** (paragraph 32 reproduced text from a web page where Delsman indicated that he planned postcards, and displayed two postcards, one of which contained the "Ponzi" reference). However, it was in paragraph 34 of the complaint, not cited to the district court, that Sedgwick identified the Delsman postcard mailing that included "Paul 'Ponzi' Posey" and the phrase "Sedgwick's latest Ponzi scheme." That postcard was cited to the district court only in a **different** bulletpoint, ER 6, as showing the factual basis for Sedgwick's claim for "interference with Sedgwick's economic relationships with its customers and prospective customers," a claim that has not been pursued on appeal.

Similarly, in the court below Sedgwick never contended that Delsman's communications using the "Ponzi scheme" term were any less related to issues of public interest than his direct references to its claims handling. Indeed, as noted above, Sedgwick's opposition to the motion to strike did not identify **any** specific comments by Delsman and certainly made no mention of the "Ponzi scheme" references. Sedgwick's only argument against treating Delsman's communications

as being within the scope of the anti-SLAPP statute was that he was pursuing a personal vendetta based on the denial of his own claim for benefits rather than speaking to a greater public issue. That argument has not been pursued on appeal. Consequently, Sedgwick's appellate argument against treating the "Ponzi" references as being related to an issue of public interest (Br.13-24) was not preserved for appeal.

Sedgwick also did not argue below that there was anything different about mailing postcards than about other means that Delsman used to express his criticisms. If, for example, Sedgwick had argued below that Delsman did not send specific postcards to many people, Br. 15-16, Delsman could have responded with evidence. Sedgwick may not make this fact-based argument for the first time on appeal.

Finally, Sedgwick did not make any arguments in the trial court in support of its claim for trade libel. It did not identify any statements by Delsman that constituted trade libel, and, although it included a paragraph in footnote 6 that recited the legal elements of a claim for trade libel, ER 5, Sedgwick made no effort to show how the evidence in the record below, or even the allegations in its complaint, made out a prima facie case of trade libel. Nor did any of the bullet points purport to show any evidentiary basis for a claim of special damages, which is an element of a claim for trade libel. That claim was thus abandoned in the court below and cannot be revived on appeal.

II. SEDGWICK SUED DELSMAN IN CONNECTION WITH HIS EXERCISE OF HIS CONSTITUTIONAL RIGHT OF FREE SPEECH, AND FAILED TO SHOW PROBABILITY OF SUCCESS.

A. This Case Falls Within the Scope of the Anti-SLAPP Statute.

California law protects against use of the courts to discourage free speech. Lawsuits that have this intended effect are known as SLAPP suits.

> SLAPP suits stifle free speech. They undermine the open expression of ideas, opinions and the disclosure of information. The marketplace of ideas, not the tort system, is the means by which our society evaluates [and validates] those opinions. The threat of a SLAPP action brings a disquieting stillness to the sound and fury of legitimate . . . debate.
>
> *Beilenson v. Superior Court*, 52 Cal. Rptr.2d 357, 365 (Cal. App. 1996).

In 1992, the California legislature recognized that there was a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition," and found a strong public interest encouraging "continued participation in matters of public significance." California Code of Civil Procedure, § 425.16(a) (further citations to the anti-SLAPP statute will be only to the sections of the Code of Civil Procedure). As one court explained:

> While SLAPP suits "masquerade as ordinary lawsuits" the conceptual features which reveal them as SLAPP's are that they 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. . . . Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for

> sanctions) are inadequate to counter SLAPPs. Instead, the SLAPPer considers any damage or sanction award which the SLAPPee might eventually recover as merely a cost of doing business. . . . By the time a SLAPP victim can win a "SLAPP-back" suit years later the SLAPP plaintiff will probably already have accomplished its underlying objective. Furthermore, retaliation against the SLAPPer may be counter-productive because it ties up the SLAPPee's resources even longer than defending the SLAPP suit itself.
>
> *Wilcox v. Superior Court,* 33 Cal. Rptr.2d 446, 450 (Cal. App. 1994).

To ensure that "this participation . . . not be chilled through abuse of the judicial process," the legislature established a presumption against the maintenance of litigation arising from any act "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." § 425.16(b). Once a court determines that such an issue is involved, the cause of action "shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." *Id.* Courts have given special consideration to SLAPP cases and have noted that "the early termination of [such a] lawsuit is highly desirable . . . . The public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain." *Baker v. Los Angeles Herald Examiner,* 721 P.2d 87, 96 (Cal. 1986) (citations and internal quotation marks omitted).

> The anti-SLAPP statute protects:
>
> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;
>
> (4) or any other conduct in furtherance of the exercise of the . . . constitutional right of free speech in connection with a public issue or an issue of public interest.
>
> § 425.16(e)

The statute expressly provides that it "shall be construed broadly." § 425.16(a). The SLAPP statute extends to all exercises of free speech rights pertaining to public issues. The California Supreme Court has specifically ruled that a statement can be protected by subdivisions (e)(3) and (e)(4) even if the issue is not pending before a public body. *Briggs v. Eden Council for Hope & Opportunity* 969 P.2d 564, 570-572, 575 (Cal. 1999).

The performance and commercial activities of companies like Sedgwick constitute "matters of public interest" for First Amendment purposes. *Paradise Hills Associates v. Procel*, 1 Cal. Rptr. 514, 522-523 (Cal. App. 1991). Consequently, the public enjoys broad, but not unlimited, latitude to discuss and present opinions regarding these topics. *Sipple v. Foundation for National Progress*, 83 Cal. Rptr.2d 677, 684 (Cal. App. 1999); *Macias v. Hartwell*, 64 Cal. Rptr.2d 222, 224-225 (Cal. App. 1997) (anti-SLAPP statute applies to leaflet in intra-union election);

Morningstar, Inc. v. Superior Court, 29 Cal. Rptr.2d 547, 557-558 (Cal. App. 1994); *see also Wilcox v. Superior Court*, 33 Cal. Rptr.2d at 454 n.6 (in defamation suit over advocacy of economic boycott by competing organization, § 425.16 deemed applicable to "commercial speech"); *Church of Scientology v. Wollersheim,* 49 Cal. Rptr.2d 620, 633 (Cal. App. 1996) (statute's phrase "matters of public interest" "include[s] activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals").

The district court held that Delsman's speech was "in connection with a public issue or an issue of public interest" in that the purpose of his web site and his postcard campaign was to call the public's attention to his opinions about Sedgwick's claims practices and to urge that companies avoid using the company's services because of the ways in which Delsman believes it mistreats company staff. ER 13. The court also noted that Delsman "urges persons who feel they have been treated improperly by Sedgwick to express their concerns to the company and to submit reports of misconduct to state and federal law enforcement agencies. . . . These statements are precisely the type of speech that presents a matter of public interest." *Id.* This ruling was plainly correct. Indeed, Delsman's campaign against Sedgwick is also connected to the much larger public controversy over the management of claims under health and disability plans that is at the heart of the national debate

about reforming health care. *E.g.*, Karpf, Lofgren, & Perman, *Commentary: Health Care Reform and Its Potential Impact on Academic Medical Centers*, 84 Academic Medicine 1472 (November 2009); Rosenfeld, *Doctors Fight Back Against Denial by Algorithm* (March 06, 2009), viewed online at http://www.miller-mccune.com/business_economics/doctors-fight-back-against-denial-by-algorithm-1045.

Sedgwick's appellate brief does not directly contest the district court's ruling in this regard, but rather argues that the one aspect of Delsman's speech to which it has limited its appeal — his use of the terms "Ponzi" and "Ponzi scheme" — does not make any explicit reference to Sedgwick's claims management and hence has no relationship to the public interest issue on which the trial court based its decision. This argument is wrong on several counts (apart from Sedgwick's failure to preserve that issue for appeal, as discussed above).

First, Delsman used the term "Ponzi scheme" as a short-hand reference to Sedgwick's claims management shortcomings. It was a hyperbolic epithet that Delsman used to call to mind Sedgwick's character (in Delsman's opinion) as a business that was destroying people's lives, by canceling the value of their investment in disability premiums, just as a Ponzi operator destroys the investments of his victims.

Second, although Sedgwick cites the "latest Ponzi scheme" language in

isolation, Delsman used it on a web site page reproduced in ¶ 32 of the complaint, ER 61-62, and on a postcard reproduced in ¶ 34 of the complaint, ER 65-66, that provided the URL's for two of Delsman's blogs. These references tied Delsman's "Ponzi scheme" language to his broader arguments about Sedgwick's claims management shortcomings, and Sedgwick does not deny that **those** alleged shortcomings are a subject of public interest. The blog pages, moreover, were published in a public forum, and hence are covered by § 425.16(e)(3).

To the extent that Sedgwick's argument of lack of coverage by the anti-SLAPP statute is limited to the contention that postcards specifically are not subject to the anti-SLAPP statute, that argument also fails, even if the Court reaches that issue despite Sedgwick's failure to preserve it below. The postcards are fully protected regardless of whether they were disseminated in a public forum, because they are covered by section 425.16(e)(4), which is not limited to statements made in a public forum, but extends to "any other conduct in furtherance of the exercise of" free speech rights regarding an issue of public interest. As the California Court of Appeal held in *Wilbanks v. Wolk*, 17 Cal. Rptr.3d 497, 505 (Cal. App. 2004), "even if . . . communications were not made in a public forum, and therefore do not fall under section 425.16, subdivision (e)(3), they fall under subdivision (e)(4)." *Accord Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr.2d 205, 211 (2000).

Fourth, and finally, Delsman can qualify for protection under subsection 425.16(e)(4) regardless of whether the Court decides that the "Ponzi scheme" references were by themselves speech about a matter of public interest, so long as the postcards and web pages where those references appeared qualify as "conduct" that is "in furtherance of the exercise of the . . . constitutional right of free speech" which is, itself, "in connection with a public issue or an issue of public interest." Delsman sent the postcards to advertise his web sites about Sedgwick, and Sedgwick not only does not contest on appeal the trial court's ruling that the more general topic is an issue of public interest, but comes close to acknowledging that statements about its claims-handling **are** within the scope of the anti-SLAPP statute. Br. 16, 17. Consequently, Delsman's use of this epithet on a postcard advertising his web sites about these issues of public interest is within the scope of the anti-SLAPP statute.

Sedgwick apparently also argues, as part of its contention that Delsman's comments are outside the scope of the anti-SLAPP statute, that Delsman's accusations are so extreme that they are not protected by the First Amendment. Br. 18-19, 20-21, 22-24. This mode of analysis has been repeatedly rejected under the anti-SLAPP statute. *Navellier v. Sletten,* 52 P.3d 703 (Cal. 2002); *1-800 Contacts, Inc. v. Steinberg*, 132 Cal. Rptr.2d 789, 801 (Cal. App. 2003); *Fox Searchlight Pictures v. Paladino*, 106 Cal. Rptr.2d 906, 916 (Cal. App. 2001):

> Plaintiff's argument confuses the threshold question of whether the SLAPP statute potentially applies with the question whether an opposing plaintiff has established a probability of success on the merits. The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the secondary inquiry as to whether the plaintiff has established a probability of success would be superfluous. Rather, any claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise and support in the context of the discharge of the plaintiff's secondary burden to provide a prima facie showing of the merits of the plaintiff's case.

800 Contacts, 132 Cal. Rptr.2d at 801 (citation & punctuation omitted).

B. Sedgwick Has Not Shown That It Had a Probability of Prevailing on the Merits.

Because Delsman has shown that his speech and conduct are within the scope of the anti-SLAPP statute, the burden is on Sedgwick to show that it has a probability of success on the merits of its defamation claims over the one term on which it focuses its appeal — Delsman's reference to "Sedgwick's latest Ponzi scheme" and his sobriquet "Paul 'Ponzi' Posey." Even if Sedgwick's failure to preserve its arguments for appeal could be overlooked, its attempt to meet its burden should be rejected for two independent reasons.

1. "Ponzi" Was a Rhetorical Expression of Opinion.

First, Sedgwick has not shown that Delsman has made a defamatory statement of fact. The threshold question in a defamation case is whether the publication

"impl[ies] an assertion of objective fact." *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990). Statements of opinion are constitutionally protected because "[u]nder the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

> [W]here potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by the use of epithets, fiery rhetoric, or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.

Manufactured Home Communities, Inc. v. County of San Diego, 544 F.3d 959, 963 (9th Cir. 2008). Similarly, the California courts distinguish between objective facts, which are actionable, and statements of opinion, which are not actionable (and are, indeed, constitutionally protected).

> In making the distinction [between fact and opinion], the courts have regarded as opinion any "broad, unfocused and wholly subjective comment," . . . such as that the plaintiff was a "shady practitioner," . . . "crook," . . . or "crooked politician." . . . . Similarly, . . . this court found no cause of action for statements in a high school newspaper that the plaintiff was "the worst teacher at FHS" and "a babbler." The former was clearly "an expression of subjective judgment." And the epithet "babbler" could be reasonably understood only "as a form of exaggerated expression conveying the student-speaker's disapproval of plaintiff's teaching or speaking style."
>
> *Copp v. Paxton*, 52 Cal. Rptr.2d 831, 838 (Cal. App. 1996).

In this case, the phrase "Ponzi scheme" identified by Sedgwick as defamatory

consists of figurative and hyperbolic language — the hallmarks of nonactionable speech. *See Morningstar, Inc. v. Superior Court*, 29 Cal. Rptr.2d at 558; *Unelko Corp v. Rooney*, 912 F.2d at 1053. Indeed, the term "Ponzi scheme" is often loosely applied in public discourse to refer to insurance schemes where money is taken by an insurer in the hope that the company will find it unnecessary ever to make a payout. For example, in attacking a health care reform proposal sponsored by the late Senator Ted Kennedy last year, Senator Kent Conrad denounced the plan as "a Ponzi scheme of the first order.'" Montgomery, *Proposed long-term insurance plan raises questions,* Washington Post (October 27, 2009), viewed online at http://www.washingtonpost.com/wp-yn/content/article/2009/10/27/AR2009102701417. Similarly, critics of the Social Security system often refer to it loosely as a Ponzi scheme. Mandel, *Is Social Security a Ponzi Scheme?* Business Week (Dec. 28, 2008), viewed online at http://www.businessweek.com/the_thread/economicsunbound/archives/2008/12/is_social_secur.html?campaign_id=rss_daily; Cato Institute, *Why is Social Security often called a Ponzi Scheme?* (Mar. 11, 1999), viewed online at http://www. socialsecurity.org/daily/05-11-99.html; Mulshine, *The Ponzi Scheme that Baby Boomers are waiting to cash in on*, New Jersey Star Ledger (Dec. 25, 2008), viewed online at http://blog.nj.com/njv_paul_mulshine/2008/12/the_ponzi_scheme_ that_baby_boo.html. One doctor used the term to denounce

private health insurance generally, saying,

> Commercial, for-profit health insurance is one of the greatest Ponzi schemes ever foisted on the public . . . . The executives are the ones that benefit to the detriment of everyone else. How else does the president of one of the largest insurance companies get to be a billionaire? By being at the top of the pyramid of companies' and individuals' premium payments.
>
> Terry, *The Ponzi Scheme that is Health Insurance*, MedScape Today (March 12, 2009), viewed online at http://www.medscape.com/viewarticle/588861.

Still others have used Ponzi terminology

- to denounce banks, such as when former New York Governor and Attorney General Elliott Spitzer appeared on MSNBC's Morning Meeting on July 25, 2009, and denounced the Federal Reserve: "This is a Ponzi scheme, an inside job."

  Tencer, *Spitzer: Federal reserve is 'a Ponzi scheme, an inside job'* (July 25, 2009), http://rawstory.com/08/news/2009/07/25/spitzer-federal - reserve-is-a- ponzi -scheme-an-inside-job/;

- to denounce state budgeting plans, such as when the head of the California League of Cities denounced Governor Schwarzenegger's proposed budget compromise as "a Ponzi scheme that passes off responsibility to future governors, legislators and to our taxpayers."

  Anderson & Orlov, *State budget deal decried by local officials*, Los Angeles Daily News (Oct. 22, 2009), viewed online at

http://www.dailynews.com/ breakingnews/ci_12893017;

and

- to describe trade imbalances, such as when MSN Money's Jon Markman denounced the state of US- China trade relations as a Ponzi scheme.

  Markman, *The US-China Ponzi scheme*, MSN Money (July 17, 2009), viewed online at http://articles.moneycentral.msn.com/Investing/SuperModels/mad-world-chinas-bind-is-ours-too.aspx.

These were mere epithets to make a denunciation stronger, and just as Senator Conrad, Mr. Spitzer, the California League of Cities, and the CATO Institute could not be sued for libel for using this terminology, so Delsman is not subject to being sued for libel for his hyperbolic speech.

Here, Delsman's characterization of Sedgwick's "latest Ponzi scheme" was a rhetorical statement of his anger about the fact that, after working hard for General Electric and paying disability and other premiums, he and other GE employees had lost the investment that they expected from their labor through what Delsman believes is unfair denial of their claims. Delsman could also have been referring generally to the fact that, by denying claims unfairly, Sedgwick enables its clients to minimize the payments they need to make into claims reserves. *See* Bronsteen, Maher, & Stris. *ERISA, Agency Costs, and the Future of Healthcare in the United States,* 76 Fordham L. Rev. 2297, 2309-2313 (2009) (describing incentives of ERISA

fiduciaries to please the companies that hire them by reducing the cost of benefit plans). Delsman views this scheme as roughly comparable to the way a Ponzi operator receives the investments of many but avoids having to make complete payouts by the ruse of making small payouts to keep its scheme going.

Moreover, it is well settled that the characterization of a statement as fact or opinion rests in part on the context in which the statement appears, *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 402 (2d Cir. 2006), and the rhetorical nature of Delsman's use of the term "Ponzi" is also shown by the rest of the postcard and web site on which that term appears. On the postcard shown in paragraph 34 of the complaint, ER 65-66, the phrase "latest Ponzi scheme" appears after such rhetorical phrases as "tired of a pocket full of Poseys" and "More Liar Lawyers ready to take your rights away for their bottom line." and next to a photograph of "Paul 'Ponzi' Posey" shown on an Old-West style WANTED poster with the phrase "1 CENT REWARD." On the other side of the card, beside the recipient's address, are the words "Have you been terrorized, threatened and lied to by Sedgwick Claims Management Services." On the postcard illustration from Delsman's web site, shown in paragraph 32 of the complaint (the only way in which a page using the word "Ponzi" was even indirectly cited to the trial court as supporting Sedgwick's defamation claim), the WANTED poster and "latest Ponzi Scheme" phrase appear

under a photo of a skull with the question: "Have you or your family been terrorized by David North and his Minions." Delsman's use of "Ponzi" was no more an assertion of fact than his use of "terrorized" was a factual allegation that Sedgwick is a terrorist organization.

As this Court said in *Knievel v. ESPN*, 393 F.3d 1068, 1075 (9th Cir. 2005), "[t]he context in which the statement appears is paramount in our analysis, and in some cases it can be dispositive." In the context in which Delsman used the word "Ponzi," the reader of such a postcard and web page is not likely to take the word "Ponzi" as stating a fact, but as an expression of highly rhetorical opinion.

2. Sedgwick Did Not Present Admissible Evidence to Support Its Defamation Claim and Trade Libel Claims.

Even if the term "Ponzi scheme" were deemed a statement of fact and not an opinion, the trial court properly granted Delsman's motion to strike because Sedgwick neither presented admissible evidence that Delsman's statement was false, nor showed that his statement was made with actual malice. As noted above (at 15), Sedgwick's entire submission below to show probability of success was to call the trial court's attention to three paragraphs of its **complaint**. As Judge Armstrong properly held, in response to a special motion to strike a plaintiff may not rely on its pleadings, but must present admissible evidence in the form of affidavits. ER 14-15,

citing *Ampex Corp. v. Cargle*, 27 Cal. Rptr.3d 863, 868 (Cal. App. 2005) (plaintiff "must bring forth evidence that would be admissible at trial"); *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, 12 Cal. Rptr.3d 493, 499 (Cal. App. 2004) ("the plaintiff's showing of a probability of prevailing on its claim must be based on admissible evidence"); *Roberts v. Los Angeles County Bar Assn.*, 129 Cal. Rptr.2d 546, 552 (Cal. App. 2003) ("similar to reviewing a motion for summary judgment; plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent and admissible evidence in support of its claim"). *See also Gilbert v. Sykes*, 53 Cal. Rptr. 3d 752, 763 (Cal. App. 2007).

On appeal, Sedgwick faults Judge Armstrong for saying that its complaint was unverified, pointing to a paragraph in the Huffman Affidavit that it says verified the complaint. ER 21, ¶ 2. Apart from the fact that the anti-SLAPP section of Sedgwick's opposition brief never even mentioned this paragraph of the Huffman affidavit, and did not tell Judge Armstrong that the complaint was verified, paragraph 2 of the Huffman Affidavit does not contain any admissible evidence showing that Delsman's "Ponzi scheme" references were false. Paragraph 2 of the Huffman Affidavit reads as follows:

> I have read Sedgwick's First Amended Complaint . . . and know its contents. I am authorized to make verification as to the truth of the Complaint's contents for and on Sedgwick's behalf, and I make this

> verification for that reason. I am informed and believe and on that ground allege that the matters stated in the Complaint are true.
>
> ER 21.

This averment is not sufficient to show that any of Delsman's statements are false, even where the complaint had asserted that some specific statement was false, because the verification is made on information and belief and not on personal knowledge. Such averments would not, as the anti-SLAPP cases cited by the trial court require, be admissible at trial. Nor do they satisfy the express requirement for summary judgment affidavits, contained in Rule 56(e)(1) of the Federal Rules of Civil Procedure:

> A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.

Indeed, because Huffman is only Sedgwick's communications director, there is no reason to believe that he would have personal knowledge about whether Sedgwick was running a Ponzi scheme, and, in any event, Huffman's affidavit never avers that Sedgwick is **not** running such a scheme. Nor, indeed, does the complaint that Huffman purports to verify.

Similarly, because he is Sedgwick's communications director, there is no reason to believe that Huffman would have personal knowledge about whether

Sedgwick suffered special damages, which as Sedgwick admitted below is an element of a claim for trade libel. SER 5 n.6. Sedgwick's only reference to damages in its arguments below was in a bullet point on page 6 of its opposition (SER 6):

> • Sedgwick's resulting damages from all of Delsman's tortious acts (Complaint, ¶¶39-41, Dec. of Huffman, ¶4).

Neither the paragraphs of the complaint nor the Huffman affidavit meet California's requirements for special damages:

> To prevail on its trade libel claim, [plaintiff] must present evidence showing it suffered some pecuniary loss. . . . It may not rely on a general decline in business arising from the falsehood, and must instead identify particular customers and transactions of which it was deprived as a result of the libel. . . .
>
> *Mann v. Quality Old Time Service*, 15 Cal.Rptr.3d 215, 226 (Cal. App. 2004).

The cited paragraphs in the unverified complaint alleged in conclusory fashion that Sedgwick had to address Delsman's complaint and that Sedgwick was worried about "lasting negative effects," without identifying any actual lost business or specifying any resulting pecuniary loss. ER 69. And paragraph 4 of Huffman's affidavit said only that Sedgwick was less likely to use for commercial purposes the photographs that Delsman placed on his web sites and postcards. ER 21. Sedgwick provided no "evidence of pecuniary loss" from the false statements, and no evidence of specific customers and transactions lost. Nor does Huffman's affidavit show why he, as the

director of communications, would have any personal knowledge on that subject. Consequently, Sedgwick did not make a showing of special damages that it would need to show probability of success on its trade libel claims.

This Court has repeatedly insisted that summary judgment affidavits be made on personal knowledge. *See, e.g.*, *Bliesner v. Communication Workers of America*, 464 F.3d 910, 915 (9th Cir. 2006). Moreover, the Court has treated anti-SLAPP motions as analogous to summary judgment proceedings, *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999), and hence decided that they proceed subject to Rule 56' s requirements. *Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (anti-SLAPP motion must follow Rule 56(f) discovery procedures). Thus, because Huffman's affidavit does not show that he is competent to testify on personal knowledge, and because he verified the complaint only on information and belief, Sedgwick failed to show probability of success on the merits of its claims, and Delsman's special motion to strike was properly granted.

Finally, even if the Huffman affidavit were adequate to verify the allegations made in the complaint, the complaint itself never alleged that Delsman made his allegedly false statements with actual malice. But the First Amendment requires a showing of actual malice before a defendant may be held liable for defaming a public

figure like Sedgwick. Sedgwick's showing of a probability of prevailing fell short for this reason as well.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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RELATED CASE STATEMENT

Appellee knows of no related cases.

CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared this brief in 14-point Times Roman font, using Word Perfect, and that Word Perfect counted 7309 words in the brief exclusive of cover, tables and certificates.

/s/ Paul Alan Levy
Paul Alan Levy

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of January, 2010, I am causing this brief to be served on counsel for appellant by filing it with the Court's ECF docketing system, which will serve the brief electronically.

/s/ Paul Alan Levy