NO. 20-987

In the Supreme Court of the United States

SPIELBAUER LAW OFFICE,

Petitioner,

v.

MIDLAND FUNDING, LLC ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the California Sixth District Court of Appeal

REPLY BRIEF OF PETITIONER

THOMAS SPIELBAUER, ESQ.
COUNSEL OF RECORD
SPIELBAUER LAW OFFICE
1839 YGNACIO VALLEY ROAD
SUITE 420
WALNUT CREEK, CA 94598
(408) 213-7440
THOMAS@SPIELBAUER.COM

MARCH 9, 2021 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

RULE 29.6
CORPORATE DISCLOSURE RESTATEMENT

The Spielbauer Law Office restates that it is a fictitious business entity. It is not a publicly traded entity and has no managers or owners other than the individuals who comprise the Spielbauer Law Office.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

JUDICIAL RULES

TABLE OF AUTHORITIES – CONTINUED

Page

OTHER AUTHORITIES

INTRODUCTION

Midland's Opposition is misleading and mis-states the facts. Curiously, on page 8 of its brief, Midland concedes, "The collection action later became inactive, . . . " It does not explain why the complaint sat idle for 3 years, and in light of Midland having falsely claimed that there was a conditional settlement pending, when there was none, so as to pull the matter off the jury trial calendar.

ARGUMENT

I. THE LAWSUIT WAS FOR TORT, NOT FREE SPEECH.

As Petitioner explained in its petition, the lawsuit was not one involving free speech. It was an action to recover in tort. Despite the fact that the Spielbauer Law Office (hereinafter referred to as the SLO) was counsel for Ms. Barr, Midland extracted, behind the SLO's back, in excess of $20,112.67, and despite the fact that the action was subject to the five year mandatory dismissal pursuant to California Code of Civil Procedure § 583.310 when it did so. Midland did this despite the fact that the SLO, even to this day, is and was listed as counsel for Melanie Barr on the court docket.

Contrast Midland's conduct with Ms. Barr and with the SLO in this case to that which was forbidden to Midland by the Consent Judgments of 2015 and 2020. The consent judgment is discussed *infra*.

By 2018, Ms. Barr owed Midland nothing due to Midland's failure to prosecute the case or take it to trial. As a result, the SLO sued Midland for intentional interference with contractual relations, negligent interference with prospective economic advantage, unjust enrichment, and unfair business practices.[1]

After having interfered with the attorney-client contract, and relationship between Ms. Barr and the Spielbauer Law Office, Midland is now looking for a total windfall of $86,261.72 ($20,112.67 (Barr Payment) + $49,896 (Atty Fees) + $15,218.50 (Appeal Fees) + $1,034.55 (unspecified costs)) as a reward for its malfeasance.

II. THE FOCUS OF THIS REPLY WILL BE WHY CERTIORARI SHOULD BE GRANTED.

Given this is a Petition for a Writ of Certiorari, Petitioner will focus on why this Court should grant certiorari rather than the SLO attempting to clean up Midland's misrepresentations in Midland's response.

III. CONSTITUTIONAL CONCERNS WERE RAISED FROM THE BEGINNING.

Midland is wrong in claiming that Petitioner Spielbauer Law Office (SLO) did not raise issues of due process and equal protection of law. These issues are were raised before the Sixth District, specifically in the SLO's petition for rehearing, and to the California Supreme Court in the SLO's petition

[1] It should be noted that the SLO did not sue Ms. Barr but rather sued Midland for Midland's tortious conduct.

for review. The issues of due process and equal protection came into being as soon as the motion to dismiss was filed.

SLO further points out that constitutional rights, specifically due process and equal protection, are inherent in every legal proceeding. It is a general principle of statutory law that a statute must be definite and certain to be valid. (*People v. Heitzman* (1994) 9 Cal.4th 189.) Before declaring a statute void for vagueness, a court has an obligation to determine whether its validity can be preserved by giving specific content to terms that might otherwise be unconstitutionally vague. (*People v. Heitzman* (1994) 9 Cal.4th 189.)

IV. HARMONIOUS READING OF THE STATUTES AVOIDS UNCONSTITUTIONAL VAGUENESS.

In this matter, Petitioner is not asking that California Code of Civil Procedure § 904.1(a)(1), California Code of Civil Procedure § 904.1(a)(13), California Code of Civil Procedure § 425.16 be declared to be unconstitutionally vague. Petitioner is asking that this Court rule that these code sections, as argued in the Petition for a Writ of Certiorari, can be harmoniously interpreted, rather than in isolation, so as to be constitutional in their application.

As argued in Petitioner's original petition, Petitioner maintains that California Code of Civil Procedure § 425.16(i) is not ambiguous if it is harmoniously read as a whole with California Code of Civil Procedure § 904.1(a)(1) and § 904.1(a)(13). If these statutes are read together, and in light of the discretionary "may" of California Code of Civil Procedure § 904.1(a), the reasonable and common sense interpretation is that

a plaintiff may timely take an appeal either from the entry of an order, or from an entry of the judgment when an anti-SLAPP motion is granted. If read separately, it is ambiguous, and constitutionally flawed.

V. MIDLAND'S INTERPRETATION OF AMBIGUITY IS INCORRECT.

Midland takes an extreme position. It argues that a statute cannot be ambiguous unless the language of the statute is in reality gibberish. (*See* Midland Opposition, page 9 and 15.)

Midland argues that *Russell v. Foglio* (2008) 160 Cal.App.4th 653 and *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242 provide the clarity needed to avoid ambiguity. That argument, of course, ignores the case(s) cited by Mr. Applegate in his letter, that case among others being *Tuchscher Development Enterprises v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219. Mr. Applegate's letter is in the Petitioner's Appendix at App.29a-32a. Petitioner requests that this Court review again this letter as it demonstrates a reality significantly different from that what Midland is attempting to present. Mr. Applegate's letter highlights the confusion, and the due process and equal protection concerns, surrounding a timeliness of appeal from the grant of an Anti-SLAPP motion.

The fact that there is confusion is demonstrated by Justice Rubin's concerns. If the timelines for an appeal were clear, Justice Rubin would not have made his comments about the statutes being a trap for the unwary, and the wary. (*Russell v. Foglio* (2008) 160 Cal. App.4th 653, 664.)

As Petitioner has pointed out, the difference between "may" and "must" is not clear. "May" is generally discretionary or optional and "must" is mandatory. An interesting question presented by this petition is whether this SCOTUS will issue a decision on the merits of the difference between the words "may" and "must" in a statute, particularly when they have constitutional consequences.

VI. JUSTICE RUBIN'S WARNING INCLUDES QUASI-CRIMINAL CONSEQUENCES.

Midland minimizes the harm that can befall a practitioner who falls into the trap for the unwary, and the wary, warned of by Justice Rubin. (*Russell v. Foglio* (2008) 160 Cal.App.4th 653, 664.) As the SLO discussed in its original petition to this Court, falling into this trap, *i.e.*, tardy filing of a notice of appeal, can subject an attorney to State Bar proceedings, and even disbarment. This possibility is so significant that the United States Supreme Court considers state bar disciplinary proceedings to be "quasi-criminal." The United States Supreme Court held in *In re Ruffalo* (1968) 390 U.S. 544, 550-551 that where administrative proceedings contemplate the deprivation of a license to practice one's profession, these proceedings are adversary proceedings of a quasi-criminal nature and procedural due process must be afforded the licensee.

Given the fact that state bar proceedings are quasi-criminal in nature brings forth yet another rule of statutory interpretation, and that is the Rule of Lenity.

VII. RULE OF LENITY.

The Rule of Lenity is intended to safeguard the rights of criminal defendants. Under the Rule of Lenity, ambiguous criminal statutes are interpreted in favor of the defendant, unless the private conduct is clearly outlawed by the statute. (*United States v. Santos*, 553 U.S. 507, 514 (2008) (applying the rule of lenity where it was ambiguous whether the word "proceeds" in a federal money-laundering statute means "receipts" or "profits").)

Given the use of the word "May" in California Code of Civil Procedure § 904.1(a), and the lack of specificity of California Code of Civil Procedure § 425.16(i) as to which of the thirteen (13) subsections of California Code of Civil Procedure § 904.1(a) apply, and the appeal must be taken, the statute is unconstitutionally vague if read in such isolation. If read in harmony, *i.e.*, an appeal may be timely taken either from CCP § 904.1(a)(1) or CCP § 904.1(a)(13), the constitutional confusion avoided.

VIII. MIDLAND'S RECENT HISTORY OF MISCONDUCT.

On or about October 5, 2020, the Consumer Financial Protection Bureau (Bureau) filed a proposed stipulated final judgment and order to settle its lawsuit against Encore Capital Group, Inc., and its subsidiaries, Midland Funding, LLC; Midland Credit Management, Inc.; and Asset Acceptance Capital Corp.

The CFPA sued Midland Funding, LLC et Al. for violations of the Consumer Financial Protection Act (CFPA), Fair Debt Collection Practices Act (FDCPA), and Fair Credit Reporting Act. Midland had entered into a consent judgment in 2015. Despite agreeing to

the judgment, Midland immediately began ignoring and violating the terms of the 2015 judgment. Thus, the enforcement action of October 5, 2020.[2]

The Bureau's September 8, 2015 complaint, filed in federal district court in the Southern District of California, specifically alleged that since September 2015, Encore and its subsidiaries violated the consent order by suing consumers without possessing required documentation, using law firms and an internal legal department to engage in collection efforts without providing required disclosures, and failing to provide consumers with required loan documentation after consumers requested it. The Bureau also alleged that the companies violated the consent order, the CFPA, and the FDCPA by suing consumers to collect debts even though the statutes of limitations had run on those debts. Midland violated the consent order by attempting to collect on debts for which the statutes of limitations had run without providing the required disclosures. The Bureau further alleged that the companies violated the CFPA by failing to disclose possible international-transaction fees to consumers, thereby effectively denying consumers an opportunity to make informed choices of their preferred payment methods. The Bureau also alleged that each violation of the consent order constituted a violation of the CFPA.

The stipulated final judgment and order required Encore (and Midland) and its subsidiaries to pay

---

[2] The October 15, 2020 judgment can be found at https://files.consumerfinance.gov/f/documents/cfpb_encore-capital-group-et-al_proposed-stipulated-final-judgment-and-order_2020-10.pdf and accompanies this Reply.

$79,308.81 in redress to consumers and a $15 million civil money penalty. The settlement also required Encore and its subsidiaries to make various material disclosures to consumers, refrain from the collection of time-barred debt absent certain disclosures to consumers, and abide by certain conduct provisions in the 2015 consent order for five more years.

In addition to this judgment is the fact that the Attorney General of Pennsylvania Josh Shapiro announced in 2018 that Pennsylvania and 41 other states and the District of Columbia had reached a $6 million settlement with Encore Capital Group, Inc. and its subsidiaries Midland Credit Management, Inc. and Midland Funding, LLC, which collectively form one of the nation's largest debt buyers. The settlement required the companies to make key reforms to how they collect consumers' debts and eliminated over $256,000 in debts owed by 155 Pennsylvanians.[3]

Midland's credibility, and integrity, is very much at issue in this matter.

PRAYER

For the reasons set forth in this Petition for a Writ of Certiorari, Petitioner prays this Supreme Court grant it certiorari. Petitioner prays that this Court find that the Court of Appeal was in error in concluding that California Code of Civil Procedure

---

[3] *See* https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-shapiro-announces-6-million-settlement-with-debt-buying-and-debt-collector-companies/

§ 904.1(a)(13) is mandatory and exclusive, irrespective of California Code of Civil Procedure § 904.1(a)(1). Petitioner prays that this Court find that when California Code of Civil Procedure § 425.16(i), California Code of Civil Procedure § 904.1(a)(1), and California Code of Civil Procedure § 904.1(a)(13) are harmoniously read together as a Whole Act, and under the Rule of Lenity, that there are two deadlines under which an eligible party may timely appeal an adverse Anti-SLAPP decision. One deadline is from the entry of the order. The other deadline is the entry of judgment.

Petitioner also prays that this Court find that the dismissal of the Petitioner's appeal violated Petitioner's rights under the 5th and Section One of 14th Amendments of the United States Constitution.

Respectfully submitted,

THOMAS SPIELBAUER, ESQ.
COUNSEL OF RECORD
SPIELBAUER LAW OFFICE
1839 YGNACIO VALLEY ROAD
SUITE 420
WALNUT CREEK, CA 94598
(408) 213-7440
THOMAS@SPIELBAUER.COM

COUNSEL FOR PETITIONER

MARCH 9, 2021